The University of the State of New York

The State Education Department
State Review Officer
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No. 24-317

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

Appearances:
Liberty and Freedom Legal Group, Ltd., attorneys for petitioner, by Peter G. Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) to the extent it did not order the full costs under the parent's contracts for transportation services from Sisters Travel and Transportation Services, LLC (Sisters Travel) and nursing services from B&H Health Care, Inc. (B&H Health Care) for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which found that it failed to offer an appropriate educational program to the student and ordered it to reimburse the parent for her daughter's tuition costs at iBrain for the 2023-24 school year and other related costs. The appeal must be sustained. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

On August 9, 2022 a Committee on Preschool Special Education (CPSE) convened, found the student eligible for special education as a preschool student with a disability, and developed an IEP for the 2022-23 school year with a projected implementation date of September 6, 2022 (Dist. Ex. 15). The August 2022 CPSE recommended that the student attend a 12-month school

year program in an 8:1+2 special class in a State-approved preschool special education program with related services (Dist. Ex. 15 at pp. 1, 18-19).

For the 2022-23 school year, the student attended iBrain (see Dist Exs. 6; 11; 13-14).[1] The August 2022 IEP was the subject of a prior impartial hearing, which resulted in a IHO decision finding that the district failed to meet is burden to prove that it offered the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. B at p. 5). The IHO in that matter found iBrain to be an appropriate unilateral placement and ordered the district to directly fund the costs of the student's tuition at iBrain for the 2022-23 school year and to fund round-trip transportation to be provided by a company of the parent's choosing (id. at pp. 6-10).

In preparation for the student's transition to school-aged programming, the district completed a social history update and conducted a classroom observation of the student in March 2023 (Dist. Exs. 8; 9; see Dist. Ex. 10).

On May 19, 2023, a CSE convened, found the student eligible for special education as a student with multiple disabilities, and developed an IEP for the 2023-24 school year with a projected implementation date of September 1, 2023 (Parent Ex. I).[2, 3] The May 2023 CSE recommended that the student attend a 12-month school year program in a 6:1+1 special class in a district specialized school for a total of 25 periods per week consisting of English language arts (ELA) (10 periods per week), mathematics (10 periods per week), social studies (3 periods per week), and sciences (2 periods per week) (id. at pp. 34-35, 37, 40). In addition, the CSE recommended that the student receive daily full-time support from a paraprofessional for health, feeding, ambulation, and toileting (id. at p. 36). For related services, the CSE recommended four 30-minute sessions per week of individual hearing education services, five 30-minute sessions per week of individual occupational therapy (OT), five 30-minute sessions per week of individual physical therapy (PT), five 30-minute sessions per week of individual speech-language therapy, and four 30-minute sessions per week of individual vision education services (id. at pp. 35-36). The CSE recommended that the student have access to assistive technology consisting of a "PillowGrip Switch, Mounted Toggle Switch, and a single cell switch" (id. at p. 36). For special transportation, the CSE recommended that the student receive transportation from the closest safe curb location to school with limited travel time and support of a 1:1 paraprofessional on an air-conditioned lift bus that could accommodate a regular size wheelchair (id. at p. 40).

In a prior written notice dated June 1, 2023, the district summarized the May 2023 CSE's recommendations and noted that a "School Location Letter w[ould] be sent separately" (Parent Ex.

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

[2] The student's eligibility for special education as a student with multiple disabilities is not in dispute (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

[3] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only the parents' exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

J). In a June 15, 2023 prior written notice, the district notified the parent of the particular public school site to which it assigned the student to attend to receive the services set forth in the May 2023 IEP (Dist. Ex. 2).

In a letter to the district dated June 20, 2023, the parent, through her attorney, stated her disagreement with the May 2023 IEP, particularly her view that a district specialized school could not provide the program mandated in the IEP, indicated the parent had not received notice of an assigned public school site, and informed the district of her intent to unilaterally place the student at iBrain for the 2023-24 school year at district expense (Parent Ex. H).

On July 1, 2023, the parent entered an enrollment agreement with iBrain for the student's attendance for the 2023-24 school year (Parent Ex. D). The parent also signed an agreement with Sisters Travel dated July 6, 2024, for transportation services, and an undated agreement with B&H Health Care for nursing services for the student for the 2023-24 school year (Parent Exs. E-F).

The student attended iBrain for July through September 2023, after which the student began attending ADAPT, a State-approved nonpublic school (see Tr. pp. 214, 220).

A. Due Process Complaint Notice

In a second amended due process complaint notice, dated December 11, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. L).[4] Initially, the parent asserted the student was entitled to pendency at iBrain, along with transportation and nursing services, based on an unappealed April 2023 IHO decision (id. at pp. 1-2).

The parent alleged that the district failed to conduct sufficient evaluations of the student, arguing in particular that the district failed to conduct a neuropsychological evaluation, a psychological assessment within three years, or updated related service evaluations, and failed to assess the student's educational needs within the six months prior to the CSE meeting (Parent Ex. L at p. 6). The parent stated her disagreement with the district's evaluations and requested district funding for an independent educational evaluation (IEE) (id. at pp. 6-7). As to the conduct of the May 2023 CSE meeting, the parent asserted that the district failed to provide her with a meaningful opportunity to participate and did not consider her request for a State-approved nonpublic school (id. at pp. 5, 6-7).

Regarding the May 2023 IEP, the parent alleged that the recommended 6:1+1 special class in a district public school would not provide the student with "intensive 1:1 attention from a special education teacher" or "with the quiet, distraction-free environment she need[ed] in order to make progress" (Parent Ex. L at p. 4). In addition, the parent alleged that the CSE failed to recommend music therapy as a related service and "failed to specifically identify and recommend whether a related service [wa]s to be facilitated via push-in or pull-out on the May 2023 IEP" (id. at p. 6). The parent also contended that the CSE failed to recommend a 1:1 nurse (id.).

[4] The original and first amended due process complaint notices were dated July 5, 2023, and October 26, 2023, respectively (Parent Exs. A; K).

As for the assigned public school, the parent alleged that the district did not send a school location letter until June 15, 2023, "which failed to provide Parent with sufficient time to allow Parent to investigate the proposed school placement before the start of the school year" (Parent Ex. L at pp. 4, 7). Further, the parent argued that the assigned school location was not appropriate because the school was co-located on a campus which included nondisabled students (id.). The parent contended that the student would not be appropriately grouped with students with similar needs as "[t]he majority of the students" in the 6:1+1 special classes at the assigned public school were "ambulatory" and "most [we]re autistic" (id. at p. 5). The parent also alleged that the proposed classroom would present a safety risk because the majority of students were ambulatory (id.). Regarding the school's capacity to implement the IEP, the parent argued that the school did not offer an extended school day and, therefore, could not implement all of the recommended related services (id.).

The parent asserted that the unilateral placement of the student at iBrain for the 2023-24 school year from July 5 through September 29, 2023 was appropriate and that no equitable considerations would warrant reduction or denial of funding (Parent Ex. L at pp. 7-8). For relief, the parent requested district funding for the costs of the student's tuition at iBrain "in addition to the costs of related services, and a 1:1 paraprofessional and nursing," as well as the costs of special transportation for the 2023-24 school year from July 5 through September 29, 2023 (id. at p. 8). The parent also requested that the district be required to provide assistive technology services and devices to the student (id.). Finally, the parent requested district funding for an IEE (id. at p. 9).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 14, 2023 and concluded April 25, 2024 after 12 days of proceedings, three of which were devoted to addressing the merits of the parent's complaint (see Tr. pp. 1-278).[5] In a decision dated June 18, 2024, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year, that iBrain was an appropriate unilateral placement, and that equitable considerations supported an award of district funding for the costs of the student's tuition (IHO Decision at pp. 12-13).

Initially, the IHO made factual findings about the student's needs, including that the student "require[d] a number of specific modalities and an extended school day," would not benefit from exposure to nondisabled students, and that the student's attendance in a classroom with students "with varied behavioral profiles and needs would likely have diminished the care and attention that she would receive at [iBrain]" (IHO Decision at p. 8). Regarding the May 2023 IEP, the IHO found that, because the IEP was dated September 1, 2023, yet recommended 12-month services, there was a "de facto concession that the IEP was untimely" (id.). In addition, the IHO held that, the lack of a recommendation for a full-time nurse rendered the IEP inadequate, opining that a full-time health paraprofessional would not have been "as skilled as a qualified nurse to recognize the

[5] A different IHO presided over the matter for the first three days of proceedings and issued an interim decision on pendency (see Tr. pp. 1-25; Interim IHO Decision). The originally assigned IHO subsequently recused herself (see Tr. pp. 23, 28). All references in this decision to "the IHO" are to the IHO who presided over the remainder of the impartial hearing and issued the final decision (see Tr. pp. 26-278; IHO Decision).

onset of a seizure and its treatment" and that the district's witness did not satisfactorily explain why the CSE did not recommend nursing services (id. at pp. 8-9).

Next, the IHO found that iBrain was appropriate for the student, noting the provision of one-to-one instruction and related services, including one-to-one nursing, for an extended school day (IHO Decision at p. 10). The IHO also noted special transportation services were provided (id.). The IHO found the evidence in the hearing record indicated the student had made progress at iBrain (id.). As for equitable considerations, the IHO noted the parent provided the district timely notice of her intent to unilaterally place the student and that nothing indicated that the parent had not been cooperative (id. at pp. 11-12). In addition, regarding transportation, the IHO found the private services, including the paraprofessional and nurse, were "a necessity" for the student (id. at p. 12).

For relief, the IHO ordered the district to fund and/or reimburse the costs of the student's tuition at iBrain, including an extended school day, for the 12-month 2023-24 school year (IHO Decision at p. 13). The IHO also ordered the district to fund a one-to-one nurse and nursing services including during transportation (id.). For transportation, the IHO ordered the district to fund and/or reimburse "special education transportation between the Student's home and the school" (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO's order is "unclear with respect to the payment for transportation, transportation-related services, and nursing services." In particular, the parent argues that, although the IHO does not explicitly limit or reduce the contract rates, the wording of the IHO's order could be interpreted as reducing those costs. The parent concedes that the amounts due "may be prorated to reflect the time that the Student was enrolled at iBRAIN." The parent requests clarification that the order requires the district to directly pay the cost of the student's special transportation, including travel nurse services, consistent with the terms of the parent's agreement with Sisters Travel, and to directly pay the cost of the student's nursing services consistent with the terms of the parent's agreement with B&H Health Care.

In an answer and cross-appeal, the district responds to the parent's appeal and alleges that the IHO erred in finding that the district failed to offer the student a FAPE for the 2023-24 school year, that iBrain was an appropriate unilateral placement, and that equitable considerations weighed in the parent's favor. First, the district argues that the IHO erred in finding the May 2023 IEP untimely. To the extent the IHO made findings about peer grouping, extended school day, or the student's need for specific modalities, the district asserts that the findings would not be proper bases for a finding of a denial of a FAPE. Regarding nursing services, the district contends that, contrary to the IHO's finding, the CSE's recommendation for a full-time individual health paraprofessional was designed to address the student's needs.

As for the unilateral placement, the district argues that the parent failed to meet her burden to prove the appropriateness of the student's program at iBrain for the period of July through September 2023 before the student left iBrain and transferred to ADAPT. The district argues that the testimony regarding iBrain was vague and appeared to be "pulled from a May 2023 iBRAIN report that was developed prior to the" 2023-24 school year and that the hearing record included

no progress reports or session notes to support the parent's burden. Regarding equitable considerations, the district argues that any award of funding for transportation and nursing services should be limited to days the services were actually used, which the district asserts that the IHO's order reflects. The district also contends that, if iBrain is found appropriate, the IHO's finding of appropriateness, as well as the order of funding, should be modified and prorated to limit it to the period of July through September 2023.

In an answer to the cross-appeal, the parent responds to the district's allegations and argues that the IHO's determinations that the district failed to offer the student a FAPE, that iBrain was an appropriate unilateral placement, and that equitable considerations support a full award of funding for tuition and additional costs should be upheld except to the extent that the IHO's decision could be read to order funding for a reduced award of transportation and/or nursing services.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in 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]).[6]

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.

[6] 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).

Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Operative IEP

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6). In addition, the Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unilaterally] place" their child (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]). As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]).

With respect to identifying the IEP in effect for the student at the beginning of the 2023-24 school year, it is relevant that the student was transitioning from preschool services under the auspices of the CPSE to school-age services under the CSE. State law provides that "[a] child shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend" school as a school-aged student (see Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]). Thus, for July and August 2023, the student remained entitled to receive special education and related services under the CPSE (see Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]).

Consistent with this authority, the student's initial school-aged IEP, developed at the May 2023 CSE meeting, had a projected implementation date of September 1, 2023 (Parent Ex. I at p. 1). Indeed, the IEP and prior written notice further emphasized that the student would be starting kindergarten and the services recommended in the May 2023 IEP would be "put into effect in" September 2023 (Parent Exs. I at pp. 38, J at pp. 2-3). Thus, on this point, the IHO erred in finding that the May 2023 IEP by the CSE was "untimely" due to its projected implementation date of September 1, 2023, after the summer portion of the 12-month school year (IHO Decision at p. 8). There was no defect in the CSE's procedure because the CSE did not have an obligation to engage in educational planning for the summer 2023; that was the role of the CPSE under State law.

With that said, the inquiry does not end there. The hearing record contained no evidence that the CPSE had any IEP in place for the student for July and August 2023. The August 2022 CPSE IEP reflects a projected implementation date of September 6, 2022 but on the cover page indicates that 12-month services were recommended for "July/August 2022," not 2023 (Dist. Ex. 15 at pp. 1, 4, 18-19). Even if one were to argue that the August 2022 CPSE IEP was still operative for summer 2023, it was the subject of a prior impartial hearing and, in an April 2023 decision—prior to the beginning of the 12-month 2023-24 school year—an IHO found that the IEP did not offer the student a FAPE (see Parent Ex. B). There is no indication that a CPSE thereafter convened to develop a new IEP for the student for summer 2023, and the district did not defend the August 2022 CPSE IEP during the impartial hearing as the operative IEP in place for summer 2023.

In fact, the district's position has offered nothing to clarify the matter and, instead, despite the evidence to the contrary, appears to point to the May 2023 CSE IEP as the operative IEP for summer 2023. For example, in its opening statement, the district stated that "the evidence w[ould] show that a valid IEP meeting was held on May 19th, 2023" and that "[t]his IEP was in place at the start of the '23/'24, 12-month school year" (Tr. p. 156). In its post-hearing brief, the district identified the May 2023 IEP as the operative IEP (Dist. Post-Hr'g Brief at p. 3). Similarly, on appeal, the district simply notes that the CSE convened in May 2023 and that, therefore, the IHO erred in finding the IEP was untimely (Req. for Rev. ¶ 3). However, as the student was not eligible for school-aged services for summer 2023, the May 2023 CSE IEP, with its projected implementation date of September 1, 2023, could not have been the operative IEP as of July 1, 2023 (see Parent Ex. I). Thus, in this case, the district's own argument underscores its misunderstanding of the legal requirements during a CPSE to CSE transition as well as a failure to address the relevant facts and time period with respect to the educational planning for this student during the extended school year in summer 2023.

Based on the foregoing, the district did not establish that it had an IEP in place for the student at the beginning of the 2023-24 school year. Accordingly, while my reasoning may differ, there is no reason to disturb the IHO's ultimate conclusion that the district did not meet its burden to prove that it offered the student a FAPE for the 2023-24 school year. In light of this finding, it is unnecessary to address the district's cross-appeal of the IHO's remaining determinations regarding the district's offer of a FAPE, including her findings about the student's need for nursing services.

B. Unilateral Placement

Having found the district failed to offer the student a FAPE for the 2023-24 school year, I turn to the that portion of the district's cross-appeal alleging that the IHO erred in finding iBrain to be an appropriate unilateral placement. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364

[2d Cir. 2006]; see also 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 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 (id. 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., 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). 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. The Student's Needs

Initially, I note that the student's needs are not in dispute, the May 2023 CSE adopted many of the recommendations from the iBrain education plan; however, a brief description of the student's needs provides context for an analysis of whether iBrain was an appropriate unilateral placement during summer 2023 (compare Parent Ex. I, with Dist. Ex. 6).

The student has visual and hearing impairments (Dist. Ex. 3 at p. 1). In terms of academics, the student required a "hand under hand technique to build rapport and initiate tactile exploration," multisensory inputs and learning materials, large brightly contrasted materials, verbal descriptions, visual and multi-sensory supports, and extended time for attending to and processing stimuli (Parent Ex. I at p. 1; Dist. Ex. 31 at p. 4). According to the March 2023 classroom observation the student required hand over hand assistance to push a large button to greet her teacher (Dist. Ex. 8 at p. 1). The student "seemed receptive" to teacher prompting and "seemed to enjoy" her teacher singing (id. at p. 2). The student benefitted from tactile and auditory instruction, as she could "really only see shades" (id.). The student was becoming more receptive to hand over hand guidance to explore materials and use her switch (id.).

The student benefitted from a quiet environment to explore materials tactilely, extended time for cognitive processing, and breaks during academics (Parent Ex. I at p. 1). In the area of literacy, the student was focusing on maintaining attention and interacting with tactile materials (id. at p. 2). In the area of math, the student was exploring materials to identify soft/hard, smooth/bumpy, and fast/slow (id.).

The May 2023 IEP stated that the student's social development skills were assessed using sections of the Dynamic AAC Goals Grid-2 (DAGG-2), the Pediatric Evaluation of Disability Inventory (PEDI), the Communication Function Classification System (CFCS), and clinical observation (Parent Ex. I at p. 2). The student was able to smile spontaneously which was likely in response to hearing a guitar or a fan being blown gently on her face (id.). The student did not usually respond to new people or interact with her siblings at home (id.). The student exhibited "clear preferences for sensory based activities" such as being picked up, rocking, swinging, and playing with sensory toys (id.). The student did not show awareness or interest in others and did not demonstrate an ability to take turns (id.).

According to the PEDI "Social Function Domain" sub-test, the student presented with an "emerging ability to manipulate her body with intent," such as by turning away when being fed to indicate that she did not want another bite (Parent Ex. I at p. 2). The student was functioning as a seldom effective communicator with familiar partners according to the CFCS level identification chart, as she did not initiate contact and rarely communicated intentionally with others (id.). The student was able to attract the attention of her communication partner by crying, eye-gaze, facial expression, and/or body language/movements (id.). The student required support from a familiar person who was able to understand and provide for her routine activities such as feeding, changing, and sleeping (id.).

The student was calmed by music and required sensory activities while pre-setting her to avoid startling her (Dist. Ex. 8 at p. 2). The student blew bubbles and smiled when she was happy and cried when she was in pain, and sometimes appeared to babble (id.).

The student had been evaluated for assistive technology and was provided with a "Pillow Grip Switch," a "Mounted Toggle Switch," and a "single cell switch" for verbal communication (Tr. pp. 176-77; Parent Ex. I at p. 36; Dist. Ex. 31 at p. 4). The student was provided with assistive technology support at iBrain, consisting of augmentative alternative communication (AAC) devices such as a single voice output switch with pre-recorded messages (Parent Ex. I at p. 2). The

student was focusing on accessing the switches to communicate greetings, simple requests, comments, and preferences (id.).

The May 2023 IEP reflected the results of an April 17, 2023 evaluation report using the Vineland Adaptive Behavior Scales Third Edition (Vineland-3) Comprehensive Parent/Caregiver Form (Parent Ex. I at p. 4; see Dist. Ex. 7). The student's overall adaptive functioning fell below the 1st percentile (Parent Ex. I at p. 4; Dist. Ex. 7 at p. 2).

According to the March 2023 social history assessment the student was diagnosed with infantile spasms at three months old, for which she took medication, and a bilateral hearing loss when she was five months old, for which she wore hearing aids (Dist. Ex. 9 at p. 1). The student was diagnosed with a cortical vision impairment and was registered with the Division for the Blind (id.). The student had poor head control, and weakness in her neck, trunk, legs and back (id.). The student was unable to grasp objects, sit up, feed herself, or express her needs independently (id. at pp. 1-2). The student exhibited global developmental delays, "significant" vision and hearing loss, and was non-verbal and non-ambulatory (Parent Ex. I at p. 1; Dist. Exs. 8 at p. 2; 9 at p. 1). The student was unable to feed herself, wore diapers, and was unable to indicate when her diaper needed to be changed (Dist. Exs. 8 at p. 2; 9 at p. 1). The student required assistance for transfers, mobility, dressing, feeding, and all other activities of daily living (Parent Ex. I at p. 1).

The student had recently received new hearing aids and her teacher reported that, as a result, she seemed to be able to hear "a little" (Dist. Ex. 8 at p. 1). The student was tolerating wearing them and she had shown a "remarkable improvement" in her ability to follow 1-step directions (Parent Ex. I at p. 1).

The student required support during all activities in all environments for positioning, transfers, splints, attention, cognitive processing, and motor control (Parent Ex. I at p. 4; Dist. Ex. 31 at p. 3).

The May 2023 IEP identified the student's myriad classroom management needs, which are not in dispute, including the student's need for a one-to-one paraprofessional to support her physical, cognitive, and sensory needs throughout the day (Parent Ex. I at p. 12). The IEP also indicated the student required assistance with transfers, mobility, navigation, activities of daily living, sensory support, sustained attention, using adapted devices, donning and doffing orthotics, completing position/equipment changes, and managing her overall safety (id.). The student benefitted from verbal and physical cues, additional processing time, highly structured classroom with minimal distractions, multisensory instruction, and sensory breaks (id. at p. 13). The student responded well to quiet, calm environments, and to being picked up and rocked when she was upset (id. at p. 14).

2. iBrain

The iBrain deputy director of special education (deputy director) described iBrain as "a private and highly specialized special education program . . . created for children who suffer from acquired brain injuries or brain-based disorders" (Parent Ex. R at ¶ 5).[7] He explained that students

[7] The deputy director started at iBrain in February 2023 and testified that he visited the iBrain campus the student

at iBRAIN are evaluated upon entry and quarterly thereafter (Tr. p. 235). Many students who attended iBrain were nonverbal and non-ambulatory, every student required a 1:1 paraprofessional, and many students required a 1:1 nurse (Parent Ex. R at ¶ 5). The deputy director indicated that iBrain provided extended school days from 8:30 to 5:00 for a 12-month extended school year (id.). According to the deputy director, iBrain developed an education plan for each student and provided instruction utilizing practices such as "direct instruction, cognitive strategies, and compensatory education (using diagnostic-prescriptive approaches), behavioral management, physical rehabilitation, therapeutic intervention, social interaction, and transition services" (id. at ¶ 7). He also indicated that iBrain provided related services usually in 60-minute sessions using a "push-in and pull-out model" (id. at ¶ 8).

The deputy director testified that iBrain would have evaluated the student in areas of OT, PT, speech, vision, hearing, assistive technology, and music therapy (Tr. pp. 235-36). The May 2023 iBrain education plan for the student detailed 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. C).[8] To address the student's identified needs described above, the iBrain education plan recommended that the student attend a 12-month program in a 6:1+1 special class along with the support of 1:1 paraprofessional services throughout the day and assistive technology devices and services (id. at pp. 58-59). 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, three 60-minute individual sessions per week of speech-language therapy, three 60-minute session per week of individual vision education services, two 60-minute individual and one 60-minute group session per week of music therapy, and one 60-minute session per month of parent counseling and training (id. at pp. 53, 58-59). The plan reflected that the student was being evaluated for hearing education services and included hearing goals (id. at pp. 26, 38-39). In addition, although the plan did not specifically recommend nursing services, it included an individual health plan that referred to the use of a 1:1 nurse (id. at p. 34).

The iBrain deputy director testified that, for the 2023-24 school year, the student attended a 6:1+1 special class "with direct and small-group instruction" to minimize distractions (Tr. pp. 237-38; Parent Ex. R at ¶ 13). Specifically, the student received 30 minutes of one-to-one direct instruction daily from her classroom teacher, targeting academic goals using errorless learning and

attended two to three times a week and observed the student informally during these visits (see Tr. pp. 235, 249-50; Parent Ex. R ¶ 1).

[8] There are three documents in the hearing record titled "iBrain recommended IEP" that bear the same date of May 4, 2023 (compare Parent Ex. C, with Dist. Ex. 6, and Dist. Ex. 28); however, while all three versions include some of the same information, they also all appear to have some differences. For example, district exhibit 28 includes a recommendation for five sessions of speech-language therapy instead of three and two sessions of hearing services whereas the other two versions do not include such a recommendation (compare Dist. Ex. 28 at pp. 53-54, with Parent Ex. C at pp. 58-59, and Dist. Ex. 6 at pp. 55). On the other hand, district exhibit 6 appears to include some additional language in the section describing the student's present levels of performance (see Dist. Ex. 6 at pp. 1-2, 7, 9). Since the district did not explain the origins of or reasons for presenting exhibits 6 and 28, for the purpose of this decision, parent exhibit C, will be referenced as the iBrain education plan for the student for the 2023-24 school year.

correction procedures, and 30 minutes of group instruction targeting social goals, with additional academic support provided through push-ins by teacher assistants while the student was receiving related services (Tr. pp. 238-39, 253-55). The group sessions, reflected on the student's schedule as "Morning Meeting," were "usually conducted by the teacher assistant," and consisted of the students interacting with peers with their AAC devices and participating in group activities (Tr. p. 253; see Dist. Ex. 27). The deputy director indicated that the student attended the 6:1+1 special class with peers having similar needs, including those who had been classified as students with traumatic brain injuries and who were nonverbal and nonambulatory (Tr. pp. 237-38; Parent Ex. R at ¶ 13).

The deputy director summarized the related services the student received for the 2023-24 school year to include four sessions of OT, five sessions of PT, three sessions of speech-language therapy, three sessions of vision education services, two sessions of hearing education services, one session of assistive technology services, and two sessions of music therapy, all delivered in 60-minute sessions (Parent Ex. R at ¶ 13).[9] According to the deputy director, due to the student's "highly intensive management needs," related services sessions shorter than 60 minutes were insufficient, and, instead, the student needed 60-minute sessions to allow time for repositioning or taking breaks (Tr. pp. 237, 257-58; Parent Ex. R at ¶ 16). The deputy director indicated the student needed a 1:1 paraprofessional to assist the student with transfers, changing, feeding, mobility, and participation in related services, and a 1:1 nurse throughout the day to monitor her frequent seizures and administer her seizure action plan and medications (Tr. pp. 240, 258-59; Parent Ex. R ¶ 14). The deputy director clarified that the recommendation for a one-on-one nurse for the student was made after the iBrain education plan was developed (see Tr. p. 248).

The foregoing demonstrates that, contrary to the district's position, the evidence in the hearing record and, in particular, the deputy director's testimony was not "vague with respect to the services provided to this specific Student" (Answer Cr.-Appeal ¶ 7). Instead, the testimony of the deputy director, in combination with the detailed May 2023 iBrain education plan, demonstrated that iBrain provided the student with specially designed instruction to meet her needs for the summer 2023.

The district also argues that the descriptions of the student's progress appeared to be "pulled from" the May 2023 iBrain education plan, developed prior to the 2023-24 school year (Answer Cr.-Appeal ¶ 7). It is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at

[9] The student's schedule includes five sessions of speech-language therapy instead of three as described by the deputy director and three sessions of music therapy instead of two as described by the deputy director (compare Dist Ex. 27, with Parent Ex. R at ¶ 13). However, the district does not point out or argue that such discrepancies should be considered in evaluating the parent's evidence regarding the appropriateness of iBrain.

*22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

The iBrain deputy director indicated in his direct testimony by affidavit that the student made progress during the 2023-24 school year across academic and related service domains (Parent Ex. R at ¶ 15). During additional live testimony in April 2024, the deputy director testified that, in academics, the student demonstrated improved attentiveness, participation, and ability to follow one-step directions (Tr. p. 241). In math, the student made progress in discriminating between different surfaces using her AAC device (Tr. pp. 241-42). For assistive technology, the student demonstrated an enhanced ability to access and use her device (Tr. pp. 239-40, 242). With respect to hearing, the student showed improved engagement with tactile symbols and demonstrated awareness of sound, as well as attempts to localize sound (Tr. pp. 242-43). The student enjoyed music therapy, which helped her to self-regulate, particularly with percussive instruments (Tr. pp. 242-43). In OT and PT, the student improved her tolerance for sitting, her functional reaching ability, and her ability to transition between prone and supine positions (Tr. pp. 243-44).

The district does not point to any examples of the deputy director's testimony that mirrored the May 2023 iBrain education plan and, during the impartial hearing, the district did not cross-examine the deputy director regarding any similarities between his testimony and the language included in the education plan. Even if the descriptions of progress were similar between the May 2023 education plan and the deputy director's testimony about the student's progress between July and September 2023, given the short passage of time and the nature of the student's needs, which may require working on similar skills over time, not to mention the purpose of 12-month services (i.e., during July and August 2023) being to prevent regression, this would not undermine the parent's evidence regarding the appropriateness of iBrain.

Overall, the hearing record reflects that iBrain provided the student with specially designed instruction that addressed his identified special education needs for July through September 2023. In order to meet her evidentiary burden, the parent 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 (Parent Exs. C; J at ¶ 13). Moreover, the transportation contract with Sisters Travel reflects that the parents also unilaterally-obtained special transportation services to address her needs during her transportation to and from iBrain (see Parent Ex. E). Based on the foregoing, there is insufficient basis in the hearing record to disturb the IHO's finding that iBrain was an appropriate unilateral placement for the student.

C. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ.,

226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["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"]).

Thus, among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

Here, the IHO found that the parent provided timely notice of her intention to unilaterally place the student for the 2023-24 school year and cooperated with the CSE (IHO Decision at pp. 11-12; see Parent Ex. H). The district has not alleged that the IHO erred in these findings; accordingly, they have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The only equitable ground at issue relates to the costs of the nursing and transportation services, with the parent arguing that the IHO's order could be interpreted to require the district to fund only the days the student used the service, in contrast to the parent's contracts, which charged for the services whether the student used them or not. The district argues that an order requiring the district to fund the costs for days that the student did not attend school would be excessive. To be clear, the IHO's decision does not set forth an analysis of whether the transportation or nursing services were excessive.

It is undisputed that iBrain did not deliver the transportation services or 1:1 nursing services to the student but that, instead, the services were delivered by Sisters Travel and B&H Health Care (see Parent Exs. D; E; F; see also Tr. p. 244). Further, there is no argument presented and the IHO did not find that the amount of transportation or nursing services provided to the student exceeded the level that the student required in order to receive a FAPE such that a reduction of the amounts charged for each of the segregable costs would be warranted. Accordingly, the issue of excessiveness is specific to the cost of the services.

The parent entered a contract with Sisters Travel for the provision of transportation to and from iBrain for the 12-month 2023-24 school year (Parent Ex. E).[10] The contract set forth an annual rate for the services and noted that fees would be based on school days even if the services were not used (id. at p. 2). The parent also entered into a nursing services contract for the 2023-24 school year with B&H Health Care for the provision of a 1:1 nurse during the school day and during transportation to and from iBrain (Parent Ex. F). The nursing services contract, like the transportation contract, set forth an annual rate and provided that the fees in the contract were based upon the number of school days in the school year whether the student used the services or not unless the provider was at fault for the student not utilizing the services (id. at pp. 2-3).

In support of the parent's contention that the award should include the full cost of the transportation contract with Sisters Travel, the parent relies on a recent district court case, which reviewed similar contracts with the same transportation company and determined that the terms of the contracts required parents "to pay fees irrespective of whether the students use[d] the services" (Abrams v. New York City Dep't of Educ., 2022 WL 523455 at p. *5 [S.D.N.Y. Feb. 22, 2022]). In its answer and cross-appeal, the district relies on another holding from the same district court, Araujo v. New York City Department of Education, 2023 WL 5097982 (S.D.N.Y. Aug. 9, 2023), to support its position that the IHO should have limited the award of transportation costs to be within the range of fair market rates, as opposed to the amount the parent contracted to pay in the transportation agreement. In further support, the district points to a similar holding in Davis v. Banks, 2023 WL 5917659 (S.D.N.Y. Sept. 11, 2023). It is worth noting that none of the cases cited by the parties are directly relevant to the issue being addressed on appeal, i.e. whether the

[10] The parent testified that, when the student attended a preschool program and received transportation from the district, the transportation was unreliable (Tr. pp. 211-12).

award of funding for transportation or nursing services should be reduced, as all three of the matters cited by the parties involved implementation of either unappealed pendency orders or an unappealed final IHO decision and, therefore, the cases focused on enforcement and the language included in the orders that were being enforced rather than a direct review of the merits of administrative decisions themselves (see Davis, 2023 WL 5917659 ["the sole source of the [district's] reimbursement obligations in each Plaintiff's case[s] is the applicable administrative order"]; Araujo, 2023 WL 5097982 ["[p]laintiffs have not met the IDEA's exhaustion requirement with respect to challenges to the [IHO's decision] itself, as opposed to [d]efendant's implementation of the [IHO's decision]]; Abrams, 2022 WL 523455 ["[t]he heart of this matter[] boils down to the [district's] legal obligations under the [p]endency [o]rders"]).

Generally, an excessive cost argument focuses on whether the rate charged for services were 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 or, in this case, evidence of providers who would only charge for the services delivered. Here, the district cites no evidentiary basis, and an independent review of the evidence reveals no such basis, for a finding that the award of direct funding should be limited to only those transportation and nursing services that were actually provided to the student during the 2023-24 school year.[11] Accordingly, there in insufficient grounds upon which to find that an award of services should include only those 1:1 transportation and nursing services actually delivered to the student instead of the full amount of the parent's financial obligation pursuant to the terms of the contracts.

Accordingly, to the extent the IHO's decision could be read to limit the award of funding for transportation and nursing services, the parent's appeal is sustained.

As a final matter, the parties agree that the student only attended iBrain from July through September 2023 and that, therefore, any award of funding for the 2023-24 school year should be limited to the months the student attended. To the extent the IHO's decision could be read to order otherwise, the district's cross-appeal is sustained.

VII. Conclusion

In summary, the evidence in the hearing record supports the IHO's findings that the district failed to offer the student a FAPE in the LRE for the 2023-24 school year and that iBrain was an appropriate unilateral placement for the student for July through September 2023. The evidence supports a finding that equitable considerations weighed in favor of the parent's requested relief and, to the extent the IHO's order could be read to equitably reduce the amounts awarded for the costs of the student's nursing services and transportation services, the IHO's order will be modified. In addition, to the extent the IHO's order could be read to require district funding for any period of

[11] The district offered into evidence an email exchange between the district and iBrain in which the former iBrain director of special education stated in June 2023 that she was unaware of any students that would be seeking transportation from the district (Dist. Ex. 22); however, on appeal, the district does not contend that the email exchange demonstrated that there was an option for transportation from that the parent unreasonably did not take advantage of. In any event, there is no evidence that the district communicated such an offer to the parent in this matter.

the 2023-24 school year after the student stopped attending iBrain in September 2023, the IHO's decision will be modified.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the IHO's decision dated June 18, 2024, that ordered the district to reimburse the parent for or directly fund the student's tuition and fees at iBrain for the 2023-24 school year is modified to provide that the district shall reimburse or directly fund the costs of the student's tuition and fees for the period that the student attended iBrain from July through September 2023.

IT IS FURTHER ORDERED that the portion of the IHO's decision dated June 18, 2024, that ordered the district to fund and/or reimburse the costs of nursing and transportation services "to and from school" for the 2023-24 school year is modified to provide that the district shall fund and/or reimburse the costs of nursing and transportation services pursuant to the parent's contracts with B&H Health Care and Sisters Travel for the period that the student attended iBrain from July through September 2023.

Dated: **Albany, New York**
August 29, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER