The University of the State of New York

The State Education Department
State Review Officer
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No. 24-031

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Zack Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Gauthier, 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 those portions of a decision of an impartial hearing officer (IHO) which denied, in part, her request for direct funding for special transportation services for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's determination that the parent's unilateral placement of her daughter at the International Academy for the Brain (iBrain) was an appropriate placement and ordered it to fund the student's tuition costs at iBrain for the 2023-24 school year. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the CSE convened on March 9, 2023, to formulate the student's IEP for the 2023-24 school year (see generally Dist. Ex. 1). The CSE prepared an IEP that recommended placement in a 12:1+(3:1) special class, adapted physical education, an array of related services including occupational therapy, parent counseling and training, physical therapy, speech language therapy, vision education services, as well as a health paraprofessional, a switch with voice output and AT services (Dist. Ex. 1 at pp. 57-58). The parent disagreed with the recommendations contained in the March

2023 IEP, and asserted that the district failed to timely notify the parent of the recommended program and placement and/or school location for the student for the 2023-24 school year and, as a result, notified the district of her intent to unilaterally place the student at iBrain (see Dist. Ex. 2; Parent Ex. H). In a due process complaint notice, dated July 5, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A).

An impartial hearing convened on August 31, 2023 and concluded on November 8, 2023 after five days of proceedings (Tr. pp. 1-353). In a decision dated December 20, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year, that iBrain was an appropriate unilateral placement, and that equitable considerations generally weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 3-15). As relief, the IHO ordered the district to reimburse the parent or directly fund the cost of the student's tuition and related services at iBrain for the 2023-24 school year (id. at pp. 14-15). Additionally, the IHO ordered the district to reimburse the parent or directly fund the cost of the student's private special transportation "at a rate of $500.00 per completed round trip for transportation services to and from the Student's home and the unilateral placement" (id. at p. 14). The IHO also ordered the district to conduct certain evaluations and reconvene a CSE to recommend an updated IEP (id. at pp. 14-15).

IV. Appeal for State-Level Review

The parent appeals. The district cross-appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer and cross-appeal, and the parent's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The crux of the district's cross-appeal is whether the IHO erred in finding that iBrain was an appropriate unilateral placement and therefore erred in awarding any relief to the parent. The parent's appeal concerns whether the IHO erred in reducing the award for the cost of the student's private special transportation.

V. Applicable Standards

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

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

an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's

needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[1]

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

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

VI. Discussion

At the outset, the district has not cross-appealed from the IHO's determination that the district failed to offer the student a FAPE for the 2023-24 school year.[2] As a result, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Therefore, the only issues left to be resolved are whether the IHO erred in finding that the parent's unilateral placement of the student at iBrain for the 2023-24 school year was appropriate and whether the IHO erred in the relief ordered. Because the parent's requested relief is contingent

[1] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

[2] The district did not present witnesses in support of its IEP recommendations, rather it entered into evidence a copy of the March 2023 IEP and a few other documents (Dist. Exs. 1-4). The IHO did not engage in any factual analysis of any of the alleged violations that the parent lodged against the district with respect to the proposed class size and school location aspects of the public programming and simply determined that the district was precluded from relying on its documentary evidence in the absence of witness to sustain its burden to prove that it offered the student a FAPE (IHO Decision at pp. 6-8). The IHO relied on a 2002 SRO decision in a case in which the district failed to appear on appeal in a State-level review under Part 279 hold that unrefuted allegations in a due process complaint notice are "deemed true" on a procedural grounds, thus ignoring Congress' statutory revisions in 2004 that required the IHO to make the determination on substantive grounds (20 U.S.C. § 1415[f][3][E][i]). Nevertheless, the district did not appeal these findings and is now bound by them.

upon a determination that the parent's unilateral placement was appropriate, I will first address the district's cross-appeal.

B. Unilateral Placement

The district appeals from the IHO's finding that the parent's sustained her burden to show that iBrain was an appropriate unilateral placement for the student during the 2023-24 school year. Specifically, the district alleges there was little evidence regarding the student's attendance at iBrain during the school year, rendering it impossible to determine how much of the recommended services in the iBrain plan the student actually received (Answer ¶5). The district notes that there is scant evidence of the student's progress at iBrain and despite testimony that the student's progress was tracked via "quarterly progress reports" no such reports were entered into the hearing record (id.). The district also contends that the IHO failed to consider that the iBrain plan recommended a 1:1 nurse for the student, yet iBrain's deputy director testified that no such nurse was provided to the student at iBrain (id. at ¶6). Additionally, the district asserts that there was insufficient information in the hearing record regarding the qualifications and certifications of the student's providers at iBrain because some of the providers were not identified in the iBrain plan and none of the student's direct providers testified at the impartial hearing (id. at ¶7).

A review of the IHO's analysis of the parent's unilateral placement at iBrain during the 2023-24 school year, including the related services provided to the student at iBrain and the private special transportation obtained by the parent, reveals that the IHO may have comingled consideration of whether the unilateral services were reasonably calculated to enable the child to receive educational benefits—the second prong of the Burlington/Carter analysis—with equitable considerations including the question of whether the flat fee transportation services contract or the rate of pay for the services were excessive—the third prong of the Burlington/Carter analysis (see IHO Decision at pp. 10-14). As the Second Circuit Court of Appeals has recently held, it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations within the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246-47 [2009]).

Nonetheless, I will address the district's claims with the correct standards in mind.

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).

With regard to the parties dispute over whether iBrain was appropriate to address the student's needs during the 2023-24 school year, my independent review of the hearing record supports the IHO's determination that the parent met her burden to demonstrate that iBrain was an appropriate unilateral placement.

According to the hearing record, the student began attending iBrain in the 2018-19 school year, and iBrain developed an education plan for the student dated March 9, 2023 (iBrain plan) with a projected implementation date of April 3, 2023 (Parent Exs. C at pp. 1, 58-59; J ¶11). At the time of the March 2023 iBrain report, the student was described as a jovial 12-year-old, who showed excitement when in the classroom, loved listening to salsa music and practicing interactive

reading in her space, and used a range of modalities to communicate her basic wants and needs, as well as to participate in her daily routine and academic day (Parent Ex. C at p. 1).

According to written testimony from iBrain's deputy director of special education, iBrain is a private and highly specialized special education program created for children who "suffer from acquired brain injuries or brain-based disorders" and offers an extended 12-month school year calendar and services during its extended school day (Parent Ex. J ¶ 5). The deputy director stated that every student at iBrain requires a 1:1 paraprofessional to assist with activities of daily living (ADLs) and to access and benefit from the educational programming (id.). He further stated that many students require a 1:1 nurse to attend to their health needs (id.). According to the deputy director, iBrain provides its students "with an individualized education program ("IEP"), geared towards improving functioning skills appropriate to their cognitive, physical and developmental levels, through a collaborative and multidisciplinary approach which incorporates the best practices from the medical, clinical, and educational fields" and are instructed using "the most effective strategies from evidence-based practices" (id. ¶ 7). At the time of the hearing, the deputy director indicated that iBrain had seven 6:1+1 special classes and three 8:1+1 special classes over two campuses and could accommodate students aged five to 21 years old (id. ¶ 6).

The March 2023 iBrain plan described the student as non-verbal, non-ambulatory, and legally blind with diagnoses of periventricular leukomalacia, cerebral palsy, asthma, cortical visual impairment (CVI), optic nerve atrophy, rotational nystagmus, intermittent exotropia, hypermetropia, astigmatism, seizures, as well as oral motor and feeding difficulties (Parent Ex. C at p. 1). The plan noted that due to the student's primary classification of traumatic brain injury (TBI), she manifested a variety of challenges within the areas of communication, cognition, attention, perception, swallowing function and overall volitional motor capabilities, and these deficits and significant needs required continual, intense supervision and supports in order for her to be able to communicate and interact with objects and individuals within her environment, as well as to demonstrate motor and cognitive potential to learn new concepts (id.).

With respect to cognition, the iBrain plan noted that the student was aware of her environment and noticed when she was in her classroom, but due to her brain-based disability, she exhibited severe impairments in her cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem solving, information processing and speech (Parent Ex. C at pp. 1-2). According to the iBrain plan, the student became highly dysregulated and unable to participate in settings that were "larger and noisy", as evidenced by her facial expressions, startles, and decreased attention and engagement (id. at p. 2). The iBrain plan indicated that the student showed social comprehension and responsiveness to conversations directed toward her in the classroom, responded to her name with a high degree of consistency with her response often showing her mood and affection, and the student demonstrated the most curiosity around social situations and in response to hearing music (id.). According to the iBrain plan, the student worked on academic skills including color and letter identification, weather, calendar, sequencing, and the seasons (id.).

The iBrain plan noted that with respect to speech and language functioning, the student used a combination of methods to communicate including eye gaze, facial expression, and two "jellybean switches" connected to two voice output switches (Parent Ex. C at p. 19). The student indicated her preferences with smiles and improved alertness, and when choosing among three activities for her session (usually listening to music, reading a book, or completing a craft), she required 15 to 60 seconds (depending on her energy level and environmental stimulation) to

process a verbal or light tactile cue to her forehead or side of head to assist in sequencing the steps for motor planning to scan and select a response (id. at pp. 19-20). The iBrain plan stated that on a typical day the student attended throughout the session, visually scanned the stimuli, and laughed or smiled to express that she was enjoying the task (id. at p. 20). With respect to receptive language, the student oriented to sound, recognized her name and that of familiar people, understood 10 words, understood short sentences about familiar objects and people, followed familiar and routine one-step commands, and the iBrain plan noted that receptive language appeared to be a relative strength for the student (id. at p. 24). With respect to expressive language, the student most successfully communicated through the use of facial expression, body language, gestures, and/or behavior (id.). According to the iBrain plan, the student's non-verbal language was considered highly reliable for the expression of acceptance or rejection, and she demonstrated a desire to communicate by looking toward communication partners and attempting to find and activate her switches spontaneously in response to a question (id. at pp. 24-25). As related to her oral motor mechanism, the iBrain plan indicated that the student presented with a predominantly open mouth posture, low tone, high vaulted palate, and "poor secretion management" with pooling in, and frequent spillage from, the oral cavity (id. at pp. 26-27). In the area of feeding, according to the iBrain plan, the student received nothing by mouth, and all nutrition, hydration and medication via g-tube (id. at p. 27).

The iBrain plan stated that, physically, the student required a "tilt-in-space" manual wheelchair with a custom back and tray to aid with cervical alignment throughout the school day, maximal two person transfers, bilateral ankle foot orthoses (AFOs) for bench sitting and all lower body weight bearing activities, and demonstrated little to no volitional movement in her extremities (Parent Ex. C at pp. 5, 8-12). In addition, while the student could not initiate taking steps, she tolerated being fully supported in a gait trainer with saddle and thoracic support, as well as standing in a supine stander with knee immobilizers and AFOs (id. at p. 31). With respect to fine motor skills, the iBrain plan indicated that the student demonstrated a left-handed dominance, that she required total assistance for all self-care skills, wore bilateral functional hand splints to passively grasp an object, and wore resting wrist-hand orthoses to maintain range of motion (id. at pp. 6-8). The student required total assistance to reach for, grasp, release and manipulate objects, and to engage in bilateral coordination of tasks (id.). Due to the student's vision needs and cortical visual impairment diagnosis, she required materials placed approximately 6 inches from her eyes and to her left and central fields of vision, extended time to localize objects, and a spotlight to assist the student in directing her attention to specific parts of a book or object (id. at pp. 13, 20).

With respect to assistive technology, the iBrain plan indicated that the student accessed two "jellybean switches" mounted on her left temple and back of head via two modular hose mounts with each switch connected to a voice output switch to communicate pre-recorded messages (Parent Ex. C at p. 15). The student had begun to trial switches connected to a "high-tech speech generating device" and trialed head tracking using an iPad with specific software and the back of her head as access (id. at pp. 15-16). The educational plan stated that, with the assistance of her paraprofessional, the student demonstrated the most consistency using the iPad via jellybean switches, and that she frequently used her devices in her classroom, engaging with her teachers and peers to respond to questions, indicate her feelings, and make choices (id. at p. 16).

The iBrain plan indicated that, with respect to music therapy, the student was "highly motivated and cognitively aroused by live music," that she demonstrated "a great change in affect in response to music cues to show her likes and dislikes," she appeared motivated to hold her body and head upright during music cues for maximum participation, and she responded more quickly to instructions when they were sung rather than spoken (Parent Ex. C at p. 33). In terms of the effects of the student's needs on her involvement in the general education curriculum, the iBrain education plan stated that due to the student's "significant impairments in cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psycho-social behavior; physical functions; information processing; and speech," the student required an individualized curriculum (id.) In addition, the iBrain plan stated that the student required highly intensive interventions, specifically designed instruction, modifications and adaptations such as a 1:1 paraprofessional, 1:1 academic instruction, assistive technology, extended processing time, breaks, environmental modifications, and access to the general education curriculum in a way that was appropriate and relevant to the student (id.).

To address the student's identified needs, iBrain recommended that she attend a 12-month program in a 6:1+1 special class with 1:1 nursing and 1:1 paraprofessional services throughout the day, as well as assistive technology devices and services (Parent Exs. C at pp. 57-59; J ¶ 13).[3] In addition, iBrain recommended the student receive related services that included four 60-minute individual sessions per week of occupational therapy (OT), five 60-minute individual sessions per week of physical therapy (PT), five 60-minute individual sessions per week of speech-language therapy, three 60-minute individual sessions per week of vision education, one 60-minute individual session per week of assistive technology, three 60-minute individual sessions as well as one 60-minute session in a small group per week of music therapy, and one 60-minute session per month of parent counseling and training (Parent Exs. C at pp. 58-59; J ¶ 13). To further support the student's identified needs, the March 2023 iBrain plan reflected a recommended that the student receive transportation accommodations including adult supervision by a nurse, a lift-bus with a wheelchair ramp and air conditioning, and limited travel time of 60 minutes (Parent Ex. C at p. 58).[4] In addition, the iBrain plan included numerous goals (as well as individualized health plan goals) and corresponding objectives or benchmarks that targeted the student's needs as identified by iBrain (Parent Ex. C at pp. 36-41, 42-56).

On appeal, the district argues that the IHO did not sufficiently consider the fact that iBrain recommended 1:1 nursing services for the student, and iBrain's deputy director testified that iBrain did not provide 1:1 nursing services to the student, with no explanation for the discrepancy. The parent also testified that the student did not receive 1:1 nursing at iBrain and that the student required a nurse (Tr. pp. 197-98, 321-324, 345-47). However, in contradiction to the allegations in the parent's due process complaint notice,[5] the parent later testified that she did not believe that

[3] Although 1:1 nursing services were recommended for the student throughout the day at iBrain, according to the March 2023 iBrain plan, the deputy director testified that those services were not delivered to the student, and iBrain was not providing a 1:1 nurse to the student "as of yet" (Tr. pp. 321-24, 346-47; Parent Ex. C at pp. 57-59).

[4] The parent testified the student's trip to school is 60 to 90 minutes (Tr. p. 239).

[5] With the assistance of her attorneys, the parent also alleged that the student was receiving the services of a 1:1 nurse at iBrain, and that the CSE was wrong to have failed to include a 1:1 nurse in its IEP, and the which was

the student required a 1:1 nurse but was open to considering one for the student (Tr. pp. 197-98, 238-39). The district's attorney stated during the impartial hearing that there was no nursing contract in the evidence in this case (Tr. pp. 196-97).

Although iBrain recommended 1:1 nursing services in its March 2023 plan and did not provide the nursing services as of November 8, 2023 (last date of hearing), the hearing record demonstrates that iBrain developed an individual health plan for the student that outlined her nursing diagnoses, goals, nursing interventions, and expected outcomes (Parent Ex. C at pp. 36-41). To address the student's nursing goals the iBrain plan included the following interventions monitor the student's asthma signs and symptoms, triggers, and medications; observe aspiration precaution; monitor g-tube feeding and tolerance; assess need for assistance with assistive technology; observe fall and seizure precautions; monitor medication for seizures and seizure activities; monitor allergy/anaphylaxis and medication; observe incontinence precaution; provide frequent skin checks and repositioning; continue toilet training; monitor food and fluid intake; monitor bowel movements; refer for and coordinate physical, occupational, and speech and language therapy services; assist with wheelchair travel and elevator access; determine use of coping skills that affect the student's ability to be involved in social interactions; and allow ample time to accomplish tasks (id.). The individual health plan also included the use of a 1:1 paraprofessional as a means of addressing the student's nursing goals (id.), not unlike the district's proposed programming (Dist Ex. 1 at p. 55-56). In addition, the iBrain plan included paraprofessional annual goals and short-term objectives, which served to outline the duties of the paraprofessional and which again, like the district's programming, indicated that the paraprofessional would consistently consult with the school nurse regarding close monitoring of the student's medical needs and ensure that the student's toileting, feeding, and ambulation needs were addressed (Parent Ex. C at pp. 36-41, 56; Dist Ex. 1 at p. 55-56). Like the interventions listed in the individual health plan, the short term objectives related to the paraprofessional's need to observe the student for signs of aspiration, monitor oral feeding and tolerance, keep the student free from injury, observe precaution during transfer, monitor seizure precautions at all time, demonstrate awareness of medications taken, monitor administration of anticonvulsive medications, provide frequent skin checks and repositioning, observe incontinence precautions, schedule toileting time, and monitor food and fluid intake as well as bowel movements (Parent Ex. C at p. 56). Based on the foregoing, I am not persuaded by the district's contention that the lack of 1:1 nursing services to the student renders iBrain inappropriate when the hearing record otherwise shows that iBrain was addressing the student's health management needs.

clearly untrue (Parent Ex. A at p. 3, 6). So either the parent and her attorneys overstated her allegations against the district, or, as the parent clarified during the impartial hearing, the lack of 1:1 nursing services is not a serious as she alleged when lobbing allegations at the district. On the other hand, the district is unwilling to clearly concede that the student did require a 1:1 nurse in order to receive an appropriate program. Given that the IHO failed to explore the issue in the district's programming and only mentioned a 1:1 transportation nurse, district did not recommend a 1:1 nurse in its public programming, and the parent walked back her own allegations during the impartial hearing, there is a near total lack of candor on this issue by the participants in this process, thus I am unwilling to modify the IHO's decision under these circumstances for lack of any cognizable position by any participant, especially when the evidence shows that even the parent did not believe that the student required a 1:1 nurse. Each side contradicted itself in one form or another, I find the parties conduct on this issue was disgraceful.

Next, the district's contention that the hearing record did not contain sufficient information about the student's providers and their qualifications is not compelling because iBrain's deputy director identified all of the student's providers in testimony and as set forth above, a private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14; see Tr. pp. 298- 302; Parent Ex. C at p. 60).

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

In light of the above, I find that the March 2023 iBrain plan provided the student with specially designed instruction to meet her unique needs.

Turning to the district's contention that the parent failed to present evidence of the student's actual attendance, program or schedule, or progress reports during the school year at issue, I find that although there was room to develop the hearing record further, the parties and the IHO did not do so or preserve their arguments and there is insufficient basis to overturn the IHO's overall decision that iBrain was appropriate.[6] As far as the available evidence, when asked whether the student "attended iBrain in person for every day" the parent replied that "[f]or the current school year, yes, she has" (Tr. pp. 216-17). The parent further testified that although there is a program in place at iBrain for at-home services, the student had "gone to school every day this year so far" and had not received any at-home services (Tr. p. 221). The parent also testified regarding the transportation provided by Sisters Travel in picking the student up at her home and taking her to iBrain, describing the need for help getting the student from the second story of the residence and noting that the same driver had been in place for the student during the school year (Tr. pp. 212-19). iBrain's deputy director testified that the student had "pretty good in person attendance" attending iBrain classes "at iBrain in person" and that he could not recall the student missing any days during the 2023-24 school year (Tr. p. 305). Although the record does not contain attendance records from the school, the evidence above went uncontradicted and tends to show that the

[6] During the impartial hearing, there was much debate concerning subpoenas, issued by the district and signed by the IHO, served upon iBrain and Sisters Travel (see, e.g., Tr. pp. 22-40, 85-100, 112, 172, 219). Apparently, neither iBrain nor Sisters Travel responded to the subpoenas and there is nothing in the hearing record suggesting that the district took any action outside the hearing to enforce the subpoenas (Tr. p. 172). IBrain and Sisters Travel have failed to respond to subpoenas in several matters before this office and this has not gone unnoticed and it is troubling in light of the importance of a fully developed hearing record in due process proceedings (see e.g., Application of a Student with a Disability, Appeal No. 23-060). The district has not requested any relief attached to issues with the subpoenas in this matter as part of its cross-appeal. It may be that in future cases adverse inferences may be drawn from the failures to respond to the subpoenas, however in the present matter the hearing record demonstrates that the parent met her burden of proving the appropriateness of iBrain.

student attended iBrain in person and there is no basis to find that iBrain was not appropriate for any reason associated with a lack of in-person attendance.[7]

In this instance, while the hearing record is limited with respect to detailing the student's experience in the recommended program at iBrain during the 2023-24 school year, the evidence within the hearing record sufficiently describes the elements of the program, which align with the student's needs.[8] The evidence of progress is only stated in general terms. In written testimony, the deputy director of iBrain stated that the student had "made progress in skills across academic and related service domains in her educational program at iBrain" (Parent Ex. J ¶ 15).[9] The deputy director further stated that he anticipated the student would continue to build on progress already made as long as she was "provided with continuity in regard to her educational program" (id.).[10] Additionally, the parent provided a generalized blanket statement testimony by affidavit that the student had made progress at iBrain, which adds no support to the parent's case, but does not detract from it (Parent Ex. K ¶ 11).

However, the lack of specific evidence regarding progress at iBrain is not a sufficient basis to overturn IHO's decision. It is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However,

[7] I note that the deputy director confirmed that iBrain does not differentiate their attendance between in-person and remote instruction or excused absences (Tr. pp. 315-17). The deputy director testified that each service provider at iBrain had "their own unique method of tracking" if a student required make-up services for missed classwork or related services and that "each provider and teacher" kept "their own session notes, their own personal session notes, and they would know whether or not a student" needed to make up a session or not (Tr. p. 317). That explanation of the deputy director included statements that he did not manage matters with regard to related services and did not have information regarding related service provider's sessions (Tr. pp. 330-31).

[8] The hearing record did not include a class schedule, related service or attendance records for the student's 2023-24 school year at iBrain (see generally Parents Exs. A-L).

[9] How the deputy direct would know the student was making progress in the related services areas (which makes up the vast majority of the student's day) is unclear since he disclaimed knowledge and responsibility for those areas during the impartial hearing (Tr. pp. 330-31).

[10] The iBrain plan developed in March 2023, indicated that the student had demonstrated improvement in several areas including her ability to make choices, activate switches, extend her elbow, localize objects, attend to materials, manage secretions, and reliably answer yes/no questions, among other things (Parent Ex. C at pp. 2, 3, 10, 14, 15, 25, 27). But this progress description was retrospective in that it took place during the 2022-23 school year or earlier. The plan also includes numerous graphs, described in the narrative and labeled "progress"; however, even with the narrative it is hard to determine what exactly is being measured by the graphs as the y-axes do not indicate what each data point represents (Parent Ex. C at pp. 17, 22, 30, 30, 31). The graphs are not persuasive evidence, but the finding is not fatal to the parent's case.

while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

In light of the above, I find that the hearing record contains sufficient evidence to conclude that iBrain's program was individualized for the student and provided the student with instruction specially designed to meet her unique needs. Accordingly, I decline to overturn the IHO's finding that iBrain was an appropriate unilateral placement.

C. Equitable Considerations

The IHO's order directed the district to "pay for transportation related expenses at a rate of $500.00 per completed round trip for transportation services to and from the Student's home and the unilateral placement" (IHO Decision at p. 14). To the extent that the IHO's order could be interpreted as requiring the district to fund only the transportation services provided to the student, it would effectively constitute a reduction of the relief awarded to the parents when compared to the contract terms for the privately obtained transportation services for the 2023-24 school year on an equitable basis. In the body of the decision the IHO set forth a calculation of the total cost of the transportation contract the parent executed with Sisters Travel divided by the number of days in a 12-month school year and found that the parent was "seeking $737.05 per day" (id. at p. 12). The IHO determined that in the "absence of a demonstration that $737.05 is an appropriate amount and a flat fee arrangement is reasonable . . . the services shall be compensated $500.00 per documented round trip" (id.). The IHO stated that the amount "represents consideration of the student's unique needs, the staffing involved and the relative cost information made available to me for my review" (id. at pp. 12-13).

The parents challenge this language from the IHO's order, asserting that in reducing the amounts to be funded and ordering funding per actual use, the IHO impermissibly went outside of the evidence submitted to find the district did not have to fund transportation per the terms of the contract between the parent and Sisters Travel. The district asserts that the IHO's order reducing the transportation funding should be affirmed as written because the parent "failed to provide a foundation in the record establishing the reasonableness of the costs charged by Sisters" and the cost of the transportation services was excessive.[11]

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the

[11] In addition to the subpoenas issued by the district that went unanswered as described above, the parent also sought to subpoena documents from the district in reference to contracts it may have had with transportation and special transportation providers during the impartial hearing (Tr. pp. 112-14). The aim of the subpoena was to obtain evidence with respect to the costs the district incurred in obtaining transportation services, including the terms of the contracts that may have shown that the district was liable for costs generally as opposed to a per use basis, that the parent hoped would show that the cost of the Sisters Travel transportation contract was not unreasonable or outside market rates (Tr. pp. 130-38). After extensive argument on the issue of the parent's subpoena it appears that the IHO declined the parent's request to issue a subpoena (Tr. pp. 112-77; IHO Decision at p. 11). Although the outcome of the parent's appeal obviates the need for a remand to issue the subpoena the parent sought, I note that in the context of the district's argument that the cost of the private transportation contract was excessive, the cost and details of the district's transportation contracts would surely be relevant.

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"]).[12]

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as

[12] In support of the parent's contention that the IHO erred by failing to award the parent the full cost of the transportation contract with Sisters Travel, the parent relies on a recent district court case, which reviewed similar contracts with the same transportation company and determined that the terms of the contracts required parents "to pay fees irrespective of whether the students use[d] the services" (Abrams v. New York City Dep't of Educ., 2022 WL 523455 at p. *5 [S.D.N.Y. Feb. 22, 2022]). In opposition, the district relies on another holding from the same district court, Araujo v. New York City Department of Education, 2023 WL 5097982 (S.D.N.Y. Aug. 9, 2023), to support its position that the IHO properly limited the award of transportation costs to be within the range of fair market rates, as opposed to the amount the parent contracted to pay in the transportation agreement. In further support, the district points to a similar holding in Davis v. Banks, 2023 WL 5917659 (S.D.N.Y. Sept. 11, 2023). It is worth noting that none of the cases cited by the parties are directly relevant to the issue being addressed on appeal, i.e. whether the IHO erred in reducing the award of transportation funding, as all three of the matters cited by the parties involved implementation of either pendency orders or a final IHO decision and, therefore, the cases focused on enforcement and the language included in the orders that were being enforced rather than a review of the substance of administrative decisions themselves (see Davis, 2023 WL 5917659 ["the sole source of the [district's] reimbursement obligations in each Plaintiff's case[s] is the applicable administrative order"]; Araujo, 2023 WL 5097982 ["[p]laintiffs have not met the IDEA's exhaustion requirement with respect to challenges to the [IHO's decision] itself, as opposed to [d]efendant's implementation of the [IHO's decision]]; Abrams, 2022 WL 523455 ["[t]he heart of this matter[] boils down to the [district's] legal obligations under the [p]endency [o]rders"]).

such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

Generally, an excessive cost argument focuses on whether the rate charged for services were reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services.

Here, the parent entered into a contract with Sisters Travel for the provision of the student's transportation to and from iBrain for the 12-month 2023-24 school year (Parent Ex. E). The contract set forth an annual rate for the services and noted that fees were based on school days even if the services were not used (id. at p. 2). Although in its pleading the district contends that the parent has not shown that the cost for the transportation services Sisters Travel provided was reasonable, during the impartial hearing, it offered scant evidence against which to compare the cost, such as evidence of reasonable market rates for the same or similar services. Further the district opposed the parent's attempt to obtain evidence of transportation costs and contracts borne by the district which could have provided such comparisons.

Overall, the IHO erred by conducting a cost analysis without sufficient fact evidence to support it. For example, the IHO's rationale for reducing the amounts awarded for the student's transportation services relied on his determination that the parent needed to document each day that the student used the private transportation, but absent any evidence that these services were not delivered to the student—and apparently unmindful of the only available testimony that the student in fact used the services every school day—the IHO essentially appeared to alter the terms of the contractual relationship without evidence or an articulated equitable basis to do so (see IHO Decision at pp. 10-13; see generally Tr. pp. 212-21, 1-353; Parent Ex. E). The IHO may have reason to question the parties on the facts presented, but if that is so, then it is up to the IHO to develop the factual record to provide a basis for his findings or provide clear directives the parties to do so.

In addition, while the district submitted a document reflecting Medicaid reimbursement rates from March 2018, the district did not present evidence demonstrating that any private providers who contemporaneously accepted similar rates for either nursing or transportation services, or moreover, any evidence that rates as low as the 2018 Medicaid rates were paid by the

district in the 2023-24 school year for transportation services for these students (see generally Tr. pp. 1-353; Dist. Exs. 1-4). In other words, a Medicaid reimbursement rate is set by the government, which has very different bargaining power than private citizens and absent evidence that it is likely that parents can acquire services at such rates, the district's argument is unpersuasive. This district did not articulate any specific calculation arising out of the Medicaid rate document in its post-hearing Brief (IHO Ex. I at p. 16). More plausible might be evidence of statistics presented from either the United States Bureau of Labor Statistics or New York State Department of Labor's Occupational Employment and Wage Statistics as suggested by an IHO in a recent case (see Application of a Student with a Disability, Appeal No. 23-078), but the district in this case has not presented evidence of market-based data of this variety.[13]

Therefore, the hearing record fails to contain sufficient evidence upon which to reduce the amounts awarded to fund the student's transportation services, and the IHO's reductions must be reversed.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2023-24 school year, and that iBrain was an appropriate unilateral placement for the student, and having found that the IHO erred in reducing the award for funding of the cost of private special transportation, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated December 20, 2023, is modified by reversing those portions which reduced the amounts awarded for the costs of the student's transportation services; and,

IT IS FURTHER ORDERED that the district shall fund the costs of the student's unilaterally obtained transportation services for the 2023-24 in the amount of $154,780, consistent with the contract the parent entered into evidence to obtain such services.

Dated: **Albany, New York**
March 21, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[13] If an IHO were to take judicial notice of such government-published statistical information, it would only be appropriate to do so after disclosing to the parties the intention of doing so and providing them with an opportunity to be heard.