



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-002

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

Appearances:

Brain Injury Rights Group, Ltd., attorneys for petitioners, by Sarah Khan, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Mitchell Pashkin, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the International Institute for the Brain (iBrain) for the 2021-22 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student in this matter has been the subject of prior appeals to the Office of State Review (Application of a Student with a Disability, Appeal No. 19-058, Application of a Student with a Disability, Appeal No. 18-122). The student has received diagnoses of cerebral encephalopathy, seizure disorder, microcephaly, hypertonia, and legal blindness-visual impairment and she is non-ambulatory, is nonverbal, and uses prescribed eyeglasses (Dist. Exs. 8 at p. 2; 9 at p. 2). During the 2020-21 school year, the student attended a 6:1+1 classroom at iBrain and received five 30-minute sessions per week of individual academic instruction in addition to small group instruction throughout the day, 1:1 paraprofessional services, occupational therapy (OT), physical therapy (PT), speech-language therapy, assistive technology, and vision education services (see Parent Ex. D at p. 1; Dist. Ex. 9 at p. 2).

In January 2021 the district conducted a bilingual social history update with the student's parents (Dist. Ex. 8 at pp. 1-3).¹ According to the parents the student had seizures daily with her last seizure occurring on the morning of the interview and, at that time, she continued to take seizure medication twice daily (*id.* at p. 2). The parents also reported that the student did not suffer from asthma or allergies to food or medication and had not had any surgeries or hospitalizations in the past year, and that there were no concerns with the student's hearing (*id.*). Reportedly, the student required maximum adult assistance with all activities of daily living (ADLs) including feeding and toileting and the parents continued to receive 30 hours of respite services used during the week as needed (*id.*). The report indicated that at this time, the parents agreed with the district's recommendations made at "the last IEP meeting" but disagreed with the "program recommendation" of a district specialized school and continued to believe that iBrain was an appropriate school placement for the student (*id.* at p. 1).

A January 2021 district-conducted, level 1 vocational assessment indicated that the student was legally blind and therefore could not complete a visual version of the alternate vocational assessment and that the parents completed "this version" of the assessment (Dist. Ex. 7 at p. 1). According to her parents the student enjoyed music, listening to cartoons, getting attention from the family, and going out into the community and that when her brother read to her, she paid attention and listened (Dist. Exs. 7 at p.1; 8 at p. 2).

In February 2021 the district arranged for a speech-language evaluation to determine whether the student continued to be eligible for school-based speech-language services (Dist. Ex. 9 at pp. 1-7). At that time, the student received five 60-minute sessions per week of speech-language therapy (*id.* at p. 2). Reportedly the student was provided with a "Switch" for communication, her teacher used a tablet in the classroom to help the student communicate, and the student required "[a]lternative [a]ugmentative [c]ommunication (AAC)" devices, an adapted environment, multisensory supports, individual and direct instruction and continual adult support and supervision in order to complete academic tasks (*id.* at pp. 2-3, 6). The parent reported that the student did not have a tablet for communication at home and that they used the student's routines and schedules for communication and to help meet the student's wants and needs (*id.* at p. 2).

The speech-language pathologist found that the student's ability to reach and handle toys was very limited, that she needed maximum assistance, and relied significantly on her auditory skills (Dist. Ex. 9 at p. 3). Using an expressive/receptive informal assessment, the speech-language pathologist found that the student smiled at people and familiar voices, cooed and made sounds other than crying to communicate pleasure and displeasure, used two different vowel sounds ("ahh" and "ohh"), and produced two bilabial consonant /B/ in "ba" and /M/ in "am" or in isolation (*id.*). Examination of the student's oral-peripheral speech mechanism revealed grossly low tone; intact, high and narrow palate; unremarkable dentition and velopharyngeal closure; labial, lingual, and cheek structures with low tone but within functional limits, and jaw structure with low tone and habitual open mouth posture but again within functional limits (*id.* at p. 4). With respect to hearing, the speech-language pathologist found that, subjectively, the student turned her head

¹ A speech-language evaluation report indicated that English and Spanish were the main languages spoken in the student's home (Dist. Ex. 9 at p. 2).

toward the source of sound presented bilaterally and responded to familiar voices more consistently than unfamiliar voices (*id.* at p. 5). He noted that objective measuring of the student's hearing was not conducted at the time of the assessment and that further audiological evaluation was pending (*id.*). The speech-language pathologist indicated that the areas of language, pragmatic language skills, fluency, and voice/articulation could not be assessed because the student "remained non-verbal during the evaluation" (*id.* at pp. 3-5).

In sum, the speech-language pathologist found that due to the student's brain injury there were several impairments in her cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem solving and information processing, and speech (Dist. Ex. 9 at p. 5). He concluded that the student presented with severe weakness in receptive and expressive language skills (*id.*). According to the speech-language pathologist, the student needed to incorporate AAC in both receptive and expressive tasks, purposeful emotional connection, and turn taking communication skills with peers and adults and also needed to continue to work toward developing expressive communication via the use of AAC and multimodal communication (*id.* at p. 6). The speech-language pathologist noted there was both the presence of a disability and an adverse educational effect as a result of severely delayed language skills and that the student would continue to benefit from effective strategies and therapeutic intervention to improve her use and understanding of language and therefore, he recommended that speech-language therapy continue (*id.* at pp. 5-6).

In addition to some of the diagnoses identified above, a February 2021 OT evaluation report stated that the student's medical history was remarkable for diagnoses of cerebral palsy (spastic quadriplegia) with bilateral hip contractures, Lennox Gastaut with intractable epilepsy, feeding difficulties, and visual impairment as well as a record of severe cognitive impairment (Dist. Ex. 10 at p. 2). The occupational therapist reported that the student's June 2020 IEP mandate stipulated four 60-minute sessions per week of OT to address academic, play/leisure, and self-care goals and noted that the student's participation was highly dependent on her state of arousal and that she benefited from vestibular, proprioceptive, and auditory input to increase her arousal level and active participation in sessions (*id.*). It was further reported that the student was dependent on caregivers for all transfers, positioning, and wheelchair mobility, and that she presented with spastic quadriplegia and maintained her hands in a fist position, had splints for both hands, and required neck/head, lumbar, thigh supports and other positioning safety features (*id.* at p. 3). According to the OT evaluation report the student could use her hands to activate switches and would maintain hold on an object placed in her hand but at that time, was not using her hands to feed or perform any self-care or functional tasks and was not holding objects and bringing them to her mouth, banging objects together, or transferring an object from one hand to the other (*id.*). In sum, the occupational therapist stated that the student presented with global sensory motor delays/deficits and would benefit from OT intervention to maximize her functional potential, recommended the continuation of the current OT mandate, and noted that steps should be taken to ensure that there was carryover from therapy across environments (classroom, lunchroom, and home) (*id.*). The occupational therapist included recommended annual goals which targeted increasing the student's motor skills, moving hand with object to produce sound, and increasing upper body strength, endurance, and control (*id.* at p. 4).

A February 2021 PT evaluation report stated that the student required a classroom with minimal external visual and auditory stimuli with an emphasis on individual and small group

instruction and that to support the student's difficulties in concentrating and low arousal levels, several modifications were implemented including moving the student to a less crowded area of the classroom, breaking up academic sessions into shorter periods of time to capitalize on her periods of alertness, dimming the lighting, providing ample wait time, and using short music breaks (Dist. Ex. 11 at p. 3). At that time, the student was receiving one 60-minute session per week of assistive technology services and had trialed various switches and access points with which she had showed inconsistent success (*id.*). According to the report, the student therefore continued to rely on using a "Big Mack" voice output switch since a better access had not been found (*id.* at pp. 3-4). The physical therapist reported that the student needed a great deal of consistent support to show and maintain interest in a variety of items and activities; continued to practice making choices and indicating her desired item through reaching, activating the switch, or smiling; and would benefit from generalizing independent activation of her switch in her academic curriculum and being exposed to different activities and items (*id.* at p. 4).

The PT evaluation report reflected that at mealtime the student consumed pureed foods and nectar thick water via a spoon, required moderate cues to open her mouth to the spoon for feeding and prompting to swallow, and took one to one and a half hours to complete meals (Dist. Ex. 11 at p. 4). According to the evaluation report the student exhibited inadequate postural and head control for oral motor functioning while also presenting with low muscle tone (hypotonia) of the trunk, shoulder girdle, head/neck, jaw, lips, and tongue resulting in overall weakness and instability and was dependent with all ADLs including dressing, hygiene, and toileting needs (*id.*). The student's lower extremity range of motion (ROM) was restricted especially on the right side of her body, she demonstrated weakness in her postural muscles and had rounded shoulders with sitting activity, was unable to stand, was non-ambulatory, required two person assist to transfer to the wheelchair, and was dependent with rolling, sitting, and prone positioning (*id.* at pp. 4-5). The physical therapist recommended the student continue with PT (*id.* at p. 5).

In March 2021 iBrain developed an IEP for the student for the remainder of the 2020-21 school year to be implemented March 8, 2021 (Parent Ex. D at pp. 1-48). The iBrain IEP provided for a 12-month program in a 6:1:1 special class; related services of two 60-minute sessions per week of individual vision education services, five 60-minute sessions per week of individual speech-language therapy, five 60-minute sessions per week of individual PT, four 60-minute sessions per week of individual OT, one 60-minute session per week of individual assistive technology services, one 60-minute session per week each of individual and group music therapy, and one 60-minute session per month of individual parent counseling and training; in addition, the IEP provided for the support of a full-time 1:1 paraprofessional and a school nurse (*id.* at pp. 32-48). The iBrain IEP contained supports including an AAC device and switches and accompanying mounts and interface software, two person transfers, and school personnel training (*id.* at p. 47).

In March 2021 the CSE convened to conduct the student's annual review and develop an IEP to be implemented beginning March 19, 2021 (Parent Ex. E at pp. 1-7; Dist. Exs. 1 at pp. 1-5; 2 at pp. 1-62; 3). Finding the student eligible for special education and related services as a student with multiple disabilities the CSE recommended a 12-month program consisting of a 6:1+1 special class placement in a district specialized school with school nurse services, OT, PT, speech-language therapy, music therapy, vision education services, and parent counseling and training (Dist. Ex. 2 at pp. 1, 52-53, 54). The CSE also recommended that the student receive full-time, individual health paraprofessional services, special transportation including 1:1 paraprofessional

services, transportation from the closest curb location to school, and a wheelchair lift bus with air conditioning, individual assistive technology services including the use of switches, and supports for school personnel (id. at pp. 53-54, 57-58).

The CSE reconvened in May 2021 (Dist. Ex. 4 at pp. 1-5; 5 at pp. 1-60; 6). The CSE recommended the same program, services, and supports recommended in March 2021 (compare Dist. Ex. 2 at pp. 1-62, with Dist. Exs. 5 at pp. 1-60; 12 at pp. 1-7).

In June 2021 the district provided the parents with a school location letter identifying the specific school location at which the student's program would be provided (Dist. Ex. 12 at pp. 8-10).

On June 23, 2021, the parents notified the district that they were rejecting the district's program and placement for the student for the 2021-22 extended school year and advised the district of their intention to place the student at iBrain and seek public funding for the cost of the student's placement (Parent Ex. F at pp. 1-2).²

In July 2021 iBrain updated the student's March 2021 iBrain IEP by adding the notations that the student was hospitalized in June 2021, had a g-tube placed, and was now being recommended for a 1:1 nurse (compare Parent Ex. D at p. 1, with Parent Ex. G at p. 1). As such, iBrain changed the student's program recommendation by adding 1:1 nursing services and increasing OT to five 60-minute sessions per week "in order to continue working on energy level and engagement in a range of academic and self-care tasks in the school setting on a daily basis" (compare Parent Ex. D at p. 46, with Parent Ex. G at pp. 10, 46).

On July 1, 2021, the parents executed an enrollment contract with iBrain for the 2021-22 extended school year beginning on July 7, 2021 (Parent Ex. H at pp. 1-7).

A. Due Process Complaint Notice

In a due process complaint notice dated July 7, 2021, the parents alleged the district denied the student a FAPE for the 2021-22 extended school year (Parent Ex. A at p. 1).³ First, the parents argued that the district failed to identify the appropriate disability category and properly classify the student as a student with a traumatic brain injury (id. at p. 3). The parents then alleged that the district failed to provide individual and direct parent counseling and training and mandate an individual 1:1 nurse (id. at pp. 3-4). Next, the parents argued that the district failed to recommend an appropriate school location, specifically citing that the district's recommended 6:1+1 special class placement was for students on the autism spectrum and the specialized public school program did not offer the extended school day necessary to implement the mandated related services indicated on the student's IEP (id. at p. 4). Additionally, the parents asserted that the placement

² The parents' reference to "extended school year" includes services provided to the student in July and August 2021 (see generally Parent Exs. A at p. 1; H at p. 1; M ¶ 2).

³ The parents also asserted that the student's pendency entitlements included direct payment of tuition and costs for related services at iBrain and direct payment of special transportation services and support costs to and from iBrain (Parent Ex. A at p. 2).

failed to group the student with other students with brain-based injuries to ensure the type of educational needs the student required, and did not have an environment properly matched to the student's academic, medical, behavioral/social, physical, and management needs (id.). Further, the parents "reserve[d] the right to raise any other procedural or substantive issue that may come to their attention during the pendency of the litigation of this matter, including, but not limited to" challenges regarding the qualifications of district staff and providers, and the district's ability to maintain an appropriate student-to-staff ratio and provide the student with all related services needed to make meaningful progress (id. at p. 5). The parents also argued that iBrain was an appropriate placement for the 2021-22 extended school year to address the student's academic, physical, and social/emotional needs and that there were no equitable considerations which would bar reimbursement (id. at pp. 3, 5).

As resolution the parents requested an order declaring that the district denied the student a FAPE during the 2021-22 extended school year and that iBrain was appropriate, funding for the cost of full tuition at iBrain for the 2021-22 extended school year including related services, "1:1 paraprofessional and/or nurse" services, and reimbursement and/or prospective funding of special education transportation with limited travel time and a transportation paraprofessional, nurse, or porter services as required (Parent Ex. A at p. 5). Additionally, the parents requested a new CSE meeting, and an order compelling the district to provide assistive technology services and AAC devices and reimburse the parents for all associated costs (id.).

B. Events Post-Dating the Due Process Complaint Notice

In a letter dated July 14, 2021, the district acknowledged the parents' disagreement with the CSE's recommendations and their intent to unilaterally enroll the student at a private school and seek reimbursement from the district (Parent Ex. J). The district further advised that the parents' claim was "not appropriate for settlement" (id.). On July 27, 2021, the parents executed a contract with a transportation services company to provide the student's transportation to and from iBrain from July 1, 2021 through June 30, 2022 (Parent Ex. L at pp. 1-5).

C. Impartial Hearing Officer Decision

On August 16, 2021 a pre-hearing conference was held at which the parents requested a pendency hearing (IHO Decision at p. 1; Tr. pp. 1-15; Parent Ex. B at pp. 1-5). In an interim order issued on the same date, the IHO found that the parties agreed that an unappealed decision by a different IHO issued on April 26, 2021 established the basis of pendency and constituted the last agreed upon educational placement for the student and ordered the district to pay the student's

tuition for the 2021-22 extended school year including the costs for special transportation (Parent Ex. B at pp. 1-5; see August 16, 2021 Parent Ex. B).^{4,5}

A status conference was held on September 14, 2021 and the parties proceeded to an impartial hearing on the merits on October 18, 2021 (IHO Decision at p. 1; Tr pp. 16-73). In a decision dated November 21, 2021, the IHO determined that the district conceded that it did not provide a FAPE to the student and that the burden shifted to the parents who were seeking tuition reimbursement for the 2021-22 school year in furtherance of a unilateral placement at iBrain (IHO Decision at pp. 2-3). Additionally, the IHO found that the parents withdrew their request for transportation reimbursement "when these records and/or testimony were not forthcoming or available" (id. at p. 2).

First, with respect to the district's argument that the parents were precluded from requesting reimbursement for nursing services as this request was not articulated in their 10-day notice, the IHO found that it was unclear when the student's need for nursing care arose and whether the parents were aware of that need at the time of the 10-day notice and that the record was silent as to the efforts put forth by the district to "expeditiously respond" to the 10-day notice (IHO Decision at pp. 5-6). In addition, the IHO stated that the parents' due process complaint notice articulated a claim for nursing services and found that the parents were not precluded from raising the issue (id. at p. 6).

In regard to whether iBrain was an appropriate placement for the student for the 2021-22 school year, the IHO stated that she did not believe the parents had adequately established that the program and related services offered by iBrain were provided to the student (IHO Decision at pp. 10-15). The IHO found that the description of the program by the director of special education at iBrain (director) might have applied to every student the school served and minimally addressed the student's specific needs and that the record was silent regarding the implementation, methodology, or progress monitoring of the annual goals included in the IEP (id. at pp. 12-13). The IHO found that a "detailed IEP, largely standing alone, does not establish" that the school appropriately met the student's needs and that based on the evidence presented, she could not conclude that the student received "meaningful and appropriate services" (id. at p. 13).

With respect to related services provided by iBrain, the IHO found that the parents "again offered no evidence" as to the skills, experience and/or qualifications of the individuals providing therapy in the areas of speech, OT, PT, vision education, nursing, and music therapy; that the

⁴ Rather than consecutively identifying the exhibits in the hearing record, the parents produced one set of exhibits during the hearing regarding the student's pendency on August 16, 2021 (August 16, 2021 Parent Exs. A-D) and another set of similarly marked exhibits for the remaining portion of the hearing (Parent Exs. A-J; L-Q). For ease of reference, citations to the exhibits introduced during the August 16, 2021 hearing will include the date of the hearing and the remaining exhibits will be referred to as marked.

⁵ In the April 26, 2021 decision, an IHO found that the district did not meet its burden of showing that it offered the student a FAPE for the 2020-21 school year, that the parents had sustained their burden of demonstrating the appropriateness of the student's unilateral placement at iBrain for the 2020-21 school year, and awarded direct payment for the cost of the student's tuition at iBrain and reimbursement for the cost of special transportation (August 16, 2021 Parent Ex. B). In the same proceeding regarding the 2020-21 school year, the IHO issued a subsequent seemingly identical decision dated September 17, 2021 (Parent Ex. C).

hearing record was "simply devoid" of any evidence to establish whether the student was actually receiving a particular intervention or service; that the director offered limited insight into the related services offered and a vague assessment that the student had made progress; and that the parents had not established their burden with regard to the appropriateness of the student's related services (IHO Decision at pp. 13-14). As for nursing services, the IHO found that the affidavit provided from the health services agency was inadequate to establish a claim for either reimbursement or prospective payment and failed to address who provided the service, their qualifications, how services were provided, and the medical rationale for such services; accordingly, the IHO found that the record did not support an award (id. at p. 15).

Having determined that the parents had not met their burden of establishing the appropriateness of iBrain for the student, the IHO found that the issue of the equitable considerations need not be addressed (IHO Decision at p. 16).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by failing to find that the parents' unilateral placement of the student at iBrain was appropriate and that equitable considerations weighed in favor of an award of tuition, related services, and special transportation for the student. First, the parents contend that the IHO mischaracterized the parents' position on transportation funding and that while they withdrew a transportation affidavit the parents never indicated they were withdrawing this claim and a transportation contract admitted into evidence was the "best evidence" of the contractual terms between the parents and the transportation company. The parents also assert that the IHO erred by confusing the record by speaking off topic, confusing the order of testimony and witnesses, and by referring to the parents' witness as representing the district.

Next the parents argue that the IHO erred in finding that the parents did not meet their burden of proving that iBrain was an appropriate placement for the student. Specifically, the parents contend that the IHO erred by finding that the director's testimony minimally addressed the student's specific needs; the parents note that iBrain served a highly specific population and thus many components of the program were similar from student to student because the entire student population was similar and had similar needs. The parents claim that the IHO ignored written testimony, which described the student's specific program, the services she actually received during the 2021-22 extended school year, and the progress she made and that further specifics about the program were included in the iBrain IEP.

The parents assert that the IHO erred in finding that the parents were required and failed to present evidence regarding the student's related service providers' skills, experience, and qualifications. According to the parents, although they did not have to show the qualifications of the staff at the unilateral placement, the attendance page from the district IEP and the iBrain IEP list the qualifications of each provider in attendance and contain reports from each provider "for [the student's] activities and progress." The parents contend that they provided evidence, ignored by the IHO, which demonstrated that iBrain offered and provided services which aimed to help the student meet her goals. In addition, the parents argue that the IHO erred in failing to find that the record established the student's need for 1:1 nursing services.

The parents argue that the IHO erred in finding that the parents were not entitled to direct funding for the costs of the student's tuition at iBrain and special transportation and in failing to find that equitable considerations favored the parents.

In its answer the district begins by generally denying "each and every" allegation set forth in an extensive portion of the parents' request for review. Specifically, the district asserts that the IHO correctly found that the parents did not establish a claim for nursing services and that the parents were not entitled funding for special transportation. The district further argues that even if the parents' transportation claim was not withdrawn as the IHO had found, the record contained no evidence that the student received any transportation services and that in the event that an award was proper in this case the order should be limited to transportation funding on days which the student physically attended iBrain. However, the district does not argue in its answer that the IHO's finding that iBrain was not an appropriate unilateral placement should be affirmed; rather, the district requests, in its wherefore provision, that the State Review Officer find that iBrain was appropriate for the student, that there was no equitable bar to tuition relief, and that the parents were entitled to direct funding of that tuition relief. The district only requests that those parts of the IHO's decision which found that the parents did not establish a claim for nursing services and were not entitled to payment for transportation services be upheld.

In a reply, the parents note that the district conceded that the IHO erred by finding that iBrain was not an appropriate unilateral placement for the student and agreed that there is no equitable bar to the requested relief. The parents also reiterate their argument that the IHO also erred by denying the parents' requests that the district fund the student's costs for special transportation and nursing services for the 2021-22 school year.⁶

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New

⁶ A reply is limited by State regulation to addressing "any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal." (8 NYCRR 279.6[a]). To the extent the reply, in part, exceeds the scope of permissible content by improperly reiterating the parents' arguments set forth in the request for review, those portions of the reply have not been considered.

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. ___, 137 S. Ct. 988, 999 [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., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [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

A. Preliminary Matter - Conduct of Hearing

The parents argue that the IHO erred by confusing the hearing record in that she incorrectly referred to the parents' witness as representing the district, appeared to be confused about the order of testimony and witnesses, was unaware of what was going on in the proceeding, and improperly went off topic (Req. for Rev. ¶¶ 35-37; see Tr. pp. 12, 14-15, 38-39, 66-68).

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-064).

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., 137 S. Ct. at 1000).

An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

Upon review of the portions of the hearing record cited by the parents in support of their allegations, it appears that the IHO and counsel for the parents had an off topic conversation while waiting for the parents' witness to appear (Tr. pp. 38-39). In addition, at the conclusion of the parents' case, the IHO appeared briefly confused as to what the next step in the proceeding was going to be as the matter was scheduled for an additional day of hearings (Tr. pp. 66-67). It does not appear from the hearing record that the IHO's conversation with parents' counsel or her momentary confusion as to how the matter would be proceedings prejudiced the parents in any way. In fact, the parents raise these allegations without any assertion that the IHO was not fair or impartial, that the parents were impaired in their ability to present their case, or that the parents were denied their due process rights. Accordingly, the parents' allegations related to the conduct of the hearing do not provide any basis for overturning the IHO decision.

B. Unilateral Placement – iBrain

As the district has not cross-appealed the IHO's finding that it failed to offer the student a FAPE for the 2021-22 school year, the next issue for discussion is the parents' appeal of the IHO's determination that iBrain was not an appropriate unilateral placement (IHO Decision at pp. 2-3; Tr. pp. 32-33, 66-67). Additionally, the district concedes, in its answer, that iBrain is an appropriate placement for the student for the 2021-22 school year and that equitable considerations are not a bar to the requested relief. Accordingly, the district concedes that it did not offer the student a FAPE for the 2021-22 school year, that iBrain is an appropriate placement for the student for the 2021-22 school year, and that equitable considerations are not a bar to an award of tuition reimbursement. Generally, a finding that the services offered by the district were inadequate or inappropriate, that the services selected by the parents were appropriate, and that equitable considerations support the parents' claim would result in an award of tuition reimbursement

(Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70; R.E., 694 F.3d at 184-85). The only objections the district raises to the parents' requested relief are that the IHO's findings regarding nursing services and special transportation should be upheld. Accordingly, a reversal of the IHO's findings as to the appropriateness of iBrain could be made based on the district's concessions. However, as the IHO determined iBrain was not an appropriate placement for the student, and the same standards apply to the issues disputed by the district as to the appropriateness of iBrain overall, it is prudent to review the IHO's findings and the parents' arguments as to IHO error.

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

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They

need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

In this proceeding, the student's needs are not in dispute in this matter and are extensively identified in both the district's evaluation reports discussed above and in the iBrain IEPs (compare Parent Exs. D at pp. 1-25; G at pp. 1-25, with Dist. Exs. 7-11). As described above, the student exhibits severe impairments in cognitive, language, and academic skills, she is non-ambulatory, nonverbal and uses assistive technology, she is visually impaired, dependent on adult support for all ADL needs including positioning and transfers, and she underwent g-tube placement in June 2021 (see Parent Exs. D at pp. 1-29; G at pp. 1-29).

1. Specially Designed Instruction

In reviewing the program developed by iBrain for the student for the 2021-22 school year, the iBrain IEP included 17 annual goals and accompanying short-term objectives in the areas of literacy, vision education, speech-language therapy, PT, OT, assistive technology services, and music therapy (Parent Ex. G at pp. 1, 29-41). To address the student's needs in literacy and cognition, the IEP included three annual goals which targeted following simple one step directions to complete a classroom activity, improving attention span during an academic session or classroom activity, and demonstrating and communicating a range of responses to varied multisensory stimuli during academic activities (id. at pp. 29-30). Regarding vision education services the IEP contained two annual goals requiring the student to demonstrate a shift of gaze between two illuminated and/or brightly colored objects and a visually guided reach toward visually stimulating objects (id. at pp. 31-32). The IEP included three speech-language annual goals targeting the increase of receptive language skills, the increase of expressive language skills utilizing an AAC device, and the increase in tolerance for oral-motor exercises utilizing tools and sensory stimulation (id. at pp. 32-34). In the areas of PT and OT the IEP included five annual goals targeting the student's sit to stand transition, her ability to short sit on a bench, and her participation in academic/classroom, play/leisure, and self-care activities (id. at pp. 35-38). The IEP included an assistive technology services annual goal targeting activating a one panel switch and three music therapy annual goals addressing active participation when playing instruments and in interpersonal interactions and increasing expressive communication skills within the context of music therapy (id. at pp. 39-40). The July 2021 iBrain IEP also included annual goals for parent counseling and training and 1:1 paraprofessional support (id. at pp. 41-43).

In addition, the iBrain IEP's present levels of performance included details regarding identified areas of need which would be addressed during the 2021-22 school year. For example, the July 2021 iBrain IEP stated that for the upcoming year, the student would benefit from being able to activate a switch with moderate physical and verbal adult support, working on her ability to activate a switch to initiate and maintain a desired activity and to stop an adverse activity, being exposed to different activities and items, and working on indicating her desired item either through reaching, activating a switch with a message on it, or smiling when that item was presented (Parent Ex. G at p. 2). The iBrain IEP also indicated that the student's occupational therapist planned on

continuing to provide services "to improve active upper extremity movement, increase response and attention to people and tasks, and increase participation in play/leisure activities" (*id.* at p. 10). Additionally, regarding gross motor skills the iBrain IEP indicated that the student continued to work on tasks such as rolling, pivoting in prone position, standing, and weight shifting (*id.* at p. 13).

Notwithstanding the above student-specific details outlined in the iBrain IEP, the IHO found that a detailed IEP, largely standing alone, did not establish the parents' claim and that based on the evidence presented, the IHO did not think that she could conclude that the student received "meaningful and appropriate services" (IHO Decision at p. 13). In addition, the IHO found that the description of the student's program provided by the iBrain director might have applied to every student the school served and minimally addressed the student's specific needs (*id.* at p. 12). Further, the IHO determined that the hearing record was silent regarding the implementation, methodology, or progress monitoring of the annual goals included in the IEP (*id.* at pp. 12-13).

The parents contend that the IHO erred by claiming that the director's testimony minimally addressed the student's specific needs, noting that iBrain served a highly specific population and thus many components of the program were similar from student to student because the whole student population was similar and had similar needs. In addition, the parents argue that the IHO mischaracterized and ignored paragraphs nine through sixteen of the director's written testimony by affidavit, which described the student's specific program, the services she actually received in 2021-22 extended school year, and the progress made.

First, a review of the evidence in the hearing record supports the IHO's finding that, in part, the director's description of the iBrain program applied to every student the school served (compare IHO Decision at p. 12, with Parent Ex. Q ¶¶ 5-8). However, in assessing the appropriateness of a unilateral placement for tuition reimbursement purposes, a tension may sometimes exist between the legal requirement that parents demonstrate that the private school provides specialized instruction tailored to the student's unique individual needs and the reality that the private school may appear to be a "good fit" for the student, largely based on supports provided to all of the students at the school, as well as the school's general philosophy and mission, preferred pedagogical methodology, and overarching programmatic framework, even where more detailed evidence related to the student's individualized program may be lacking. Indeed, some courts have noted that evidence of the general educational milieu of a unilateral placement can be relevant for purposes of awarding tuition reimbursement, and in some cases may constitute special education, while recognizing that such considerations nonetheless do not abrogate the requirement that the appropriateness of a unilateral placement continues to rest on a finding of specialized instruction which addresses a student's unique needs (see W.A. v. Hendrick Hudson Cent. School Dist., 927 F.3d 126, 148-49 [2d Cir. 2019] [indicating that "a resource that benefits an entire student population can constitute special education in certain circumstances" but cautioning that features such as small class size might be the sort of feature that might be preferred by parents of any child, disabled or not], cert denied, 140 S. Ct. 934 [2020]; T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2017]); see also Bd. of Educ. of Wappingers Cent. School Dist. v D.M., 831 Fed. App'x 29, 31 [2d Cir. 2020] [acknowledging an SRO's statement that the standard for an appropriate unilateral placement had become less demanding but reiterating that the appropriate analysis is the "totality of the circumstances" standard]).

In this instance, while the hearing record is, at times, limited with respect to the specific services provided to the student to meet the student's unique needs, the director's testimony does explain how the program at iBrain delivers specially designed instruction for a targeted population of students and how this student fits within that population.

In her written testimony the director stated that iBrain was a private, not-for-profit, and highly specialized special education program created for children who suffer from acquired brain injuries or brain-based disabilities (many of whom are nonverbal and non-ambulatory) and that the program had a 12-month extended school year and offered all services during its extended school day (Parent Ex. Q ¶ 5). The director stated that the student's placement during the 2021-22 school year was in a 6:1+1 class "with other similar students" who were all dependent on assistive technology, received 1:1 paraprofessional supports and several received 1:1 nurse services, had similar academic functioning levels, and received similar related services all in 60-minute sessions (id. ¶ 15).

The director went on to explain that during the 2021-22 school year every student at iBrain required 1:1 paraprofessional support to assist with ADLs and to have access to and benefit from the educational program and that many students required a 1:1 nurse to attend to the students' medical needs (Parent Ex. Q ¶ 6). The director noted that most students at iBrain had a disability classification of traumatic brain injury (TBI) and had management needs that were either intensive or highly intensive which required a significant degree of individualized attention and intervention (id.). Additionally, she stated that iBrain provided its students with IEPs geared toward improving functioning skills appropriate to their cognitive, physical, and developmental levels through a collaborative and multidisciplinary approach which incorporated the best practices from the medical, clinical, and educational fields including direct instruction, cognitive strategies, compensatory education, behavior management, physical rehabilitation, therapeutic intervention, social interaction, and transition services (id. ¶ 7). According to the director, iBrain also offered its students a wide variety of related therapy services including OT, PT, speech-language therapy, vision education, assistive technology services, parent counseling and training, and services for the deaf and hard of hearing and that all of the therapy services were designed to support the education of the students and were provided, as needed, usually in 60-minute intervals (id. ¶ 8). The director explained that the related services were provided using a push-in and pull-out model which ensured that each student's therapeutic goals were addressed in multiple locations which was critical for generalization of the skills and noted that the students at iBrain generally required 60-minute sessions because of transferring and repositioning needs, additional transition time and rest, and repetition needs to foster neuroplasticity (id.).

However, the director also spoke specifically to the student's individual needs and pointed to the July 2021 iBrain IEP which was implemented during the 2021-22 school year. In her written testimony, the director described the student as nonverbal and non-ambulatory with highly intensive management needs that required a high degree of individualized attention and intervention and adult support for all ADLs due to her brain injury (Parent Ex. Q ¶ 9). According to the director, the student's classification on her iBrain IEP of TBI warranted the use of a direct instruction model and informed the clinical approach taken throughout the interdisciplinary program (related services) (id. ¶ 10). The director stated that during the 2021-22 extended school year the student attended a 6:1+1 class and received related services of four 60-minute sessions per week of individual OT, five 60-minute sessions per week of PT, five 60-minute sessions per

week of speech-language therapy, two 60-minute sessions per week of music therapy services, and two 60-minute sessions per week of vision education services (*id.* ¶ 11).⁸ In addition, according to the director, the student had an assistive technology device and received assistive technology services and training once per week for 60 minutes, was mandated to receive 1:1 nurse and 1:1 paraprofessional services all day every day to support her needs, had special transportation accommodations, and received parent counseling and training once per month for 60 minutes to support the student's educational needs and promote carryover and consistency of skills from school to home (*id.* ¶¶ 12-14). In sum, the director stated that in her "professional opinion," the student had made and continued to make notable progress in skills across all academic and related service domains (*id.* ¶ 16).⁹

The director testified that during the 2021-22 school year the student attended iBrain full time "in person" (Tr. p. 43). The student's 2021-22 iBrain schedule indicated that in addition to the related services detailed above, the student's weekly schedule included ADL skills twice daily, and daily morning meetings, 1:1 academic instruction sessions, lunch, and 60-minute literacy classes (Parent Ex. O). The director noted that during the 2021-22 school year while the student had the flu for a couple of days and "might've had a cold here and there," generally, the student's attendance had been very good (Tr. p. 45). Based on the above, the hearing record supports finding that the program at iBrain provided the student with specially designed instruction designed to meet her unique needs during the 2021-22 school year.

Turning to one other reason why the IHO found iBrain was not an appropriate placement for the student for the 2021-22 school year, the IHO determined that the parents did not provide evidence as to the skills, experience and/or qualifications of the individuals providing the student's related services.

While a unilateral placement need not employ special education teachers certified by the State (Carter, 510 U.S. at 14), it does have to provide the student with an appropriate education for the parent to be entitled to reimbursement (Frank G., 459 F.3d at 364-65). In the past, this has been determined to mean that the lack of specificity regarding the student's instruction combined with a lack of information regarding the training and qualifications of the individuals providing instruction at a unilateral placement may support finding that the unilateral placement was not appropriate to meet the student's needs (see Application of a Student with a Disability, Appeal No. 14-107).

With respect to the qualifications of the iBrain staff and related service providers, the parents argue on appeal that while they do not have to show the qualifications of staff at a private, unilateral placement, the district IEP's attendance page and the iBrain IEP list the qualifications of

⁸ According to the parents, during the 2021-22 school year they were in frequent contact with the student's therapists at iBrain (Parent Ex. P ¶ 10).

⁹ Although she testified that she was involved in going to weekly meetings about related services, attending IEP meetings, reviewing progress reports and IEP goals, and observing how students were performing in school, during cross examination the director acknowledged that she was not charged with tracking student progress (Tr. pp. 43-45).

each provider in attendance and contain reports from each provider "for [the student's] activities and progress."

Upon review, the hearing record supports the parents' argument, specifically, the related services providers working with the student during the 2021-22 school year are certified and/or licensed in their respective disciplines (see Parent Exs. G at p. 48; M ¶¶ 4-5). Further, the student's iBrain IEP identified the school nurse as an "RN" and the special education provider as having an "MSEd" degree (Parent Ex. G at p. 48). Additionally, the director testified that support staff was provided with training to "handle and address [the student's] unique conditions" (Parent Ex. Q ¶ 12).

Accordingly, the hearing record includes sufficient evidence to show that the student's providers at iBrain were qualified to deliver the student's services. In addition, overall, the director's testimony coupled with the description of the student and the student's program contained within the iBrain IEP sufficiently described how iBrain provides the student with specially designed instruction to meet her unique needs and the IHO's decision to the contrary is against the weight of the evidence.

2. Nursing Services

As for nursing services, the IHO found that the affidavit provided from the health services agency was inadequate to establish a "*bona fide*" claim for either reimbursement or prospective payment and failed to address who provided the service, their qualifications, how services were provided and the medical rationale for such services and found that the evidence in the hearing record did not support an award. The parents argue that the IHO erred in failing to find that the record established the need for the student's 1:1 nursing services and the district asserts that the IHO's decision should be upheld on this point.

As an initial note, the parents' due process complaint notice included an allegation that "[d]ue to [the student's] complex medical history and diagnoses, [she] would benefit from having a skilled 1:1 nurse all day to address her medical needs which would in turn, help increase her participation in classroom activities. [The student] needs a trained medical professional to assist with feeding, breathing/suctioning and to ensure that [she] remains on schedule for all required medications" (Parent Ex. A at p. 4).

The July 2021 updated iBrain IEP included reporting that the student was hospitalized in June 2021, had a "g-tube placed" and was being recommended for a 1:1 nurse (Parent Ex. G at p. 1). A review of the July 2021 iBrain IEP reveals that it included the recommendation for a 1:1 nurse (id. at p. 44).

The director echoed this need in her written testimony stating that the student was mandated to receive a 1:1 nurse and a 1:1 paraprofessional all day every day to support the student's needs (Parent Ex. Q ¶ 13).

The district's objection to the nursing services during the hearing centered on the argument that the parents did not notify the district of the student's need for a nurse after the student was hospitalized in June 2021; the district did not assert that the student did not require 1:1 nursing services after the June 2021 hospitalization (Dist. Post Hr'g Br.). However, while the IHO found

that the district failed to offer the student a FAPE for the 2021-22 school year, in addressing nursing services, the IHO determined that the parents failed to establish that the student needed 1:1 nursing services (IHO Decision at p. 15). In reviewing claims for tuition reimbursement, this type of rationale has been found to improperly switch the responsibility for identifying the student's needs from the district to the parent (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]).

The district's argument related to nursing services on appeal has switched again to an assertion that the parents did not establish an entitlement to payment for nursing services because they did not establish an obligation on the part of the parents to pay for the service. In this instance, the hearing record includes an August 2021 affidavit by the manager of the agency providing the nursing services which indicates that "[s]ervices" included a 1:1 nurse for the student during transportation between home and school and during school hours and the total cost of the service (Parent Ex. N). The affidavit also indicates that the services were provided under a contract entered into with the parents (id.). During the hearing, the district did not object to the introduction of this affidavit and did not request cross-examination of the affiant (Tr. pp. 26, 30).¹⁰ Accordingly, while presentation of a full copy of the contract between the company providing the nursing services and the parents would have been preferable, the hearing record includes sufficient evidence showing that an agreement existed and the parents had an obligation for the services, especially considering that the district did not object to the admission of this evidence during the hearing and only raises this argument on appeal.

3. Transportation

The IHO found that the parents withdrew their request for transportation reimbursement because "records and/or testimony were not forthcoming or available" (IHO Decision at p. 2; see Tr. p. 29). The parents contend that the IHO mischaracterized the parents' position on transportation funding and that while they withdrew a transportation affidavit that the IHO was considering entering into the hearing record as an exhibit, a transportation contract admitted into evidence was the "best evidence" of the contractual terms between the parents and the transportation company and that the parents never indicated they were withdrawing the claim for special transportation.

In the parents' due process complaint notice, they requested "[r]eimbursement and/or prospective funding of special education transportation with limited time travel and a transportation paraprofessional, nurse or porter services as required" (Parent Ex. A at p. 5).

Discussion on the record between the district and parents' attorneys and the IHO reveals that the district objected to the proposed transportation affidavit unless the witness was made available for cross-examination, and in response, the parents' attorney withdrew the transportation

¹⁰ The district objected to the admission of a separate affidavit relating to transportation services and requested cross-examination of that affiant; that document was not admitted into evidence and was withdrawn by the parents (Tr. pp. 28-29).

affidavit (Tr. pp. 28-29). However, review of the testimony does not show that the parents or their attorney made a statement that they were withdrawing their request for transportation reimbursement and subsequently, in the opening statement, the parents' attorney indicated that none of the issues raised by the district precluded a full award of tuition and related services, including transportation for the student at iBrain during the 2021-22 school year (see e.g. Tr. pp. 28-29, 36). Accordingly, based on review of the transcript, the IHO erred in finding that the parents withdrew their request for special transportation.

Turning to the merits of the parents' request for special transportation, the May 2021 IEP called for special transportation for the student "from the closest safe curb to school," with the support of a 1:1 paraprofessional, a lift bus (noting that the student used a regular sized wheelchair), and air conditioning (Dist. Ex. 5 at pp. 55-56).

The district does not contend that the student does not need this level of service in order to get to and from school. However, the district contends that any "order should be limited to transportation funding on days which the Student physically attended iBrain" (Ans. ¶5).

The hearing record includes a contract for transportation services executed by the parents in July 2021 for services to be provided during the 2021-22 extended school year (Parent Ex. L). According to the contract, the transportation company agreed to transport the student to and from school, noting that the student "attends [iBrain] year round for approximately 218 days based on [iBrain's], 12-month 2021-2022 School Year calendar" referring to these days as "school days" (*id.* at p. 1).¹¹ In addition, the contract states a daily rate for services and indicates that "fees will be based on school days, whether student used services or not, unless provider was at fault for student not utilizing services" (*id.* at p. 2). The contract indicates that there will not be any deductions due to "unexcused absences, withdrawal, suspension, or any other reason" other than termination of the agreement (*id.*). Although the contract includes a paragraph relating to inclement weather, it does not indicate if a school closure due to inclement weather is counted as a "school day" (*id.* at p. 1). Finally, the contract indicates the transportation company will provide bills for its fees on a monthly basis (*id.* at p. 2). In a recent case, a district court 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" (*A.A. v. New York City Dep't of Educ.*, 2022 WL 523455, at *5 [S.D.N.Y. Feb. 22, 2022]).

Considering the above, the parents have presented sufficient evidence to show the student's need for special transportation and that they are obligated to the transportation company for the delivery of special transportation services on school days.

C. Equitable Considerations

The parents argue that the IHO erred in failing to find that equitable considerations favor the parents. In an answer, the district "respectfully requests that the State Review Officer find . . . that there is no equitable bar to tuition relief, and that the [p]arents are entitled to direct funding of

¹¹ The contract capitalizes defined terms like "school days"; however, they are not capitalized in the quotations in this decision.

that tuition relief" (Answer at p. 3). Based on the district's concession, equitable considerations and direct payment relief do not need to be discussed further.

VII. Conclusion

As the IHO's finding that the district did not offer the student a FAPE for the 2021-22 school year is final and binding on the parties, and having determined that the hearing record supports finding that iBrain was an appropriate unilateral placement for the student for the 2021-22 school year, including the provision of nursing and special transportation services, and that the district conceded that equitable considerations do not bar an award of direct funding, the necessary inquiry is at an end.

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

IT IS ORDERED that the IHO's decision, dated September 20, 2018, is modified by reversing those portions which found that iBrain, along with nursing and special transportation services, was not an appropriate placement for the student for the 2021-22 school year; and

IT IS FURTHER ORDERED that, the district is directed to fund the costs of the student's tuition at iBrain for the 2021-22 school year, as well as the costs of the student's nursing services and the costs of special transportation of the student to and from iBrain.

Dated: **Albany, New York**
 February 24, 2022

STEVEN KROLAK
STATE REVIEW OFFICER