The University of the State of New York

The State Education Department
State Review Officer
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No. 23-081

Application of a STUDENT WITH A DISABILITY, by his 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:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Zachary Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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 the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the International Academy for the Brain (iBrain) for part of the 2021-22 school year and denied her request for additional related services for the 2020-21 and 2021-22 school years. Respondent (the district) cross-appeals from the IHO's determination that iBrain was an appropriate unilateral placement for the student for the 2021-22 and 2022-23 school years. 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 student has received diagnoses of astigmatism, farsightedness, seizures, and hypotonia (Parent Exs. M ¶ 2; N at ¶ 9).[1] In addition, the student received a diagnoses of Canavan disease when he was approximately one-month old, which the parent described as "a gene-linked

[1] The parent reported that the student also had a diagnosis of cortical visual impairment (CVI); however, according to reports from iBrain, that diagnosis was pending during these proceedings (Parent Exs. C at p. 14; L at p. 14; M at ¶ 2; N ¶ 9).

neurological disorder that causes the breakdown of white matter in the brain" (Parent Exs. C at p. 14; M at ¶ 2; see Parent Exs. J at p. 3; N at ¶ 9). The student was assessed using the Stanford–Binet Intelligence Scales, and he received a full-scale IQ score that fell in the deficient range (Parent Ex. J at p. 3). The student was non-verbal and non-ambulatory and had a G-tube for feedings (Parent Exs. C at p. 1; M ¶ 2).

On August 14, 2020, the committee on preschool special education (CPSE) met and determined that the student was eligible for special education as a preschool student with a disability (see Parent Ex. J). The CPSE recommended that the student receive a 12-month program in an 8:1+2 special class with the support of a 1:1 aide at in approved special education program (Parent Exs. J at pp. 17-18, 20). Additionally, the August 2020 CPSE recommended that the student receive three 30-minute sessions per week of individual speech-language therapy; three 30-minute sessions per week of individual occupational therapy (OT); three 30-minute sessions per week of individual physical therapy (PT); dual recommendation for two 30-minute sessions per week of individual speech-language therapy at home; dual recommendation for two 30-minute sessions per week of OT at home; and dual recommendation for two 30-minute sessions per week of individual PT at home (Parent Ex. J at pp. 1, 17).[2] The August 2020 IEP also included a speech generating device for the student and special transportation services (id. at pp. 17, 20). According to the parent, the student began attending Stepping Stones Day School (Stepping Stones) in September 2020 (Parent Ex. M at ¶ 4).

On August 12, 2021, the CPSE convened for an annual review (see Parent Ex. K). The August 2021 CPSE recommended the same 12-month programming and related services for the student for the 2021-22 school year as the previous school year (compare Parent Ex. J at pp. 1, 17-18 with Parent Ex. K at pp. 1, 14-15; Parent Ex. M ¶ 8). The parent indicated that the student attended Stepping Stones from July 2021 to February 2022 (Parent Ex. M at ¶ 8).

On February 4, 2022, the parent entered into an enrollment contract for the student's attendance at iBrain, and the student attended there from February 8, 2022 through June 24, 2022 (see Parent Ex. B; Parent Exs. C at p. 20; M ¶ 10).[3]

On April 12, 2022, the CSE convened to develop an IEP for school-age programming for the 2022-23 school year with an implementation date of September 6, 2022 (see generally Parent Ex. C). The April 2022 CSE recommended that the student was eligible for special education as a student with a traumatic brain injury (Parent Ex. C at pp. 1, 55). Based on the information contained in an April 11, 2022 iBrain report and education plan, the April 2022 CSE found that the severity of the student's "physical and cognitive impairments" required "highly intensive interventions" and "a high degree of individualization of his curriculum" (Parent Ex. C at p. 30). The April 2022 CSE recommended a 12-month program consisting of a 12:1+(3:1) special class

[2] The dual recommendations were noted as having a location in a "childcare location selected by parent" while the other related services were to be located "in school outside of class" (Parent Ex. J at p. 17).

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

in a district specialized school (id. at pp. 48, 50, 54).[4] In addition, the April 2022 CSE recommended four 60 minute sessions per week of individual OT; one 60-minute session per week of group of two OT; five 60-minute sessions per week of individual PT; four 60-minute sessions per week of individual speech-language therapy; one 60-minute session per week of speech-language therapy in a group of three; as well as two 60-minute sessions per week of individual assistive technology services and one 60-minute session per month of parent counseling and training (id. at pp. 48-49, 55). The April 2022 CSE also recommended the support of a full-time individual paraprofessional for health, safety, ambulation, and feeding (id. at p. 49). The April 2022 CSE recommended assistive technology consisting of switches and a speech generating device for the student (id.). Lastly, the April 2022 CSE recommended special transportation from the closest safe curb location, with a 1:1 paraprofessional and a lift bus for the student's wheelchair (id. at pp. 53-54, 56).

On June 15, 2022, the parent executed an enrollment contract for the student's attendance at iBrain for the 2022-23 school year beginning on July 6, 2022 and continuing through June 23, 2023 (see Parent Ex. F). On June 16, 2022, the parent signed a separate agreement for the private transportation of the student to and from iBrain for the 2022-23 school year (see Parent Ex. G).

On June 17, 2022, the parent notified the district of her disagreement with the April 2022 IEP and the recommendations for the student for the 2022-23 school year and further notified the district of her intent to place the student at iBrain for the 2022-23 school year and to seek public funding for this placement (Parent Ex. H). Upon receipt of the June 2022 letter, the district responded stating that the parent's claim was "not appropriate for settlement" and if the parent wanted payment for the unilateral placement, she was directed to file a due process complaint notice (Parent Ex. I).

A. Due Process Complaint Notice

In a due process complaint notice, dated October 18, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21, 2021-22, and 2022-23 school years (see Parent Ex. A). As an initial matter, the parent requested a pendency hearing and argued that iBrain was the "operative placement" for the student for the 2022-23 school year; however, the parent later withdrew the request for a pendency hearing (Tr. pp. 8-9; Parent Ex. A at pp. 1-2).

The parent asserted that the district failed to conduct a "triennial" reevaluation of the student or evaluate the student in all areas of his disability including a vision evaluation, an assistive technology evaluation, a music therapy evaluation, and a psychoeducational or a neuropsychological evaluation (Parent Ex. A at p. 10). The parent stated in the due process complaint notice that she disagreed with any evaluations conducted by the district or lack of evaluations and requested an independent educational evaluation (IEE) (id.).

[4] The parties and IHO refer to the 12:1+(3+1) and a 12:1+4 special class setting interchangeably. State regulations define this type of class as including no more than 12 students and, "[i]n addition to the teacher, the staff/student ratio shall be one staff person to three students," which "additional staff may be teachers, supplementary school personnel and/or related service providers" (8 NYCRR 200.6[h][4][iii]).

Additionally, the parent claimed that she was denied meaningful participation in the development of both the August 2020 IEP and the August 2021 IEP (Parent Ex. A at p. 10). The parent alleged that the CSEs failed to note her concerns, failed to have all required CSE members present, and predetermined the recommended programming (id.). According to the parent, the student's goals included in the August 2020 preschool IEP and the August 2021 preschool IEP were inappropriate, vague, and would not have enabled the student to make progress (id. at p. 11). Further, the parent asserted that both preschool IEPs failed to identify all of the student's management needs (id.).

In connection with the 2020-21 school year, the parent alleged that the August 2020 CPSE failed to recommend assistive technology services to help the student develop his communication skills (Parent Ex. A at p. 3). The parent also alleged that the August 2020 CPSE noted that the student had seizures and required medication but failed to recommend a 1:1 nurse and 1:1 health paraprofessional (id. at pp. 3, 8). The parent contended that the recommendation for the 8:1+2 special class was unable to support the student's needs (id. at p. 8). With respect to special transportation, the parent asserted that the August 2020 CPSE failed to recommend a 1:1 travel nurse, oxygen, or air conditioning on the bus (id. at p. 4). According to the parent, beginning in September 2020, she requested additional services as she believed the recommended related services were insufficient and the student required related services of a longer duration (id.). The parent alleged that the recommended related services were insufficient, and her son failed to receive all of his IEP mandated services and as a result she sought and paid for additional related services consisting of OT, PT, speech-language therapy, assistive technology services, and aquatic therapy (id.). The parent also indicated that the student received "hybrid" services at Stepping Stones "during that time" and that teletherapy resulted in "no educational benefit" for the student, and he missed "many" IEP mandated services during the 2020-21 school year (Parent Ex. A at p. 4).

For the 2021-22 school year, the parent similarly argued that the August 2021 IEP failed to list evaluation results, failed to list evaluations, failed to recommend a 1:1 nurse, failed to recommend assistive technology services, failed to recommend support and training for the student's therapists or teachers with respect to the recommended assistive technology devices, and failed to recommend a 1:1 travel nurse, oxygen, or air conditioning in connection with special transportation (Parent Ex. A at pp. 4-6). Further, the parent argued that the student missed services and education during the 2021-22 school year due to COVID-19 closures and/or exposures (id. at p. 5). The parent again alleged that the August 2021 IEP recommended an 8:1+2 special class and related services that were insufficient to meet the student's needs and therefore, the parent paid for additional OT, PT, speech-language therapy, aqua therapy, and assistive technology services (id. at pp. 5-6, 8). Lastly, the parent argued similar to the prior IEP that the August 2021 IEP was not adequately implemented (id. at p. 8).[5]

Next, with regard to the 2022-23 school year, the parent argued that the April 2022 IEP inappropriately provided for a 12:1+4 special class that was too large and would be unable to offer the student 1:1 instruction with minimal distractions (Parent Ex. A at pp. 6-7). In addition, the

[5] Some of the parent's assertions appear to be pandemic-related such as delivery of services through teletherapy, whereas other claims related to the design of the IEP itself, such as providing related services in 30-minute increments (Parent Ex. A at pp. 8-9).

parent argued that the April 2022 IEP was improper because it lacked vision education services, music therapy, and a 1:1 nurse for the student (id. at pp. 6-7, 9). Further, the parent claimed that there was no school placement offered to the student for the 2022-23 school year, at the time he transitioned from preschool to school-age programming in September 2022 (id. at p. 7).

Further, the parent alleged that the CSEs failed to recommend appropriate special education transportation services which included the failure to recommend a 1:1 travel nurse, air-conditioned bus, oxygen, or limited travel time (id. at pp. 4-5, 11-12).

The parent asserted that iBrain was an appropriate unilateral placement to address the student's health and education needs (Parent Ex. A at p. 6). According to the parent, the student was placed in a 6:1+1 special class at iBrain with a 1:1 nurse and a 1:1 health paraprofessional with related services which included music therapy (id.). The parent also claimed that there were no equitable considerations that would bar direct payment of tuition to iBrain (id. at p. 12).

The parent sought findings that the district denied the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years and a determination that iBrain was appropriate for the 2021-22 and 2022-23 school years (Parent Ex. A at p. 12). As relief, the parent sought an order directing the district to pay for the cost of tuition at iBrain for the 2021-22 and 2022-23 school years including the costs of related services, a 1:1 private duty nursing, and a 1:1 paraprofessional, as needed (id.). The parent also sought direct funding of the cost of special education transportation to and from iBrain (id.). The parent requested a neuropsychological IEE at public expense (id. at p. 13). Lastly, the parent sought that all "necessary evaluations" be conducted within 30 days of the date of the decision and a CSE meeting be held within 60 days of the date of the decision (id.).

B. Impartial Hearing Officer Decision

On January 25, 2023, the parties appeared for a prehearing conference before the Office of Administrative Trials and Hearings (OATH) and the IHO established rules and a schedule for the impartial hearing (see IHO Ex. I). On February 28, 2023, an impartial hearing was held on the merits in accordance with the schedule (Tr. pp. 1-69). During the impartial hearing, the parent discussed private related services that she obtained for the student while the student was attending Stepping Stones (see, e.g., Parent Ex. M at ¶¶ 6-9). On March 31, 2023, the IHO issued a final decision finding that the district denied the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years; that iBrain was an appropriate unilateral placement for the student; and that equitable considerations favored an award directing the district to pay the cost of the student's tuition at iBrain for the 2022-23 school year (IHO Decision at pp. 6-9, 13).

At the outset, the IHO addressed the fact that the district failed to appear at the scheduled February 28, 2023 impartial hearing despite several notifications, failed to present any documentary evidence, and failed to present any witnesses (IHO Decision at pp. 2, 6). The IHO found that the district failed to meet its burden of proof and, therefore, failed to offer the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years (id. at p. 6).

Next, the IHO discussed whether iBrain was an appropriate unilateral placement for the student for the 2021-22 and 2022-23 school years (IHO Decision at pp. 6-8). The IHO held that the evidence in the hearing record supported a finding that iBrain provided the student "with

specially designed instruction to address his identified academic needs" (id. at p. 7). Further, the IHO found evidence in the hearing record that the student made progress at iBrain and the iBrain program was "reasonably calculated to confer educational benefits on the student" (id.).

Then, the IHO addressed equitable considerations and found that there were no equitable factors that weighed against an award of full tuition at iBrain for the 2022-23 school year (IHO Decision at pp. 8-9). However, for the 2021-22 school year, the IHO found that the parent failed to produce any evidence that she provided prior notice of her intent to unilaterally place the student at iBrain in February 2022 and that there was no reason to excuse the lack of notice for any of the permissible reasons (id. at p. 9). Further, the IHO reasoned that since the parent provided written notice of her intent to unilaterally place the student at iBrain for the 2022-23 school year, the parent was aware and capable of complying with the obligation to provide notice, therefore, equities did not support an award of tuition at iBrain for the 2021-22 school year (id.).

The IHO next addressed the parent's request for reimbursement of the additional unilaterally obtained related services (IHO Decision at pp. 9-10). The IHO declined any relief for these services based on his finding that the parent's testimony on this issue was "haphazard" after "the sloppy and unprofessional preparation on the part of [parent's] counsel" even after being provided an opportunity to further develop the hearing record (id.). The IHO found that many of the additional related services provided privately by the parent were also provided by the district, but the parent continued to seek outside services (id. at p. 10). Further, the IHO found that was not recommended by a doctor and not recommended by any CSE, but the parent still sought reimbursement for aquatic therapy (id.). The IHO found that the parent's "vague" testimony about the frequency of the additional related services, as well as the amounts paid, was not credible (id.). Accordingly, the IHO declined to award any reimbursement to the parent for the additional related services (id.).

Further, the IHO found no evidence in the hearing record to award the parent a neuropsychological IEE (IHO Decision at pp. 10-12). The IHO found that the parent's first request for an IEE was in her October 2022 due process complaint notice but the hearing record lacked any evidence that the parent disputed any of the district evaluations and therefore denied the parent funding for an IEE (id. at pp. 11-12).

As relief, the IHO held that the parent demonstrated a legal obligation to pay iBrain tuition in the amount of $175,000.00, the amount of base tuition for the 2022-23 school year and awarded direct payment to iBrain (IHO Decision at pp. 12-13). However, the IHO found that the iBrain supplemental tuition amounts for related services were vague and declined to order the supplementary tuition as a lump sum (id.). The IHO ordered iBrain to submit to the district an invoice and affidavit with respect to the qualifications and dates of service for each related service provider with respect to OT, PT, speech-language therapy vision education services, assistive technology services, music therapy, and parent counseling and training (id. at pp. 13-14).

With regard to the parent's request for transportation, the IHO ordered the district to either arrange transportation that should include limited travel time, a 1:1 nurse or a 1:1 paraprofessional, an air conditioned lift bus; or alternatively, the IHO ordered the district to directly fund the parent's unilaterally obtained transportation provider "at a rate not to exceed $345.00 for each daily trip, not to exceed two daily trips each day the student actually attends school" (IHO Decision at p. 14).

Additionally, the IHO ordered the district to directly pay for the transportation services already provided for the 2022-23 extended school year (id.). The IHO ordered the private transportation company to submit to the district "an itemized invoice with an accompanying affidavit sworn to by the provider attesting to the actual provision of such services as well as the exact date and time such services were provided for each week" with an attendance report from iBrain for the dates the student required transportation services (id.).

Lastly, the IHO ordered the CSE to convene a meeting "within 60 calendar days of the date of [his] decision" to review any updated evaluations or reevaluations and develop an IEP for the student for the 2023-24 school year (IHO Decision at p. 14).

IV. Appeal for State-Level Review

The parent appeals from those portions of the IHO's decision that denied her request for tuition costs for iBrain for the 2021-22 school year, denied her request for reimbursement of additional related services for the 2020-21 and 2021-22 school years, denied an IEE at public expense, and that required both the iBrain and the private transportation provider to submit additional substantiation of the claims in order to receive direct payment.[6]

The parent contends that the IHO erred in finding that the equities weighed against the parent's claim for iBrain tuition for the 2021-22 school year because the parent failed to show that she sent a ten-day notice of the unilateral placement. The parent alleges that the ten-day notice was "inadvertently" not included in the parent's disclosure packet and requests that a copy of a ten-day notice be accepted as additional evidence as it is necessary to render a decision. In connection with the proposed additional evidence, the parent claims that she gave "proper and timely" notice of her dissatisfaction with the placement and of her intent to unilaterally place the student at iBrain for the 2021-22 school year (id.). Further, the parent contends that the complete denial of tuition was "too harsh of a penalty" and is "inequitable" as the district failed to appear at the impartial hearing and "essentially conceded [its] entire burden of persuasion" (id. ¶ 23).

Next, the parent contends that the IHO erred in not awarding reimbursement for the additional related services provided to the student during the 2020-21 and 2021-22 school years. The parent argues that the IHO failed to explain why the additional related services obtained by the parent were "inadequate and not worthy of reimbursement." For the 2020-21 school year, the parent asserts that the district failed to provide "adequate" related services and as a result the student did not make progress. With regard to the 2021-22 school year, the parent argues that the student did not receive all of his mandated services which caused the parent to obtain additional related services. The parent argues that the credibility finding made by the IHO with respect to her testimony was not supported by the hearing record. Lastly, the parent asserts that the IHO erred in not granting relief for the additional related services and further erred in denying the requested relief due to a lack of documentary evidence showing that the services had been obtained and paid for.

[6] The parent seeks to affirm the IHO's decision that the district denied the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years, and that iBrain was an appropriate unilateral placement for the 2021-22 and 2022-23 school years.

The parent also contends that the IHO erred in imposing a condition on the relief granted in the form of affidavits of the iBrain providers showing proof of their credentials as it would be "overly burdensome and duplicative" as the iBrain IEP contains the qualifications of each of the providers. In addition, the parent argues that the IHO erred in requiring the special education transportation services to be paid only "as used," that is, to the extent that the parent provides documentation that shows those days the service was used by the student.

Finally, the parent contends that the IHO erred in failing to grant an IEE at public expense. Accordingly, as relief, the parent seeks an order directing the district to pay the tuition costs, related services costs, and transportation at iBrain for the 2021-22 school year; reimbursement for additional related services privately obtained by the parent during the 2020-21 and 2021-22 school years; and a neuropsychological IEE at district expense.

In an answer, the district denies the material allegations contained in the request for review. The district argues that the IHO correctly determined that the parent's failure to submit a ten-day notice of the student's placement at iBrain for the 2021-22 school year should preclude tuition funding for that school year. In addition, the district submits that the undersigned should not accept the additional evidence of the parent's February 2, 2022 ten-day notice as it was available at the time of the impartial hearing but was not submitted into evidence by the parent. The district further argues to uphold the IHO's finding that the parent was not entitled to reimbursement for the additional related services that the parent obtained privately during the 2020-21 and 2021-22 school years.

In a cross-appeal of the IHO's decision, the district asserts that the IHO erred in finding that iBrain was an appropriate unilateral placement because the parent failed to demonstrate that the student made progress at iBrain. Additionally, in the cross-appeal, the district argues that the costs of tuition and related services at iBrain were excessive, noting that costs included billing for services being provided simultaneously, that the student missed sessions and it was unclear what services the student actually received, and that the costs were staggering and excessive. Therefore the district asserts that an award of tuition funding should be denied.

The parent filed a reply an answer to the district's cross-appeal. The parent reiterated arguments in her request for review, except that in an answer to the district's cross-appeal, the parent contends that iBrain was an appropriate unilateral placement and that the costs billed by iBrain were reasonable and not excessive.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]).

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 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]). 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

At the outset, I note that the parties have not appealed from the IHO's findings that the district failed to offer the student a FAPE regarding the first Burlington/Carter criterion for the 2020-21, 2021-22, 2022-23 school years due to the district's failure to appear or present evidence to support its burden and, therefore, the IHO's findings regarding FAPE have become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Next, I will turn to the district's cross-appeal asserting that the IHO erred in finding that iBrain was an appropriate unilateral placement.

A. Appropriateness of Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the

student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). 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).

Turning to the parties' dispute in this matter, the evidence presented by the parent shows that the student has a brain-based disorder which results in severe impairments across all domains including, but not limited to, cognitive, communication, language, gross and fine motor, visual, academic, attention, pragmatic, memory, social-emotional skills, and activities of daily living

(ADLs) (see Parent Ex. L; Parent Ex. N ¶ 9). Additionally, the student has received diagnoses of a degenerative neurological disorder, astigmatism, farsightedness, seizures, and hypotonia, and as a result was nonverbal and non-ambulatory (Parents Exs. C at pp. 1, 3; K at pp. 3, 5; L at p. 12; M ¶ 2; N ¶ 9). According to the April 2022 iBrain report and education plan, the student used a combination of communication methods to express messages (i.e., gestures, reaching, symbols, eye gaze device), and used one picture or icon at a time to communicate a message on his augmentative and alternative communication (AAC) device (Parent Ex. L at p. 16).

The evidence also shows that iBrain developed an April 2022 report and education plan for the student, which in many ways mimics a public school IEP, and which stated that the student attended a 6:1+1 special class with related services of four 60-minute sessions per week of individual OT; one 60-minute sessions per week of OT in a group; four 60-minute sessions per week of individual speech-language therapy; one 60-minute session per week of speech-language therapy in a group; five 60-minute sessions per week of individual PT; three 60-minute sessions per week of individual vision education services; two 60-minute sessions per week of individual music therapy; one 60-minute session per week of music therapy in a group; and one 60-minute session per month of parent counseling and training (Parent Ex. L at p. 58). According to the iBrain director of special education, the student required an environment that offered "highly individualized attention and support via small class size and continual adult supervision" from a 1:1 paraprofessional and 1:1 nurse to "help him remain focused and assist him in responding to directives, participating and interacting with peers, and to fully benefit during his 1:1 therapies both inside and outside of the classroom" (Parent Ex. N ¶ 11). She further explained that the student required an "intensive regimen of related services to help him build foundational skills and to support educational progress across all disciplines" (id.).

In its cross-appeal challenging the IHO's decision to award the tuition costs for iBrain for the 2022-23 school year, the district does not dispute the evidence describing the student's needs, or the appropriateness of the particular services that iBrain personnel provided to the student, such as the special class setting or related services.

Instead, the district makes vigorous arguments that the evidence produced by the parent during the impartial hearing was of inferior quality, such as alleging that the director of education, who described the programming provided to the student, was not a "clinician." The district's attempt to side-step the parent's detailed evidence only matters if there was other evidence to counterbalance it that would lead to a different outcome, but in this case, the parent's documentary and testimonial evidence was the only evidence to which weight could be accorded, evidence which the district made no attempt to contest due to its own failure to appear at the impartial hearing. Overall, the evidence admitted at the impartial hearing provided an adequate basis upon which the IHO could conclude that the unilateral placement of the student at iBrain was appropriate for the 2022-23 school year. Any purported lack of evidence that would be more to the district's liking does not undo the persuasiveness of the evidence in the hearing record that shows that iBrain was an appropriate unilateral placement for the student.

The district also argues in its cross-appeal that the parent failed to demonstrate that the student "made meaningful progress" at iBrain. Distilled to its essence, the argument is that the parent was required to prove that there were positive outcomes for the student under iBrain's detailed IEP-like educational plan in order to prevail on the second Burlington/Carter criterion.

But the district cannot hold the parent to an outcome-based standard because the IDEA was not designed to ensure guaranteed outcomes for students with disabilities, even with the provision of specially designed instruction for their unique needs (see Walczak, 142 F.3d at 133 [stating that "IDEA requires states to provide a disabled child with meaningful access to an education, but it cannot guarantee totally successful results"]; M.H., 685 F.3d at 245 [noting that the "[t]he purpose of the Act was instead 'more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside' [citations omitted]]). Thus, to the extent that the district argues that the hearing record lacks objective evidence of the student's progress at iBrain during the 2022-23 school year, a finding of progress is not a per se requirement for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; see also Frank G., 459 F.3d at 364).[7] However, a finding of progress is, nevertheless, a relevant factor to be considered because, under the totality of the circumstances, it can lend support to other evidence adduced by parents who are attempting to satisfy the second Burlington/Carter criterion (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; see T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]).

Based on the foregoing, there is no reason to disturb the finding by the IHO that iBrain was an appropriate unilateral placement for the student for the 2022-23 school year.

Next, the parent contends that the IHO also erred by "requiring the special education transportation services to be paid only on an as-used basis" with Sisters Travel and Transportation Services (Sisters Travel) (Req. for Rev. ¶ 37). The transportation contract indicates that the parents are responsible to pay for approximately 219 school days during the 2022-23 school year, whether or not the student utilizes the transportation service on a particular day unless the transportation provider was at fault for the student not utilizing the services (Parent Ex. G at pp. 1-2).[8] 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" (Abrams v. New York City Dep't. of Educ., 2022 WL 523455 at p. *5 [S.D.N.Y. Feb. 22, 2022]). As in Abrams, the contract here similarly states that payment is not

[7] In contrast, progress evidence (that is, outcome-based evidence) alone will not be sufficient without proof that the unilateral placement has specially designed instruction that addresses the student's needs. The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . 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"]).

[8] The contract stated that the approximate number of days was based on the school's calendar for the prior school year (2021-22); accordingly, it is possible that the school may have a different calendar with a slightly different number of days for the 2022-23 school year (see Parent Ex. G at p. 1).

excused for "unexcused absences, withdrawal, suspension or for any other reason" and, in reviewing that same language, the Abrams court held that the district was responsible to pay. Here, there is no persuasive reason to depart from the district Court's instruction and the unambiguous terms of the transportation contract. The district did not assert at any point in this proceeding that the special transportation was inappropriate and there appears to be no dispute on this point. The parent specifically identified concerns such as the lack of air conditioning and oxygen on transportation aspects of the district's programming, and the evidence shows that the student's most recent IEP did not identify those accommodations (Parent Exs. A at pp. 4-5, 12; C at p. 54). Sisters Travel accommodates the following needs: air 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 (Parent Ex. G at p. 2). The contract requires Sisters Travel to accommodate additional equipment for transportation (i.e., oxygen tanks) in the vehicle, if required by the student (id.). Sisters Travel is also responsible for providing the student with a transportation paraprofessional, if required (id.). Based on the foregoing, the IHO erred in limiting the transportation reimbursement award to only those days that the student utilized the service. It was further problematic for the IHO to provide the district with the option to select another contractor for the remainder of the 2022-23 school year because that would not have relieved the parent of her payment obligations to Sisters Travel for the remainder of her contract that she incurred due to the alleged problems with the district's transportation programming that went unanswered at the impartial hearing.

B. Other Requested Relief and Equitable Considerations

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

1. Additional Related Services for 2020-21 and 2021-22 School Years

The parent contends that she was entitled to reimbursement for the additional related services she obtained privately for the district's failure to provide the student with appropriate related services during the 2020-21 and 2021-22 school years (Req. for Rev. ¶ 26).[9]

The IHO declined to award the parent reimbursement for the additional related services (IHO Decision at pp. 9-10). The IHO found the parent "haphazardly" testified about the related services she obtained for the student over the school years in question (id. at p. 10). The IHO discussed the parent's testimony that she obtained additional related services for the student despite him being provided many of the same services by the school (id.). The IHO further found that aquatic therapy was not prescribed by a doctor and not recommended on the student's IEP, but the parent continued to seek reimbursement for the costs of aquatic therapy (id.). The IHO found that the parent's vague testimony with respect to the frequency of the additional related services provided and the cost of the services was not credible (id.).[10] The IHO held that the parent's use of "noncommittal language such as 'approximately[,]' 'about[,]' and 'around' in summarizing her self-serving request to be reimbursed for over $100,000 worth of [additional] related services" "without sufficient supporting evidence in the form of affidavits, invoices, and corresponding proof of payment" did not support an award for the reimbursement of the additional related services (id.).

Upon review of the entire hearing record, I find no evidence in the hearing record that would support overturning the IHO's denial of reimbursement for the additional related services. First, there is no evidence that the parent provided any 10-day notice to the district or notice at the most recent CPSE meeting that she intended to unilaterally obtain additional related services for the student outside of the school environment at district expense (see Parent Exs. J-K, M). In her due process complaint notice, which was lodged after the student was placed at iBrain, the parent alleged that the student did not receive all of his mandated services for the 2020-21 or 2021-22 school years; however, she did not list payment for the unilaterally obtained related services during the 2020-21 and 21-22 school years among the relief she was seeking, and at that point in time,

[9] It appears that some or all of these additional related services may have been delivered in the student's home, but the parent's direct testimony by affidavit is not clear (see Parent Ex. M ¶ 9).

[10] Generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). However, in addressing credibility determinations made in other administrative settings, the Second Circuit Court of Appeals has pointed out that an assessment of a witness' credibility should provide specific reasons for the adverse credibility determination (see Zhang v. U.S. I.N.S., 386 F.3d 66, 74 [2d Cir. 2004] [2d Cir. 2007] [noting that court looks to see if the trial judge "provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding"]; Williams v. Bowen, 859 F.2d 255, 260–61 [2d Cir. 1988] ["A finding that the witness is not credible must nevertheless be set forth with sufficient specificity to permit intelligible plenary review of the record"]).

the relief should have been known to the parent.[11] Additionally, there is no evidence in the hearing record that the parent communicated to anyone that the student missed services over these school years (Parent Ex. A at pp. 4-6).

In the parent's due process complaint notice, she asserted that there were many weeks during the 2021-22 school year during which Stepping Stones either closed or stopped delivering services to the student due to COVID-19 exposures (Parent Ex. A at p. 5). Additionally, the parent testified that during the 2021-22 school year, the district provided some services, but the school was unable to provide all of the student's services due to staffing shortages due the COVID-19 pandemic (Tr. pp. 58-59). To the extent that the student may have missed related services during the 2020-21 and 2021-22 school years due to the COVID-19 pandemic, both the United States Department of Education (USDOE) and the NYSED's Office of Special Education have issued guidance acknowledging that the global pandemic and the resulting closure of schools resulted in "an inevitable delay" in districts providing services to students with disabilities or engaging in the decision-making process regarding such services ("Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104 [OCR & OSERS 2020]; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 1, Office of Special Educ. Mem. [June 2021], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/documents/compensatory-services-for-students-with-disabilities-result-covid-19-pandemic.pdf). In addition, the USDOE has noted reports from some local educational agencies that they were "having difficulty consistently providing the services determined necessary to meet [each] child's needs" and that, as a result, "some children may not have received appropriate services to allow them to make progress anticipated in their IEP goals" ("Return To School Roadmap: Development and Implementation of Individualized Education Programs in the Least Restrictive Environment under the Individuals with Disabilities Education Act," 79 IDELR 232 [OSERS 2021]).

To address these delays and other delivery-related issues that occurred as a result of the pandemic, the Office of Special Education Programs (OSEP) and NYSED's Office of Special Education have indicated that, when school resumes, a CSE should convene and "make individualized decisions about each child's present levels of academic achievement and functional performance and determine whether, and to what extent, compensatory services may be necessary

[11] Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). With respect to relief (versus alleged violations), State and federal regulations require the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]).

to mitigate the impact of the COVID-19 pandemic on the child's receipt of appropriate services" ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 1, 3; see also "Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities," 76 IDELR 104; "Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak," 76 IDELR 77 [OCR & OSERS 2020]; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at pp. 2-5, Office of Special Educ. Mem. [June 2020], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf). The CSE's review might include a discussion of whether the student has new or different needs compared to before the pandemic, whether the student experienced a loss of skill or a lack of expected progress towards annual goals and in the general education curriculum, whether evaluations of the student or implementation of an IEP was delayed, and whether some of the student's IEP services could not be implemented due to the available methods of service delivery or whether such methods of service delivery were not appropriate to meet the student's needs ("Return To School Roadmap," 79 IDELR 232; "Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at pp. 3-4; see "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 1).

If the parent disagrees with a CSE's determination regarding the student's entitlement to compensatory services, State guidance notes that:

> Parents of students with disabilities may resolve disputes with school districts regarding the provision of FAPE by pursuing one of the dispute resolution options provided for in the IDEA. A parent may file a State complaint directly with NYSED in accordance with Commissioner's Regulation section 200.5(l), request mediation in accordance with Commissioner's Regulation section 200.5(h), or file a due process complaint and proceed to hearing in accordance with Commissioner's Regulation section 200.5(j).

("Compensatory Services for Students with Disabilities as a Result of the COVID-19 Pandemic," at p. 5; "Supplement #2 - Provision of Services to Students with Disabilities during Statewide School Closures Due to Novel Coronavirus (Covid-19) Outbreak in New York State," at p. 6).

Here, there is no indication that the parent sought or that a CSE has conducted such a review (see Parent Ex. C). It does not appear that a CSE discussed or considered if compensatory education was appropriate to make-up for any loss of skill attendant to the school closure or the alleged failure to deliver services due to the pandemic. The USDOE and NYSED's Office of Special Education have indicated that, under these unique circumstances, a CSE should have the first opportunity to consider the student's needs and whether any additional services may be warranted as a result of the pandemic. There is no indication that this has yet occurred for this student.

For the first time during her direct testimony by affidavit at the impartial hearing, the parent testified that she obtained additional related services for the student and paid for the services in 2021 without more specific details regarding the related services (Parent Ex. M ¶ 9). The parent testified generally about the additional related services she obtained for the student during the 2020-21, 2021-22, and 2022-23 school years to include PT, OT, assistive technology, and aquatic therapy (Tr. pp. 27-28). Then, after resting her case, and after closing statements, the parent's attorney sought to explain the additional related services (Tr. pp. 33, 36). More specifically, parent's counsel stated that the "evidence indicate[d] receipts for those services, for the services rendered as well as for the cost of those services" (Tr. p. 36). Consistent with what was noted previously, the parent's counsel wanted to make sure that the information pertaining to the additional related services was clear as the "prayer for relief" section of the due process complaint notice did not request relief for the additional related services that the parent unilaterally obtained (id.).

After the parent rested her case and made a closing statement, parent's counsel requested "to quantify the amounts that the parent ha[d] testified to with respect to reimbursement" for the additional related services (Tr. p. 44). The IHO reopened the hearing record for the parent to testify further (Tr. pp. 44-45). The parent testified that she had receipts and invoices for the unilaterally obtained related services for the 2020, 2021, and 2022 calendar years (Tr. p. 46). While the parent testified, she was directed by her counsel to look at the receipts and invoices on her computer (id.). Next, the parent testified about the additional related services the student received for the 2020 calendar year, the names of the providers, and "approximately" the number of sessions for each of the services (Tr. pp. 47-51). The parent further testified that she paid the providers and was able to provide "an approximate" total amount she paid (Tr. pp. 48-51). Then, the parent testified about the additional related services for the 2021 calendar year, the names of the providers, the approximate number of sessions for each of the related services, and approximate costs for the services (Tr. pp. 52, 54-58). The parent provided similar information regarding services she obtained for the student during the 2022 calendar year, prior to placing the student at iBrain in February 2022 (Tr. pp. 60-62).[12]

Notably, however, while the parent testified regarding approximate total amounts when asked about calendar years rather than school years, none of the receipts or invoices were offered into evidence and the IHO rejected the parent's testimony as not credible (IHO Decision at p. 10). The IHO inquired as to whether the student's preschool provided OT and PT and speech language therapy services to the student and the parent responded that that they had, but felt that with respect to the speech language therapy her privately retained therapists had, in her view, superior qualifications (Tr. p. 52). The IHO also inquired whether anyone in the school had provided aquatic therapy or if a doctor had prescribed the same to address the student's needs, to which the parent responded in the negative (Tr. p. 53).

I find little basis for disturbing the IHO's conclusions. The relief should have been known and was not sought in the due process complaint notice, the presentation of the information was

[12] The parent also testified that she obtained additional related services for the student during the beginning of the 2022-23 school year when the student was at iBrain (Tr. pp. 64-65); however, she does not request reimbursement for additional related services for the 2022-23 school year on appeal, and therefore, it is deemed abandoned (8 NYCRR 279.8[c][4]; see generally Req. for Rev.).

poor and, even if the presentation had been more artful, the IDEA does not require the district 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). The hearing record lacks consistent information about the level of services the student received and does not explain how the services addressed the student's needs (see L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; L.Q. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom, 471 Fed. App'x 77 [2d Cir. June 18, 2012]).

In view of the forgoing, I decline to disturb the IHO's determination denying the additional related services unilaterally obtained by the parent during the 2020-21 and 2021-22 school years.

2. Proof of iBrain Related Service Providers Credentials

In addition to awarding the parent the base tuition amount for iBrain, the IHO determined that the student was entitled to related services at iBrain, charged by the private school as supplemental tuition (see Parent Ex. F at pp. 1-2). As noted above, the IHO required the parent to provide affidavits to the district regarding specifics including the date and time that each of the supplemental billed services were provided to the student as iBrain charged on an hourly basis, namely the OT, PT, speech-language therapy, vision education services, assistive technology services, music therapy, and parent counseling and training (IHO Decision at p. 13-14). The parent contends that the IHO erred in requiring the parent to also include the iBrain providers credentials before direct payment shall be made to iBrain. The parent argues that obtaining an "affirmation of the professional background of each provider would be overly burdensome and duplicative" as the April 2022 iBrain report and education plan lists the professional qualifications of each of the providers (Req. for Rev. ¶ 36; see Parent Ex. L at p. 60).

I note that districts enjoy "basic budgetary oversight measures, such as requiring receipts before reimbursement" and the IDEA does not permit parents "to frustrate the fiscal policies of participating states" (Mendez v Banks, 65 F4th 56, 63 [2d Cir 2023]). The record shows that a substantial sum of taxpayer dollars is on the line in this proceeding. Accordingly, I find no stated basis to overturn the IHO's additional requirements for funding of the iBrain related services for the 2022-23 school year. I also find no undue burden to the parent or iBrain in identifying the credentials of the related services providers who provided services to the student along with the other information directed by the IHO. In fact, the terms of the iBrain contract devoted considerable ink to provisions regarding the parent commencing due process litigation against the district to recover public funding and their mutual cooperation in that endeavor (Parent Ex. F at pp. 1-4). Under IDEA, the district court enjoys 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). The IHO acted within that broad discretion in ordering equitable relief in this case when he directed the provision of the credentials of the service providers at iBrain to the district along with the invoices detailing the provision of services that are charged by iBrain on an hourly basis rather than an annual basis.

3. Additional Evidence – Ten-Day Notice

Next, the parent seeks the introduction of a letter dated February 2, 2022 prepared by the parent's attorneys purporting to have provided the district with ten-day notice of the parent's unilateral placement of the student at iBrain during the 2021-22 school year as additional evidence in the hearing record. The parent asserts that the IHO erred in denying tuition for the 2021-22 school year for lack of evidence that the parent sent a ten-day notice to the district of the student's unilateral placement at iBrain (Req. for Rev. ¶ 18). The parent contends that she gave "proper and timely notice" of her dissatisfaction with the recommended placement and unilateral placement at iBrain (id.). The parent further argues that the ten-day notice was "inadvertently" not disclosed as part of the parent's evidence and is necessary to render a decision in this matter (id. ¶¶ 19, 21-22).

In discussing equitable considerations, the IHO found that there was no evidence in the hearing record that the parent notified the district of her intent to unilaterally place the student at iBrain for the 2021-22 school year as she did for the 2022-23 school year (IHO Decision at p. 9). Accordingly, the IHO found that equitable considerations did not support an award of the costs of tuition at iBrain for the 2021-22 school year (id.).

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

The parent's arguments that additional evidence should be received at this late juncture are not persuasive. The IHO himself raised the issue of the ten-day notice during the impartial hearing, stating that there was a discrepancy of timely notice of the unilateral placement in February 2022 (Tr. pp. 38-39). The IHO further inquired why he should "grant reimbursement on equitable" grounds for the 2021-22 school year when there was no evidence of timely notice to the district (Tr. p. 39). The parent's counsel argued that the ten-day notice could be used as an equitable argument to reduce tuition, but it was not mandatory nor the exclusive manner to place the district on notice of a unilateral placement (Tr. pp. 39-41). Parent's counsel further argued that a ten-day notice was one way to place the district on notice but other communication by a parent was sufficient notice (Tr. p. 40). The parent's counsel then noted the parent's testimony by affidavit regarding her enrollment of the student at iBrain in February 2022 and requested to recall the student's mother to discuss her notice to the district (Tr. p. 41; Parent Ex. M at ¶ 10. The IHO declined this request stating that the hearing record was closed as the parent rested her case (Tr. pp. 33, 41-42).

However, after the IHO nevertheless reopened the hearing record and granted the parent the ability to testify about the additional related services, the IHO again inquired about the unilateral placement at iBrain for the 2021-22 school year (Tr. p. 66). The parent testified that in January 2022 she spoke with "the director of the school," that is, Stepping Stones, and she told that individual that she was moving the student to iBrain (id.). This was the only evidence presented during the impartial hearing by the parent of any type of communication regarding the student's unilateral placement at iBrain for the 2021-22 school year and it was not directed at the district.

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

The failure to offer this information during the impartial hearing cannot be considered an inadvertent mistake, especially when the IHO pointed out the oversight to the parent's attorney. Given the above exchange and the parent's attorney's failure to offer the ten-day notice as evidence during the hearing, I decline to consider the document at this late juncture. The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing is of even greater weight in this instance. The factor serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the proposed additional evidence

from withholding evidence that the party either knew or should have known was relevant during the impartial hearing and thereby shielding the additional evidence from cross-examination; allowing a later attempt to spring evidence on an opposing party would effectively distort the State-level administrative review and transform it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]).

This is also not an instance where the parent's attorney may not have known that the evidence would be central to an issue in dispute. The parent's attorneys were responsible to offer the notice they prepared during the evidentiary disclosure phase of the hearing process.[13] The IHO later asked about the issue not once, but twice, which was two times more than was technically required, but a wise effort on his part to encourage the development of a complete evidentiary record. While the parent may now regret that the document was not offered into evidence, this is not a basis for permitting the parent to take an end run around the impartial hearing process, which would be both unfair and unreasonable. Accordingly, I decline to consider the additional evidence offered by the parent as it was available at the time of the impartial hearing.

Based upon the foregoing, I find insufficient reason to overturn the IHO's denial of tuition at iBrain from February 8, 2022 through June 24, 2022 on the basis that the parent failed to provide notice of the unilateral placement to the district (see Parent Ex. B at p. 1).

4. Excessive Costs – iBrain Tuition 2022-23 School Year

Among the factors that may warrant a reduction in tuition based on equitable considerations is whether the frequency of the services or the cost for the services was excessive (M.C., 226 F.3d at 68; 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., 674 Fed. App'x at 101; E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private school or agency was unreasonable or regarding any segregable costs charged by the private school or agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

Ultimately, the hearing record was not developed on the issue of the reasonableness of the costs of the private programming and the responsibility for this lies with the district for not presenting any evidence on the issue and with the district for not raising the issue during the impartial hearing so that the parent was on notice and could present appropriate evidence.

[13] In the request for review, the parent indicated that counsel for the parent stated during the hearing that the parent "had in fact sent [the district] a ten-day notice, but that it was inadvertently not disclosed" (Req. for Rev. ¶22). This is not an accurate representation of the hearing record in this matter, as there is no indication that such a statement was made during the hearing (Tr. pp. 1-69).

The district did not argue that the cost of iBrain was unreasonable during the impartial hearing, because the district failed to appear at the impartial hearing. In fact, the district first raises the issue of excessiveness in its cross-appeal and has not presented any evidence that the actual costs of the services provided by iBrain were excessive, i.e., by reference to actual evidence of lower-cost programs and/or services that were comparable to and available in the same geographic area or correlated to the length of the school day. The district also did not attempt to show if similar services to those being provided to the student at iBrain could be provided at significantly lower cost by the district somewhere in its public schools. Accordingly, the district cannot prevail in whole or in part in its argument that the private costs were excessive due to lack of evidence.

5. Independent Educational Evaluation

Turning to the IHO's denial of an IEE at public expense, the IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents may seek an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).[14]

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

[14] Guidance from OSEP indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

In this instance, the IHO was the first to state concerns with the parent's inclusion of the request for an IEE for the first time in her due process complaint notice (Parent Ex. A at pp. 10, 13). In her due process complaint notice, the parent alleged, in general terms, that the district failed to evaluate the student in all areas of suspected disability and noted specific evaluations that the district failed to conduct, such as a vision evaluation, an assistive technology or music therapy evaluation, and a psychoeducational or neuropsychological evaluation (id.). The parent's request for an IEE is a subparagraph under her assertion that the district failed to conduct a psychoeducational or neuropsychological evaluation (id.). In this subparagraph, the parent indicated she disagreed with an unspecified district evaluation or lack of an evaluation and "formally request[ed] an IEE, to take the form of an independent neuropsychological evaluation to be conducted by a qualified provider of [p]arent's choosing at a reasonable market rate" (id.). In this instance, the IHO was justified in expressing concern regarding the manner in which the parent's requested an IEE; the IHO noted that he was not convinced that it was permissible for a parent to commence a proceeding seeking an IEE while expressing their disagreement with a district evaluation for the first time (IHO Decision at pp. 11 -12). The IHO further noted that there was no "evidence of any actual dispute regarding evaluations or a request by the parent outside of the instant [due process complaint notice] for an independent evaluation" (id. at p. 12). For similar reasons as those stated by the IHO, I do not find that it was a proper use of the administrative process to raise a request for an IEE in the October 2022 due process complaint notice for the first time, years after the student's last evaluation which was conducted prior to the August 2020 CPSE meeting (see Parent Ex. J at pp. 3-4).

In past decisions SROs, including the undersigned, have permitted a parent to request a district-funded IEE in a due process complaint notice in the first instance (see, e.g. Application of the Dep't of Educ., Appeal No. 21-135); however, I have also expressed reservations that this is not the process contemplated by the IDEA and its implementing regulations (Application of the Dep't of Educ., Appeal No. 23-034; Application of a Student with a Disability, Appeal No. 22-150) and my observation is that the approach has caused more problems than it resolves (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). The statute clearly indicates that a district is required to either grant the IEE at public expense or initiate due process to defend its own evaluation of the student, but a district need only do so "without unnecessary delay" (34 CFR 502[b][2]). The process envisions that a district has an opportunity to engage with the parent on the request for an IEE at public expense outside of due process litigation, and if a delay should occur as a result, one of the fact-specific inquiries to be addressed is whether the IEE at public expense should be granted because the district's delay in filing for due process was unnecessary under the circumstances (see Cruz v. Alta Loma Sch. Dist., 849 F. App'x 678, 679-80 [9th Cir. 2021][discussing the reasons for the delay and degree to which there was an impasse and finding that the 84-day delay was not an unnecessary delay under the fact specific circumstances]; Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289, at *2 [N.D. Cal. Dec. 15, 2006] [finding that an unexplained 82-day delay for commencing due process was unnecessary]; Alex W. v. Poudre Sch. Dist. R-1, 2022 WL 2763464, at *14 [D. Colo. July 15, 2022] [holding that simply refusing a parent's request for an IEE at public expense is not among the district's permissible options]; MP v. Parkland School District, 2021 WL 3771814, at *18 [E.D. Pa. Aug. 25, 2021] [finding that the school district failed to file a due process complaint altogether and granting IEE at public expense];[15] Jefferson Cnty. Bd. of Educ. v. Lolita

[15] The Parkland case also discussed caselaw with different factual circumstances in which the district's failure to

S., 581 F. App'x 760, 765-66 [11th Cir. 2014]; Evans v. Dist. No. 17 of Douglas Cnty., Neb., 841 F.2d 824, 830 [8th Cir. 1988]). As the Second Circuit observed, at no point does a parent need to file a due process complaint notice to obtain an IEE at public expense (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 168-69 [2d Cir. 2020]).[16] My continued study of the judicial and administrative guidance on the topic has led me to change my previous approach of allowing the parent to initially disagree with a district evaluation and request an IEE in a due process complaint notice (without attempting to raise such disagreement with the district first). Moreover, I am convinced in this case that the parents may have delayed sufficiently clear communication of the IEE request for a number of years while planning for the student's educational programming continued or more likely included the request for an IEE as an afterthought. This is an improper use of the due process procedures.

Accordingly, I find that the IHO did not err in his decision to deny the parent's request for an IEE at public expense that was raised for the first time in the due process complaint notice. While the parent's request for an independent neuropsychological evaluation at district expenses is denied, if the parent still desires that the student undergo a neuropsychological evaluation, she may request that the district conduct such evaluation. Upon receipt of such request, the district must consider whether it would be appropriate to conduct the evaluations to assess the student's special education needs and, after due consideration, provide the parent with prior written notice describing, if applicable, its reasons for concluding that additional evaluative data of the student was unnecessary (8 NYCRR 200.5[a]; see 34 CFR 300.503, 300.305[d]). If the parent is dissatisfied with the district's response or evaluation, the parent may then submit a request to the CSE that it fund an IEE in the manner contemplated by the IDEA, as discussed above.

VII. Conclusion

There is an insufficient basis to reverse the IHO's denial of tuition at iBrain for the 2021-22 school year, the IHO's denial of reimbursement for additional related services for the 2020-21 and 2021-22 school years, and the IHO's denial of district funding for an IEE. Further, having found that iBrain was an appropriate unilateral placement for the 2022-23 school year and the costs of tuition were not excessive, the parent is entitled to funding of the costs of the student's tuition at iBrain upon the submission of proof to the district of the iBrain providers credentials and identification of when and by whom the related services were provided to the student.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

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file for due process had been excused such as incomplete district evaluations or agreements between the district and parent that the district would conduct further evaluations.

[16] The Second Circuit, in Trumbull, speculated that a "hypothetical scenario in which a parent might need to file a due process complaint for a hearing to seek an IEE at public expense is if the school unnecessarily withheld a requested IEE or failed to file its own due process complaint to defend its challenged evaluation as appropriate" (Trumbull, 975 F.3d at 169).

IT IS ORDERED that the IHO decision dated March 31, 2023 is modified by reversing that portion that provided the district with an option regarding transportation and limited district funding for transportation to only those days that the student utilized the transportation service, and

IT IS FURTHER ORDERED that the district shall fund the costs of the student's transportation to and from iBrain for the 2022-23 school year pursuant to the contract that the parent entered into with Sisters Travel.

Dated: **Albany, New York**
July 14, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER