The University of the State of New York

The State Education Department
State Review Officer
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No. 24-604

**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 & Freedom Legal Group, Ltd., attorneys for petitioner, by Erik Paul Seidel, 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. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied, in part, her request for direct payment of the costs of her daughter's attendance at the International Academy for the Brain (iBrain), 1:1 nursing services, and special transportation services for the 2024-25 school year. Respondent (the district) cross-appeals from the IHO's finding that it did not offer the student a FAPE for the 2024-25 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school 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 this case and the IHO decision will not be recited in detail. Briefly, the student has significant global delays and began attending iBrain in March 2022 (Parent Exs. A at p. 3; B at pp. 1-4; C at p. 27; E ¶¶ 9-11; Dist. Ex. 16 at p. 2). A CSE convened on February 27, 2024, determined the student was eligible to receive special education as a student with multiple

disabilities, and developed an IEP for the student with an implementation date of March 11, 2024 (see generally Parent Ex. C).[1, 2]

The February 2024 CSE recommended 12-month programming consisting of a 12:1+(3:1) special class placement in a specialized school for all subjects for a total of 35 periods per week and related services consisting of five 60-minute sessions per week of individual occupational therapy (OT), three 60-minute sessions per week of individual physical therapy (PT), five 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of individual assistive technology services, as well as full-time individual health paraprofessional services, and individual school nurse services on an as needed basis (Parent Ex. C at pp. 45-47, 51). The CSE further recommended one 60-minute session per month of group parent counseling and training (id. at p. 46). In addition, the CSE recommended that the student receive special transportation consisting of transportation from the closest, safe curb location to the school and 1:1 paraprofessional services during transportation (id. at p. 51).

On June 13, 2024, iBrain developed an educational plan for the student (Parent Ex. B at p. 1).

In a letter dated June 14, 2024, sent by email to the district, the parent outlined her disagreements with the recommendations contained in the student's February 2024 IEP, the recommended program, and school placement for the 2024-25 school year, asserting that the district did not send out a school location letter and that the parent had previously rejected the public school site to which she surmised the district would assign the student to attend, and, as a result, notified the district of her intent to unilaterally place the student at iBrain (see Parent Ex. A at pp. 10-11).

On June 18, 2024, the parent entered into a contract agreement with B&H Health Care Services, Inc. (B&H) for the provision of a 1:1 transportation nurse to accompany the student to and from iBrain from July 2, 2024 through June 27, 2025 (Parent Ex. A at pp. 45-51). On June 20, 2024, the parent entered into an agreement with Sisters Travel and Transportation Services, LLC (Sisters) to provide the student's transportation to and from iBrain from July 2, 2024 through June 27, 2025 (id. at pp. 38-44). On June 21, 2024, the parent entered into an agreement with iBrain for the student's enrollment at iBrain for the 2024-25 school year from July 2, 2024 to June 27, 2025 (id. at pp. 31-37).

**A. Due Process Complaint Notice**

In a due process complaint notice dated July 2, 2024, the parent alleged that the district did not offer the student a free appropriate public education (FAPE) for the 2024-25 school year, asserting that the district failed to appropriately evaluate the student and failed to recommend an

[1] The hearing record includes a District Exhibit for the February 2024 IEP; however, the page numbering does not correspond to the Parent Exhibit of the same IEP due to spacing (compare Parent Ex. C, with Dist. Ex. 1). The hearing record also included a translation of the February 2024 IEP for the parent (see Dist. Ex. 17). For the remainder of the decision, only Parent Exhibit C will be cited in relation to the February 2024 IEP.

[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]).

appropriate public school location, an appropriate class size, or an extended school day, and further failed to recommend appropriate related services, noting a lack of music therapy, vision services, 1:1 nursing services, and appropriate transportation accommodations (see Parent Ex. A at pp. 1-9).[3]

The parent went on to argue that iBrain was an appropriate placement for the student because she was supported by appropriate related services that addressed her needs and she attended a smaller classroom size (8:1:1) with peers who have similar levels of function and who were working towards similar goals as the student (id. at p. 8). Additionally, the parent argued that equitable considerations favor providing a full award of tuition to iBrain and related services for the student because the parent was cooperative during the IEP process and made the student available for evaluations and observations by the district (id.).

The parent requested an order declaring that the district denied the student a FAPE for the 2024-25 extended school year; a determination that iBrain was an appropriate placement for the student for the 2024-25 extended school year; an order directing payment by the district directly to iBrain for the cost of full tuition, of related services, and for a 1:1 paraprofessional for the 2024-25 extended school year; direct payment by the district of special education transportation with a 1:1 transportation paraprofessional; direct payment of 1:1 nursing services, including a travel nurse; an order which would require the district to provide the student with assistive technology services and devices to assist the student with communication; and an order directing the district to fund an independent psychological, neuropsychological, and educational needs assessment of the student (id. at p. 9).

### B. Impartial Hearing Officer Decision

After prehearing conferences, on August 2, 2024 and August 9, 2024, an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 3, 2024 (Tr. pp. 1-241).[4] Both parties submitted closing briefs dated September 25, 2024 (IHO Exs. XXIV; XXV).

[3] The parent raised the issue of the student's pendency in the due process complaint notice and attached documents related to pendency, which were considered by the IHO in making his determination on pendency (September 4, 2024 IHO Interim Decision). However, at the request of the district, the IHO excluded from the impartial hearing on the merits some of the exhibits from the parent's due process complaint notice because they related to pendency (Tr. pp. 88-89). In submitting the hearing record, the district included the redacted due process complaint notice as Parent Exhibit A, but also included the parent's complete due process complaint notice as a part of the hearing record as a supplemental document (see July 2, 2024 Due Process Compl. Not.; Parent Ex. A). As pendency is not at issue on appeal, only the parent exhibit is referred to for ease of reference.

[4] In an interim decision, dated August 23, 2024, the IHO addressed the district's motion to dismiss the parent's due process complaint notice due to the parent's failure to appear for a resolution meeting and the IHO directed the parent and the district to appear for a resolution meeting by August 30, 2024 (Aug. 23, 2024 Interim IHO Decision; see IHO Exs. VII; XVI). The IHO issued a second interim decision addressing pendency directing the district to fund the student's tuition and related services pursuant to the parent's contract with iBrain, fund the student's transportation to and from iBrain and all related services provider facilities consistent with the parent's contract, and fund the student's 1:1 transportation paraprofessional, air conditioning, lift bus, regular-sized wheelchair, and limited travel time of 60 minutes (Sep. 4, 2024 Interim IHO Decision).

In a decision dated November 1, 2024, the IHO determined that the district failed to offer the student a FAPE for the 2024-25 school year, that iBrain was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 13-28).

Initially, the IHO rejected various claims asserted by the parent in the due process complaint notice. Specifically, the IHO found the parent's claim that the district could not implement the proposed IEP was merely speculative, that her claim the student required an extended school day was also speculative, that the district addressed the student's vision-related needs and did not need to recommend vision education services in order to provide the student with a FAPE, that although music therapy was helpful for the student it also was not required to offer a FAPE, that the district had sufficient evaluative data to make an appropriate recommendation for the student, and that the district was justified in not recommending full-time 1:1 nursing services for the student (IHO Decision at pp. 14-20). However, the IHO found that the district recommended an insufficiently supportive classroom size for the student, noting that all of the evaluative data relied on by the district indicated the student required an 8:1+1 special class, or something more supportive, and the district school psychologist did not offer a responsive or coherent explanation for why the CSE did not recommend an 8:1+1 special class for her (id. at pp. 20-21).

The IHO went on to find that the parent met her burden of proving that iBrain offered an educational program which met the student's special education needs (IHO Decision at pp. 21-23). The IHO also found that B&H, the private nursing provider, offered the student necessary nursing services to make academic progress (id. at p. 23).[5] However, the IHO found that the parent had failed to meet her burden in establishing that Sisters provided transportation services sufficient to meet the student's needs (id at pp. 23-24). The IHO found that no evidence was introduced at the hearing regarding what services Sisters offered to the student for the 2024-25 school year and Sisters failed to respond to a subpoena (id.).

Regarding equitable considerations, the IHO found that neither party acted equitably during the resolution process, but the parent provided a 10-day notice to the district of her concerns regarding the district's offer of a FAPE to the student for the 2024-25 school year (IHO Decision at pp. 25-26). The IHO found that the district did not have a person who had the authority to resolve all of the parent's claims attend the resolution meeting; however, the IHO found that the parent refused to participate in the resolution process, even after being ordered to participate (id. at p. 25). The IHO found that the award for privately-obtained nursing services should be reduced by half based on the parent's "misconduct regarding the resolution process," and because the IHO wanted to ensure that funding was not being provided for 1:1 nursing services during transportation, as the IHO was not awarding funding for transportation services (id. at p. 26).

[5] The IHO noted that it was "confusing that [iBrain] require[d] [the p]arent to obtain 1:1 nursing from [B&H], which purport[ed] to be a separate entity from [iBrain]" (IHO Decision p. 23). The IHO went on to further note that "[iBrain]'s [n]urse is referenced in [iBrain]'s [e]ducation [p]lan, and while [the s]tudent's nurse [wa]s referenced, this person [wa]s not named, and their qualifications were not provided" (id.). Despite this discrepancy, the IHO concluded that "the nursing agreement indicate[d] that [the] [s]tudent's 1:1 nurse w[ould] be properly qualified, and the expectations of the nurse [we]re clear based on [iBrain]'s [e]ducation [p]lan" (id.).

The IHO awarded the parent full tuition funding for the cost of tuition at iBrain, funding for half of the contract for the student's nursing services from B&H, and no funding for Sisters (IHO Decision at p. 27).[6] Additionally, the IHO ordered the district to provide the student with transportation to and from iBrain for the duration of the 2024-25 school year (id.).

## IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that equitable considerations did not favor the parent's claims, specifically taking issue with the IHO's finding that the parent was uncooperative in the resolution process. The parent also argues that the IHO erred in reducing the parent's request for the full, direct payment of the contracted for 1:1 nursing services. Additionally, the parent argues that the IHO erred in denying the parent's request for the full direct payment of transportation services, asserting that the IHO erred in not considering the parent's testimony and the terms of the transportation contract. Further, the parent alleges that the IHO erred in ordering the district to provide transportation for the student to and from iBrain, asserting that the transportation agreement was part of the parent's unilateral placement of the student. Finally, the parent alleges that the remaining findings of the IHO should be upheld, including that the district did not offer the student a FAPE for the 2024-25 school year, that iBrain was an appropriate placement for the student, that the student required 1:1 nursing services, and that the parent was entitled to an award of tuition funding for iBrain.

In its cross-appeal, the district argues that the IHO correctly reduced the amount awarded to the parent for the parent's failure to participate in the resolution process. The district also argues that the IHO made various implied rulings regarding the student's need for 1:1 nursing services such that the IHO's finding that the contracted for 1:1 nursing services were appropriate for the student should be overturned. In the alternative, the district argues that any relief related to 1:1 nursing should be limited to reimbursement arguing that the nursing and transportation providers had an interest in the outcome of this proceeding and should not have been permitted to benefit from the outcome of the proceeding while not complying with duly issued subpoenas. Additionally, the district argues that the IHO correctly denied the parent's request for full payment of private transportation. Finally, the district argues that that the IHO erred in finding that the district failed to offer the student a FAPE and asserts that the recommended 12:1+(3:1) special class was appropriate for the student.

In a reply to the district's cross-appeal, the parent echoes her arguments made in her request for review, but additionally argues that the district denied the student a FAPE for other reasons, asserting that the district failed to recommend 1:1 nursing services, vision education services, and music therapy.

## 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

[6] The IHO went on to reject the parent's request for an independent educational evaluation (IEE) as the parent failed to indicate the district evaluation with which the parent disagreed (IHO Decision at p. 27).

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]).[7]

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

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

**VI. Discussion**

The district has not appealed from the IHO's decision regarding the appropriateness of iBrain or the award of direct payment of tuition to iBrain for the 2024-25 school year. Therefore, these findings 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]).

[7] 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).

**A. February 2024 IEP**

As noted above, the IHO found that the February 2024 IEP was not appropriate for the student because it recommended an insufficiently supportive class size, noting that the district did not offer a coherent explanation as to why the CSE did not follow the class size recommendations made by the private school staff (IHO Decision at pp. 20-21). The IHO also addressed a number of allegations raised by the parent, such as that the February 2024 IEP did not include a recommendation for 1:1 nursing services, and found that those allegations did not result in a denial of FAPE (id.at pp. 14-20). As for its cross-appeal, the district contends that the IHO erred in finding that the recommendation for an 8:1+1 special class was not appropriate for the student, but as the IHO's other findings as to the provision of a FAPE went in favor of the district, the district did not address those in its cross-appeal, except to the extent that the district identified and argued in support of the IHO's findings as to the need for 1:1 nursing services as part of its argument concerning whether the parent's unilaterally-obtained nursing services were appropriate. In an answer to the cross-appeal, the parent argues in support of the IHO's determination that the class size recommendation was not appropriate for the student and, also, asserts that the district denied the student a FAPE for additional reasons, including that the CSE failed to recommend 1:1 nursing services for the student.

Prior to reaching the merits of the parties' dispute, a discussion of the student's present levels of performance as set forth in the February 2024 IEP provides context for determining whether the February 2024 CSE's recommendations would have provided the student with an appropriate educational program for the 2024-25 school year.

The February 2024 CSE found the student eligible for special education as a student with multiple disabilities and, taking information from a February 23, 2024 iBrain education plan, the February 2024 IEP described the student as nonverbal and identified significant deficits in her cognitive, adaptive, communicative, and physical development, noting that she required a high degree of individualized attention to meet daily care needs (see Parent Ex. C at pp. 1-25, 27; Dist. Ex. 6). The IEP reflected reports that the student had the ability to ambulate in the school and community when provided with contact guard for safety and close supervision (Parent Ex. C at pp. 19, 21). According to the IEP, the student had access to an augmentative and alternative communication (AAC) device and communicated through body language, facial expressions, gestures, and vocalization (id. at pp. 6, 7).[8] The IEP reported the student "[wa]s frequently distracted by environmental factors, like people entering the room, preferred adults, and general noise" and that she attempted to avoid structured session tasks for preferred activities in the same space (id. at pp. 7-8, 9). Avoidant behaviors, described in the IEP, included diversion of gaze, throwing items, tearing items, and grabbing items, including her "own [gastrostomy] [g]-tube and other people's hair" (id. at pp. 7-8). The IEP reported that when on task, the student engaged in social activities such as giving peers fist bumps; however, on days of dysregulation and agitation, she required maximal assistance to engage in sensory regulation activities and required increased supervision to maintain safety for herself and others, as she "tended to demonstrate unsafe behaviors such as pulling on her g-tube, planking her body, laying on the floor, [and] eloping" (id.

[8] The February 2024 IEP noted that the student was bilingual; Spanish was her primary language at home and English was her primary language at school (Parent Ex. C at p. 6).

at p. 11). Additionally, the IEP indicated that "[w]ith proper support of therapists, teachers and her paraprofessional, [the student] [wa]s often able to be redirected to school activities" (id.).

The February 2024 IEP reported that cognitively, the student was aware of changes to the environment, she looked to engage familiar individuals with a fist bump, had an emerging understanding of cause and effect, and understood when objects were taken out of sight (Parent Ex. C at p. 13). The IEP stated the student did not recognize her name in print, identify the alphabet, or match quantities to numerals, but could identify colors and shapes (id.). According to the IEP, the student understood concepts related to same and different, the sizes big and small, and the concept of more (id.). Related to the student's vision, the student had prescribed glasses for correction of myopia; however, the student needed support from school staff to wear them (id. at pp. 13, 22). The February 2024 IEP reported that the student's level of support varied from greeting the clinician using her assistive technology device independently, to maximal levels of verbal and gestural cueing to refrain from engaging in aggressive behaviors depending on her motivation, level of dysregulation, and her attention to task (id. at p. 17). The IEP reported the student needed support to maintain focus on one thing at a time and that the student required support for communication and socialization (id. at p. 19).

The February 2024 IEP reported that with regard to physical development, the student presented with mild tone and spasticity, had full active functional range of motion and good head control, with some muscle stiffness in her arms, legs and trunk and weakness in her hands; however, overall, she had fairly good muscle strength (Parent Ex. C at p. 19). The student also exhibited hypersensitivity and sensory-seeking behaviors (id. at p. 20). The IEP reported the student's need for assistance varied based on her current behaviors, specifically regarding safety awareness and impulsivity on the stairs (id.). According to the IEP, the student used an adaptive stroller as her main form of functional mobility and as a positional device at school and used a school chair with desk to sit most hours during the day (id. at p. 24). The IEP stated that the student performed best in the classroom environment when sitting in activity chairs with a belt buckle to prevent eloping and ensure safety (id.). The IEP reported, as related to feeding, the student received all primary nutrition and hydration via gastrojejunostomy (GJ) -tube feedings, and at that time received a continuous 18-hour feed, with the ability to disconnect for PT and OT for one hour at a time for a total of two hours per day (id.). The student's feed and pump remained within a small backpack carried with the student at all times and when seated hooked on the back of a chair or table (id. at p. 25). The IEP reported the student tolerated carrying this backpack; however, she "[wa]s known to pull her GJ-tube out intentionally," which was documented as an attention-seeking behavior (id.).

As discussed in the section above, the February 2024 IEP reported that the student needed assistance with hygiene, feeding, and all activities of daily living (ADL's) and school tasks (Parent Ex. C at p. 22). The February 2024 IEP reported that the student "require[d] a 1:1 paraprofessional and 1:1 nurse to support her medical, physical, cognitive, and sensory needs throughout the day" (id. at p. 23). The IEP reported the student "required support ranging from minimal to maximal assistance during all transitions throughout the day dependent on her regulation, minimal to maximal support for functional mobility and navigation of all environments depending on if she [wa]s ambulating or being pushed in her adaptive stroller, maximal assistance for completion of all ADL's, and support throughout the day to aid in attention to task, use adapted devices and assistive technology, manage her medical needs" as well as "position changes, behavior and

impulsivity management and overall safety" (id.). Further, the IEP reported the student needed the support of a 1:1 paraprofessional to manage her behaviors of eloping, pulling on her g-tube, and hitting her j-tube site, as well as with attention and safety awareness in the school environment (id.).

The February 2024 IEP identified strategies for addressing the student's management needs that provided for human, environmental, and material resources to support the student, including one-to-one paraprofessional support; use of the one-on-one direct instructional model, and verbal, physical, and tactile cues to increase comprehension and assist with task completion; a small class with students at a similar developmental, social, and communication level with peer models for communication and academic skills development; sensory breaks for regulation; access to AAC as well as adaptive equipment; and therapeutic supports to promote functional mobility (Parent Ex. C at pp. 25-26). To address the student's above identified needs, the February 2024 CSE included approximately 15 annual goals with short-term objectives that were written for improving the student's communication, academics, motor, and self-care skills; providing for the student's paraprofessional to consistently consult with the special education teacher and therapists regarding monitoring of the student's academic and therapeutic needs; and providing for the paraprofessional to consistently consult with the school nurse regarding close monitoring of the student's medical needs related to toileting, feeding, and ambulation (id. at pp. 28-44).

Considering all of the above, the analysis focuses on the IHO's determination that the February 2024 CSE was justified in not recommending full time 1:1 nursing services for the student, an issue that the parent raised in its answer to the cross-appeal. In particular, the IHO found that the district school psychologist testified that 1:1 nursing services were not recommended for the student based on the student's physician's March 1, 2024 letter which indicated the student did not require a 1:1 nurse (IHO Decision at p. 20). The IHO specifically noted that such a recommendation was "in contrast to the observations of [the s]tudent's performance listed in the IEP" but ultimately determined the letter provided sufficient basis for the CSE to not recommend 1:1 nursing services (id. at pp. 20-21).

On February 27, 2024, the CSE met to discuss the student's needs and program for the 2024-25 school year (Parent Ex. C; Dist. Ex. 14). According to the transcript of the February 2024 meeting recording, the school psychologist stated that at the time of the meeting the CSE was "not able to recommend nursing services," and that the medical forms submitted by the parent were sent to the district's nursing unit for review (Dist. Ex. 14 at pp. 1, 112-13).[9] The school psychologist, in discussion with the parent and parent advocate, stated that once the nursing unit reviewed the documents, the CSE would "reach out," or "we would need to meet again or revisit the nursing" to let the parent know the recommended nursing services (id. at pp. 112-13, 134, 138). The hearing record included the February 27, 2024 meeting minutes, which referenced reports shared by the student's providers and noted the CSE recommendation for full-time individual paraprofessional services daily; however, it did not identify any information as to the student's nursing services (see Dist. Ex. 15 at pp. 3-4). The February 2024 IEP recommended that the

[9]The school psychologist noted that the district did not receive information or medical forms until "around midnight" prior to the CSE meeting; the hearing record included an email from the director of special education at iBrain the evening prior to the February 27, 2024 CSE meeting that listed attachments including a progress report, an iBrain education plan, and nursing request forms (Dist. Ex. 14 at p. 134; see Dist. Ex. 32 at pp. 5-6).

student receive "[i]ndividual" school nurse services provided at the frequency of "[a]s [n]eeded" and for the duration of "[a]s [n]eeded" to be provided in the "[n]urse's office" (Parent Ex. C at p. 46).

The February 27, 2024 CSE included much of the February 2024 iBrain education plan within the February 2024 IEP (compare generally Parent Ex. C, with Dist. Ex. 6). The February 2024 CSE created an IEP mirroring the student's February 2024 iBrain education plan as related to 1:1 nursing, which, within the student's present levels of performance, indicated the student required a "1:1 nurse to support her medical, physical, cognitive, and sensory needs throughout the day" and "require[d] a 1:1 nurse to administer emergency medications, [and] aid in safety" (compare Parent Ex. C at p. 23, with Dist. Ex. 6 at p. 9). The February 2024 IEP also included information from the February 2024 iBrain education plan indicating that the 1:1 nurse needed to be present during related services if a medical need arose, and needed to provide maximal support to refrain the student from engaging in aggressive behaviors, and "intense and continuous monitoring of all potentially unsafe behaviors regardless of reason so as to provide as safe of an environment for [the student] at all times" (compare Parent Ex. C at pp. 17, 23, 25, with Dist. Ex. 6 at pp. 21, 22, 29-30).[10]

The hearing record indicates that, on the same day as the February 2024 CSE meeting, the district school psychologist contacted the district's office of school health with the medical forms requesting 1:1 nursing services for the student and a district registered nurse affiliated with the district's Central Nursing SESIS Unit Office of School Health responded suggesting that the justification for the 1:1 nursing services was "to prevent the student from pulling out the JG[-tube] related to behavioral challenges" and inquiring "[a]re there paras at iBrain?" further noting that the registered nurse would contact the student's health care provider (Dist. Ex. 32 at pp. 2-5).

A March 1, 2024 letter from the student's treating physician stated "[u]pon re[-]evaluation and review, 1:1 nursing [wa]s not recommended while [the student [wa]s at school" (Dist. Ex. 7). The letter went on to state that the student needed constant supervision from a health paraprofessional to ensure that the student did not pull out her feeding tube or engage in injurious behaviors to herself or others (id.). The physician advised that should the student's feeding tube become dislodged at school, she needed evaluation by the school nurse and her feeds stopped (id.). On March 4, 2024, the district registered nurse emailed the district school psychologist and district staff with the March 1, 2024 letter from the student's treating physician (Dist. Ex. 32 at p. 1). In the email, the registered nurse asked that this information be "upload[ed] into SESIS and if in agreement, please change [t]he recommendation to non 1:1 skilled nursing services," but noted that the CSE retained final say as to what level of nursing services would be placed on the student's IEP (id.).[11]

[10] The February 2024 IEP, like the February 2024 iBrain education plan included information that stated the student required a 1:1 paraprofessional to manage eloping behaviors, self-stimulating behavior like pulling on her g-tube and hitting her j-tube site, and help with attention and safety awareness in the school environment (compare Parent Ex. C at p. 23, with Dist. Ex. 6 at p. 9).

[11] The hearing record included a SESIS events log detailing information as related to justification for the level and recommendation of nursing services (Dist. Ex. 9 at pp. 1-4).

Although the school psychologist testified in her affidavit that 1:1 nursing services were not recommended because the CSE had receipt of the March 1, 2024 physician letter stating "that the student was not recommended for 1:1 nursing, but required a health paraprofessional instead," it is unclear how that occurred given that the CSE meeting was held on February 27, 2024, prior to the date of the physician's letter (compare Dist. Ex. 29 ¶ 18, with Dist. Ex. 7). In the February 27, 2024 transcript of the CSE meeting, the school psychologist stated the CSE was "not able to recommend nursing services" noting that the CSE would "reach out" after "the nursing services unit reviews [the student's medical forms]" and that the CSE would "need to meet again or revisit the nursing"; however, it does not appear that another CSE meeting took place (Dist. Ex. 14 at pp. 112-13, 134, 138). This process described by the district school psychologist 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]). Here, the registered nurse from the district's Office of School Health did at least note that the CSE retained final say as to what level of nursing services would be placed on the student's IEP; however, the evidence in the hearing record does not show that the CSE reconvened to review the March 1, 2024 physician letter or the district registered nurse's recommendation based on that letter in making recommendations regarding nursing services on the student's February 2024 IEP, nor does the IEP provide any notation of the nursing recommendation being based on the physician's letter (see e.g. Parent Ex. C at pp. 7, 12, 17, 21, 22, 23, 25, 46; Dist. Ex. 7).[12]

Turning to the recommendation for nursing services contained in the February 2024 IEP, State guidance provides guidelines for determining whether a student requires 1:1 nursing services that specifically outlines that the student's individual health needs and level of care need to be considered; the qualification required to meet the student's health needs, the student's proximity to a nurse; the building nurse's student case load, and the extent and frequency the student would need the services of a nurse (see, e.g., "Guidelines for Determining a Student with a Disability's

[12] The hearing record included a July 16, 2024 physician's order for a 1:1 nurse, signed by the student's treating physician on iBrain documentation, which also listed the student's diagnosis/medical conditions, and reason for the 1:1 nursing recommendation as related to the student's gastrostomy related needs (Parent Ex. D at p. 9). The iBrain documentation indicated that to meet the student's needs in the iBrain program "it [wa]s our assessment and recommendation that [s]he be provided with a 1:1 nurse" and stated that "[t]he MD signature [wa]s confirmation of the requested order which [wa]s for a period of 52 weeks" (id.). The hearing record did not indicate that this document was provided to the district prior to the 2024-25 school year. Here, the IHO made a finding that it was difficult to credit the assertion that the physician recommended 1:1 nursing services, given the physician's contradictory recommendation four months prior and that the physician was not called as a witness (IHO Decision at p. 16). The IHO in addition found that despite the February 2024 IEP's repeated reference to the student's need for a 1:1 nurse, he credited the testimony of the school psychologist based on the March 2024 treating physician's letter (id. at p. 19). Specifically, the IHO concluded that the CSE had a well-grounded reason for not recommending a full time 1:1 nurse as the March 2024 letter from the treating physician indicated the student did not require a full-time nurse, and the recommendation by the treating physician did not change until after the start of the 2024-25 school year when the student was already attending the private school (id. at pp. 19-20). However, all of this is retrospective evidence as it was not before the February 2024 CSE (see R.E., 694 F.3d at 186–87 ["the IEP must be evaluated prospectively as of the time of its drafting"]).

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

State guidance provides that:

> [i]n terms of providing school health services or school nurse services to a student as a part of his/her IEP, the term 'as needed' is not specific enough to provide a clear frequency and/or duration for this service and may result in inconsistent implementation. In consideration of a student's unique needs related to nursing services, the IEP may specify the timing conditions which would result in a need for this service (e.g., 'in the event that the student experiences __ '). The same would apply to duration and may include an observable, measurable signal that warrants the end of the service (e.g., until the student's heart rate measures __ beats per minute'; or 'until the student's blood glucose level reaches __'). For students whose health conditions require a full-day (continuous) one-to-one nurse, the IEP must specify the frequency, duration, and location for this service

(id. at p. 4, available at https://www.nysed.gov/sites/default/files/programs/special-education/guidelines-for-determining-astudent-with-a-disability-need-for-a-1-1-nurse.pdf).

Based on the foregoing, the district's recommendation of nursing services "as needed" did not align with the present levels of performance in the February 2024 IEP indicating the student required 1:1 nursing; and further, did not align with State guidance. While the hearing record did include a letter from the student's physician, post-dating the February 2024 CSE meeting, that indicated the student did not require a 1:1 nurse, the existence of such a letter did not absolve the CSE from making its own determination as to the student's needs and based on the information that was available to the CSE at the time it made its decision, the recommendation for school nursing services as needed was not appropriate. Therefore, the hearing record does not support the IHO's conclusion that the CSE's February 2024 nursing recommendation offered a FAPE to the student for the 2024-25 school year.[13]

**B. Unilaterally Obtained Services**

I next turn to the appropriateness of the parent's unilateral placement of the student at iBrain with additional services consisting of 1:1 nursing services and special transportation services. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has

[13] Having determined that there is a denial of a FAPE based on the district's recommendation for school nursing services, as needed, not being sufficient to address the student's needs as described in the February 2024 IEP, it is not necessary to further discuss the IHO's determination that the class size recommendation was also not appropriate.

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 Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]; 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 necessar y to permit the child to benefit from instruction.

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

Initially, neither party has appealed from the IHO's finding that iBrain was an appropriate unilateral placement for the student for the 2024-25 school year. Rather, the parties' argument focuses on the appropriateness of the nursing services delivered to the student by B&H and the

transportation services delivered to the student by Sisters. Accordingly, as noted above, the appropriateness of iBrain and funding for iBrain are not at issue on appeal and the analysis will focus on the nursing services and transportation services delivered to the student.

**1. Nursing Services**

According to the February 2024 iBrain education plan, the student required 1:1 nursing services to support her physical, cognitive, and sensory needs throughout the day and required a 1:1 nurse to administer emergency medications and aid in safety (Dist. Ex. 6 at p. 9). The iBrain plan reported that the student needed maximal support from her 1:1 aide and 1:1 nurse to refrain from aggressive behaviors and provide intense and continuous monitoring of unsafe behaviors (id. at pp. 22, 30). The iBrain education plan specified nursing duties, along with the support of the paraprofessional, to include provision of hands on contact guard during all therapy sessions to prevent falls and injury due to muscle weakness and stiffness, poor balance and ataxia related to diagnoses; provide care and nutrition via jejunostomy, jejunostomy care, administration of medication via jejunostomy; provide emergency care if the gastrostomy was displaced or accidentally dislodged per doctor's order; that the 1:1 nurse and paraprofessional monitor the student's breathing due to asthma and provide rescue Albuterol treatment, and that the 1:1 nurse monitor the student's oxygen level and provide rescue medications as ordered by her physician (id. at pp. 41-48).

Pursuant to the contract between the parent and B&H, B&H agreed to provide the student with a properly trained and licensed 1:1 nurse (Parent Ex. A at p. 27). The contract does not outline the specific duties of the licensed nurses who would be providing the student with 1:1 nursing services, but generally stated that B&H "shall provide a 1:1 [p]rivate [d]uty [n]urse for [the] [student] during the [school] [hours]" (id.). However, as discussed above, the iBrain educational plan outlines the specific duties of the student's 1:1 nurse (Dist. Ex. 6 at pp. 41-48). The contract was signed by both the parent and the provider (id. at 32).

In arguing that the IHO erred in finding the nursing services appropriate, the district asserts that the IHO made a number of findings that indicated the student did not require nursing services during the 2024-25 school year (Req. for Rev. at ¶18). For the most part, those findings related to the IHO's determination that the February 2024 CSE was justified in not recommending 1:1 nursing services for the student (see IHO Decision at p. 19). As it has already been determined that the IHO erred in his findings related to the February 2024 CSE recommendations for nursing services, those findings need not be further addressed. However, it is worth noting that the IHO did take note of the student's physician's July 16, 2024 recommendation that the student be provided with 1:1 nursing services in determining that the services contracted for with B&H were appropriate (IHO Decision at p. 23; see Parent Ex. D at p. 9). Overall, the hearing record supports the IHO's findings that the nursing services provided to the student during the 2024-25 school year were appropriate.

**2. Transportation Services**

The parent appeals from the IHO's determination that the hearing record did not support finding that the transportation services she contracted for with Sisters were appropriate for the 2024-25 school year. More specifically, the IHO found that "no evidence was introduced at the hearing regarding what [Sisters] offer[ed] [the s]tudent during the 2024-2025 school year except

[Sisters]' failure to respond to the [district's] subpoena request for records" (IHO Decision at pp. 23-24). According to the parent, the IHO failed to consider the parent's testimony and the contract with Sisters in finding that the hearing record did not support her request for funding of transportation services.

On review of the hearing record related to the student's need for special transportation, the February 2024 iBrain education plan included in the area of equipment needs and supports that "[f]or transportation needs, [the student] travel[ed] in an adaptive stroller that ha[d] travel brackets to go to and from school" (Dist. Ex. 6 at p. 9). The February 2024 iBrain education plan included transportation recommendations that provided for supervision of the student by a 1:1 nurse, vehicle/equipment needs of air-conditioning and lift-bus/wheelchair ramp, and the accommodation for limited time travel of 60 minutes (id. at pp. 67-68).

The contract between the parent and Sisters provides that Sisters will "provide the vehicles, drivers, and dispatching necessary to provide the [student] [with] the [transportation] [services]" (Parent Ex. A at p. 20). The contract also states that Sisters will "use safe and clean equipment and properly trained and licensed drivers employed or under contract with [Sisters]" (id.). According to the contract, the vehicle provided by Sisters will also have "[a]ir conditioning, regular-size wheelchair accessibility (e.g., lift-bus/wheelchair ramp), and sitting space to accommodate a person to travel with [the] [student], as needed" (id.) Additionally, the contract states that "if [the] [student] requires additional equipment for transportation (i.e., oxygen tanks), the vehicle will accommodate these additional needs of [the] [student]" (id.). The contract was signed by both the parent and the provider (id. at 24). In addition, the parent testified that Sisters was transporting the student during the 2024-25 school year, indicating that she communicated with Sisters regularly regarding the student's pick ups and drop offs (Tr. pp. 219-24).

Accordingly, overall, the hearing record includes information regarding the appropriateness of the special transportation services provided by Sisters for the student during the 2024-25 school year.

To the extent that the IHO included Sisters' failure to respond to a subpoena as part of his finding, it is worth noting that the IHO did not make an adverse inference based on the provider's noncompliance and appears to have been noting what he found to be a general lack of information regarding the transportation services provided to the student (IHO Decision at pp. 23-24). While the IHO correctly pointed to an SRO decision which indicated that a private school's failure to respond to a subpoena should be considered in weighing the evidence as to the appropriateness of the school, in the referenced matter, the IHO had specifically found an adverse inference based on the failure to respond to the subpoena (IHO Decision at p. 24; see Application of a Student with a Disability, Appeal No. 23-060). The IDEA does not "specify what particular remedies, including penalties or sanctions, are available to due process hearing officers or to decision makers in State-level appeals. The specific authority of hearing officers and appeal boards, including the types of sanctions that are available to them, generally will be set forth in State law or regulation" (Letter to Armstrong, 28 IDELR 303 [OSEP 1997]). IHOs and SROs may assert appropriate discretionary controls over the due process and review proceedings and, specifically, an IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]); however, in New York, IHOs have not been expressly granted contempt powers (Application of the Bd. of Educ., Appeal No. 02-056; Application of a Child with a Disability, Appeal No. 02-049). Nevertheless, SROs have noted that adverse inferences may be drawn when private agencies, which contracted for services

with the parents in the proceeding, failed to respond to subpoenas (see e.g., Application of a Student with A Disability, Appeal No. 24-031 at n. 6]).

However, in this instance, the IHO did not make an adverse inference and without a request for such an inference being made on appeal, the providers' failure to respond to subpoenas must be treated as a void in the evidence but without an inference that such a void implies that the subpoenaed documents would result in a finding that the services were not appropriate if they had been produced. It is worth noting that, in its closing brief, the district had argued that Sisters' failure to comply with the subpoena should have resulted in an adverse inference such that had Sisters complied with the subpoena the response would not have supported a claim that the transportation services provided were appropriate (IHO Ex. XXIV at p. 11). However, in its answer with cross-appeal, the district only notes that Sisters did not comply with its subpoena, without requesting an adverse inference.[14]

Therefore, based on the available evidence in the hearing record, although it is limited, the parent's testimony, the February 2024 iBrain education plan, and the contract between Sisters and the parent, support finding that Sisters provided the student with appropriate special transportation services.

**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

[14] The district also referred to the IHO's finding that B&H did not comply with a subpoena in its answer and cross-appeal; however, the district did not make an argument for an adverse finding against B&H either (Req. for Rev. ¶18). In the section of the answer and cross-appeal regarding funding for nursing services, the district argues that the failure of B&H and Sisters Travel to comply with subpoenas should be weighed as an equitable factor against the parent (id. ¶¶20-22). That argument is addressed below.

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"]).[15]

The parent appeals the portion of the IHO's decision that reduced the requested relief for 1:1 nursing services because of the parent's failure to participate in the resolution meeting. According to the parent, the district did not hold a proper resolution meeting because the district participants in the meeting did not have authority to agree to direct payment for the cost of the student's private school tuition and were not relevant members of the CSE.

Here, the parent failed to participate in the resolution meeting (see IHO Ex. VII).[16] Additionally, there is no way to conduct a resolution meeting if the parent refuses to attend. As set forth in 8 NYCRR 200.5 [j][2][vi][a], the remedy for a school district that is unable to obtain the participation of a parent at a resolution meeting after it makes and documents its reasonable efforts to do so is to request that the IHO dismiss the parent's due process complaint notice (see 8 NYCRR 200.5[j][2][vi][a]). It is then within the IHO's discretion to determine whether the motion to dismiss should be granted.

In this instance, the IHO denied the district's to dismiss the parent's due process complaint notice but specifically directed the parent to appear for a resolution meeting (Aug. 23, 2024 Interim IHO Decision at p. 12).

However, even after being ordered by the IHO to participate in a resolution meeting and being warned that failing to appear could result in a dismissal of the due process complaint notice or other adverse findings, the parent did not participate in the resolution meeting (IHO Decision at p. 25; Dist. Exs. 33; 35 a pp. 2-3). A party's conduct during a due process proceeding may be weighed as a factor when fashioning equitable relief. If a party has engaged in a pattern or practice that results in unfair manipulation of the due process procedures, there is nothing that precludes the IHO from considering such facts when weighing equitable factors at the conclusion of the impartial hearing, so long as they are based on an adequate record and after providing the parties a reasonable opportunity to be heard (see Application of a Student with a Disability, Appeal No. 24-333). Additionally, under IDEA, district courts enjoy broad discretion in considering equitable factors relevant to fashioning relief (Gagliardo, 489 F.3d 105, 112), and the courts have generally accorded similarly broad discretion to IHOs when fashioning equitable relief (L.S. v. Fairfield Bd. of Educ., 2017 WL 2918916, at *13 (D. Conn. July 7, 2017). Under the circumstances presented here, it was within the IHO's discretion to limit the parent's relief for her failure to participate in the resolution meeting, especially given the fact that the parent failed to comply with the IHO's order directing the parent to participate. Thus, I will uphold the IHO's ruling regarding the reduction of requested relief for 1:1 nursing services by 50 percent.

[15] The parent provided the district with the notice of her objection to the district's offer of a FAPE for the 2024-25 school year, outlining specific concerns she had with the district's proposed educational program, and gave notice of her intent to unilaterally place the student at iBrain (Parent Ex. A at pp. 10-11).

[16] The IHO found that due to the parent's failure to comply with the timelines for submitting briefs on the district's motion to dismiss, the factual timeline for events set in the district's motion was adopted and the parent's request for a fact finding hearing on those points was denied (Aug. 23, 2024 IHO Interim Decision at pp. 4-5).

The parent also appeals the portion of the IHO's decision that ordered the district to provide transportation to the student to and from iBrain. The IHO's finding disregards authority that provides that a parent may structure a unilateral placement in this manner, for example, by obtaining outside services for a student in addition to a private school placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). The parent did not seek prospective relief in the form of district delivery of specified services but instead rejected the programming offered by the district and engaged in the self-help remedy of rejecting the public program and unilaterally placing the student and obtaining private services. The parent opted to take the financial risk and unilaterally arrange for the student's enrollment and receipt of services. The parent can obtain funding from the school district for the unilateral placement and services, "if the three-part test that has come to be known as the Burlington-Carter test" is satisfied (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]). Under these circumstances, absent an agreement between the parties, the parent would not be required to accept district services a la carte in lieu of the chosen private unilaterally-obtained services. Accordingly, to the extent the IHO relied on the premise that the district could substitute its own services to replace those unilaterally obtained by the parent, the IHO erred.

Addressing the issue of the subpoenas served on B&H and Sisters as an equitable matter, I decline to weigh the refusal of a separate entity, not controlled by the parent, against the funding of the parent's requested relief, as part of an equitable considerations analysis. If the district had subpoenaed the parent for the invoices or other documentation she should have received from B&H and Sisters and the parent had refused to produce them, that would have reflected on the parent's conduct during the impartial hearing, which may be considered for equitable purposes (see Application of a Student with a Disability, Appeal No.12-076 [declining to overturn an IHO's reduction of relief based in part on his credibility findings during the impartial hearing and noting that "I find no authority that precludes an IHO from considering the parties' conduct during the impartial hearing process while exercising his or her broad equitable power to fashion relief," citing Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 09-007; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061). That is not the case here, however, and, as a result, I do not find that the failure of B&H and Sisters to answer subpoenas issued in this matter weighs against the parent.

**VII. Conclusion**

I find that the district failed to offer the student a FAPE for the 2024-25 school year because the February 2024 IEP recommended nursing services "as needed," which did not align with the present levels of performance in the February 2024 IEP indicating the student required 1:1 nursing; and further, the "as needed" language used in the February 2024 IEP does not align with State guidance. I also find that the private services provided by B&H and Sisters are appropriate for the student. I find no reason to disturb the IHO's reduction of the parent's relief for the student's 1:1 nursing services on an equitable basis for the parent's failure to participate in the resolution

meeting. The IHO's order for the district to provide transportation to the student is reversed, and the district is ordered to directly fund the cost of the student's transportation to and from iBrain by Sisters.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated November 1, 2024, is modified by reversing the IHO's order for the district to provide transportation to the student;

**IT IS FURTHER ORDERED** that the IHO's decision, dated November 1, 2024, is modified by reversing the IHO's finding that the parent failed to meet her burden of proving the appropriateness of Sisters for the 2024-25 school year;

**IT IS FURTHER ORDERED** that the district shall fully fund the student's special transportation from Sisters for the 2024-25 school year as set forth in the relevant contract in the hearing record;

**IT IS FURTHER ORDERED** that the district shall pay B&H for the cost of the student's in-school 1:1 nurse for the 2024-25 school year.

**Dated:** **Albany, New York**
**April 9, 2025**

**CAROL H. HAUGE**
**STATE REVIEW OFFICER**