The University of the State of New York

The State Education Department
State Review Officer
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No. 24-257

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:
Liberty & Freedom Law Group, Ltd, attorneys for petitioner, by Peter Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, 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, in part, her request for respondent (the district) to fund the costs of her son's tuition at the International Academy for the Brain (iBrain) for the 2022-23 school year. The district cross-appeals from the IHO's decision. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see

20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). 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[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student in this case began attending a special education preschool program in September 2019 as a preschool student with a disability (see Dist. Ex. 3 at pp. 5-6). The evidence reflects that her preschool program closed on March 16, 2020, in response to the school building

closures ordered by the former Governor of the State of New York due to the COVID-19 pandemic, and reopened in October 2020 "offering all remote or a hybrid in-person learning model" (id. at p. 5). The evidence further reflects that the parent selected an "all remote learning" model for the student, and it appears that the student continued to receive instruction through an all remote platform during the entire 2020-21 school year (id.).[1]

In December 2020 and January 2021, the student was evaluated in anticipation of an annual review through the CPSE (see Dist. Ex. 3 at pp. 5-6, 8, 10). During the 2020-21 school year, the student was mandated to receive 12-month programming in a 12:1+3 special class placement (six hours per day), the services of a 1:1 nurse to address "all her medical needs on the bus and in [the] classroom," the services of a 1:1 paraprofessional "during the school day," three 30-minute sessions per week of speech-language therapy, three 30-minute sessions per week of occupational therapy (OT), and three 30-minute sessions per week of physical therapy (PT) (id. at pp. 5, 8-9, 14). Several evaluations were conducted, including an educational evaluation, a speech-language and feeding evaluation, an OT evaluation, and a PT evaluation (see generally Dist. Ex. 3 at pp. 5-16).[2] A CPSE meeting was held and an IEP was developed for the student (id. at pp. 17-30).[3]

On May 20, 2021, a CSE convened to conduct the student's "Turning 5 Re-Evaluation" and developed a school-aged IEP for the student for the 2021-22 school year (Parent Ex. C at pp. 1, 18). The May 2021 CSE found the student eligible to receive special education as a student with multiple disabilities (id. at p. 1).[4] As noted in the May 2021 IEP, although the CSE recommended 12-month programming for the student in a 12:1+(3:1) special class and related services consisting of three 30-minute sessions per week each of individual speech-language therapy, OT, and PT, the parent "express[ed] concerns with the [district]75 placement" and indicated that she "would like home school instruction for [the student] because of her health concerns" (id. at pp. 1, 13-14). The parent also expressed that she was concerned about the student "physically attending school" and "want[ed] [the student's] providers to provide services at home" (id. at p. 2). The May 2021 CSE

[1] The evidence indicates that, as reported by the student's teacher, she provided remote learning to the student "in the form of daily lesson plans, emails, bi-weekly phone calls and remote Circle time activities" (Dist. Ex. 3 at p. 5). It is not clear if the calls were twice each week or once every other week.

[2] Based on the student's OT evaluation completed in January 2021, the therapist had been delivering OT services to the student via telehealth since March 16, 2020, when the student's school closed (see Dist. Ex. 3 at p. 10). The OT evaluation also indicated that, at the time of the evaluation report in January 2021, "in-person [instruction] ha[d] temporarily been suspended" due to the location of the preschool in a "red zone," and therefore, the preschool was then-currently offering only "full remote related services and learning" (id.). The OT evaluation report noted that "[s]everal attempts to make contact with [the] parent for teletherapy were made with no response, therefore no direct observation of [the student] ha[d] been made at [the] time of the report"; rather, the report was based on "previous clinical and teacher reports alone" (id.). Similarly, the PT evaluation report, dated January 2021, indicated that the therapist had been delivering PT services to the student via telehealth since March 16, 2020 (id. at p. 14).

[3] The CPSE IEP in the hearing record does not reflect the date of the meeting, nor does it include any specific program recommendations (see generally Dist. Ex. 3). In addition, the student's name is inaccurately reported in at least one section of the IEP (id. at p. 19).

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

also recommended the services of a full-time, individual paraprofessional for health and ambulation (id. at p. 13).

Based on the evidence in the hearing record, the student did not attend a district public school during the 2021-22 school year for instruction, but rather, consistent with her parent's request, she received "home instruction" beginning on September 20, 2021 (Parent Ex. N. at p. 1).

On May 17, 2022, a CSE convened to conduct the student's annual review and developed an IEP for the 2022-23 school year (see Parent Ex. N at pp. 1, 17). As noted in the May 2022 IEP, the student had received home instruction for the past school year (id. at pp. 1-3). At the CSE meeting, the parent "expressed a concern regarding getting [the student's] speech therapy, [OT] and [PT] in the home" (id. at p. 3). However, according to the May 2022 IEP, the CSE advised her that there were "no therapists available to provide services in the home" at that time (id.). It was further noted in the IEP that, based on a home instruction report dated May 11, 2022, the student had "difficulty staying awake through the [speech-language] session due to tiredness from her medication and sleep apnea" and that her parent was "concerned that she [wa]s not receiving enough instruction because she sle[pt] so often" (id.). Next, the May 2022 IEP reflected the parent's concern with the student's social development and more specifically, with the student "interacting more with her peers" (id.). With regard to the student's physical development, the parent expressed her concern with the student's "strength and stamina" (id. at p. 4). Based on the student's needs, the May 2022 CSE—finding that the student remained eligible to receive special education as a student with multiple disabilities—recommended 12-month programming in a 12:1+(3:1) special class placement for instruction in English language arts (ELA), mathematics, sciences, and social studies, together with three 30-minute sessions per week each of individual speech-language therapy, OT, and PT, as well as three 50-minute sessions per year of parent counseling and training services (id. at pp. 1, 13-14). The May 2022 CSE also recommended the services of a full-time, individual paraprofessional for health and ambulation (id. at p. 13).[5]

On June 10, 2022, the student underwent an initial evaluation at iBrain (see Parent Ex. J at p. 6).

On or about June 28, 2022, the parent executed a "Nursing Service Agreement" with "B&H Health Care. Inc.—DBA Park Avenue Home Care" (B&H) to provide the student with 1:1 private nursing services for the 2022-23 school year from July 6, 2022 through June 23, 2023 (Parent Ex. L at pp.1, 7). The agreement reflected that the student would receive nursing services during the school day and for transportation purposes (id. at p. 1).

[5] The hearing record includes a letter, dated June 9, 2022, penned by a doctor with a salutation of "To Whom it may Concern" (Parent Ex. I). In the letter, the doctor indicated that because the student was at "risk for problems with respiratory infections, her parents felt it was safer for her to have home instruction for the past school year" (id.). However, according to the doctor, the student had "now started the Covid vaccine series and her parents [we]re ready to send her to a specialized comprehensive program such as iBrain" (id.).

By letter dated July 5, 2022, the parent notified the district of her intentions to unilaterally place the student at iBrain for the 2022-23 school year and to seek funding for the costs of the student's attendance from the district (see Parent Ex. F at p. 1).[6]

On July 18, 2022, the parent executed a "School Transportation Service Agreement" with "Sisters Travel and Transportation Services, LLC," (Sisters Travel) to provide transportation services for the student for the 2022-23 school year (Parent Ex. G at pp. 1, 5). According to the agreement, it was "effective from July 18, 2022 through June 30, 2023" (id. at p. 1).

On or about July 25, 2022, the parent executed an enrollment contract with iBrain for the student's attendance during the 2022-23 school year beginning on July 27, 2022 through June 23, 2023 (see Parent Ex. E at pp. 1, 6).[7]

On September 8, 2022, the student began attending iBrain for the 2022-23 school year (see Parent Exs. A at p. 3; B at p. 3; J at p. 1; J at p. 5). iBrain developed an education plan for the student, dated September 22, 2022, (September 2022 iBrain education plan), which included recommendations for the student to attend a 6:1+1 special class placement and related services consisting of the following: five 60-minute sessions per week of individual speech-language therapy, five 60-minute sessions per week of individual PT, four 60-minute sessions per week of individual OT, three 60-minute sessions per week of individual vision education services, one 60-minute session per week of individual assistive technology services, access to assistive technology devices, music therapy, one 60-minute session per month of parent counseling and training services, and special transportation (with supervision by a nurse) (see Parent Ex. J at pp. 36, 40, 42, 44, 49, 52-55). In addition, the September 2022 iBrain education plan included recommendations for the services of a 1:1 paraprofessional and a 1:1 nurse throughout the school day and across all environments (id. at p. 53).

A. Due Process Complaint Notice

In a due process complaint notice dated November 22, 2022, the parent alleged through their attorneys with the Brain Injury Rights Group, Ltd,[8] that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years (see Parent Ex. A at p. 1). In relevant part, the parent indicated that for the 2021-22 school year, she "opted" for the student to receive "remote instruction"; however, the remote instruction was "not appropriate, as [the student] was unable to follow instruction on the computer screen" (id. at p. 3). In addition, the parent noted that the district failed to "provide the mandated therapy sessions" (id.). With respect to the 2022-23 school year, the parent alleged that the district had failed to

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

[7] An individual from iBrain executed the enrollment contract on June 14, 2022 (see Parent Ex. E at p. 6). The hearing record did not include any evidence to explain why the parties to the contract executed it approximately one month apart (see Tr. pp. 1-101; Parent Exs. A-O; Dist. Exs. 1-3; IHO Ex. I; Parent Post-Hr'g Brief; Dist. Post-Hr'g Br.).

[8] According to the parent's reply, it appears that Liberty & Freedom Law Group, Ltd, was formerly known as Brain Injury Rights Group, Ltd. and that the organization has been renamed.

convene a CSE meeting and develop an IEP for the student (id.). According to the parent, the student began attending iBrain for the 2022-23 school year in September 2022, where she received OT, PT, speech-language therapy, vision education services, and music therapy in 60-minute sessions; in addition, the parent noted that the student had access to an assistive technology device and services and the support of a 1:1 nurse and a 1:1 paraprofessional "to support [the student's] needs in all of her therapies and classroom activities" (id.). As relief, the parent sought an order directing the district to fund the costs of the student's tuition, related services, 1:1 nurse, 1:1 paraprofessional, and special education transportation services (with a 1:1 nurse and/or paraprofessional) (id. at p. 6). The parent also requested an order directing the CSE to reconvene to address changes, if necessary; for the district to fund an independent educational evaluation (IEE) (neuropsychological); and for the district to fund an unspecified bank of compensatory educational services based on the IEE recommendations that the student should have as a result of the district's failure to offer a FAPE for the 2021-22 school year (id.).[9]

B. Impartial Hearing Officer Decision

On February 28, 2023, the parties proceeded to an impartial hearing and continued for status updates on March 22, 2023 and May 1, 2023 (see Tr. pp. 1-16). Between the third and fourth dates of the impartial hearing, iBrain developed an education plan for the student, dated May 11, 2023 (May 2023 iBrain education plan) (see Parent Ex. K at p. 1). As noted in the May 2023 iBrain education plan, the student's then-current "medical needs" necessitated a recommendation for "home-based services and implementation of all programming and interventions outlined [within the iBrain education plan] in the home setting" (id. at p. 2). Evidence adduced at the impartial hearing indicated that the student began receiving her home-based services on May 15, 2023 (see Tr. p. 54). According to the May 2023 iBrain education plan, the student then-currently "require[d] a more contained and controlled setting, as the school environment [wa]s at th[at] time physically inappropriate" for her (Parent Ex. K at p. 65). The education plan noted that the student had "struggled with maintaining her health over her time in (sic) given the additional demands of travel and exposure to a larger number of peers and subsequent germ exposure"; therefore, "home services [we]re the most appropriate recommendation for [the student] at th[at] time" (id.). Given the switch to home-based instruction, the May 2023 iBrain education plan noted that "transportation [wa]s therefore not recommended" (id. at p. 66).[10] The May 2023 iBrain education plan continued to recommend the services of a 1:1 paraprofessional and a 1:1 nurse at the student's home throughout the day (id. at pp. 67-68).

The impartial hearing resumed, and at the fourth impartial hearing date held on June 2, 2023, the parent's representative indicated that the parent was seeking to amend the due process complaint notice "once more" (Tr. pp. 17, 19). In an amended due process complaint notice, dated June 9, 2023, the parent included more specific allegations with respect to the district's failure to offer the student a FAPE for the 2022-23 school year and the student's May 2022 IEP (see Parent

[9] The hearing record also includes an amended due process complaint notice dated November 22, 2022, which appears to duplicate the allegations in the parent's original due process complaint notice, also dated November 22, 2022, but modified the parent's address.

[10] At the impartial hearing, the director of special education at iBrain (director) testified that the student used the Sisters Travel transportation services while she attended iBrain in-person (see Tr. pp. 75-76).

Ex. B at pp. 1, 3). In addition, the parent alleged that the district failed to provide the student with all of her related services during the 2021-22 school year (id. at p. 4). With regard to relief, the parent requested an order directing the district to fund the costs of the student's tuition, related services, 1:1 nurse, 1:1 paraprofessional, and special education transportation services (with a 1:1 nurse and/or paraprofessional) (id. at p. 6). The parent also requested an order directing the CSE to reconvene to address changes, if necessary; for the district to fund an IEE (neuropsychological); and for the district to fund an unspecified bank of compensatory educational services based on the IEE recommendations that the student should have as a result of the district's failure to offer a FAPE for the 2021-22 school year (id.).

After the parent amended the due process complaint notice in June 2023, the parties returned to the impartial hearing approximately eight months later on February 8, 2024 and the hearing concluded on February 29, 2024, after six total days of proceedings (see Tr. pp. 23-101).

Both parties submitted closing briefs to the IHO after the conclusion of the impartial hearing (see generally Parent Post-Hr'g Br.; Dist. Post-Hr'g Br.).[11] Overall, the parent argued that she sustained her burden to establish the appropriateness of iBrain and that equitable considerations weighed in favor of her request for funding for the costs of tuition and related services, including nursing and special transportation services (see Parent Post-Hr'g Br. at pp. 3-8). In its closing brief to the IHO, the district argued that the parent failed to sustain her burden to establish the appropriateness of the student's unilateral placement at iBrain for the 2022-23 school year and primarily pointed to iBrain's use of telehealth to deliver related services and the absence of any progress reports in the hearing record (see Dist. Post-Hr'g Br. at pp. 1-2). The district did not raise or address any issues related to whether the district offered the student a FAPE for the 2022-23 school year or with respect to equitable considerations (id. at pp. 1-3).

In a decision dated May 15, 2024, the IHO found that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years and that iBrain was an appropriate unilateral placement, except for noting that the implementation of the student's related services was "questionable" (IHO Decision at pp. 6-9). Thus, the IHO determined that the parent met her burden with respect to the appropriateness of the unilateral placement at iBrain, "save for the related services" (id. at p. 9).

Turning to equitable considerations, the IHO noted that a finding in favor of the parent's requested relief hinged on "whether the parent cooperated with the CSE and the manner the related services were implemented" (IHO Decision at p. 9). Initially, the IHO found that the parent provided the district with a 10-day notice of unilateral placement that went "unanswered or acknowledged" by the district (id.). The IHO also found that the district raised "issues regarding the way services were provided that would limit or preclude tuition reimbursement," and through cross-examination, the district demonstrated "why full payment for services should be reduced or denied on equitable ground" (id. at pp. 9-10). Here, the IHO noted that testimony by the parent's witnesses indicated that the "related services were being rendered by a paraprofessional who was not trained by the service providers rendering services via telehealth" (id. at p. 10, citing Tr. p. 59). In addition, the IHO pointed to the district's arguments that the parent's relief should be reduced

[11] Neither the district nor the parent presented an opening statement at the impartial hearing (see Tr. pp. 101).

or denied on the basis of iBrain delivering the student's related services remotely (see IHO Decision at p. 10). The IHO was persuaded by the district's arguments, and found that while a "private placement need not provide certified special education teachers . . . where services [we]re being provided to a child with special needs, the person rendering such services must be trained" (id., citing Bucks County Dep't of Mental Health/Mental Retardation v. Pennsylvania, 379 F. 3d 61 [3d Cir. 2004]). Relying on the holding in Bucks County, the IHO concluded that the "basis for denial of the relief sought [wa]s supported" because the "person p[er]forming the services [wa]s not trained" (IHO Decision at p. 10).

Next, the IHO found that while the parent's evidence supported a determination that iBrain was an appropriate unilateral placement, the "services were not rendered appropriately," and the hearing record lacked evidence regarding whether the student made progress or whether the student benefitted from instruction (IHO Decision at p. 10). Circling back to equitable considerations, the IHO noted that the district did not explain the appropriateness of the student's IEP or the failure to provide the student with services; the parent cooperated with the CSE "as best they could"; and the parent timely provided the district with her 10-day notice of unilateral placement (id. at pp. 10-11). Therefore, the IHO found that equitable considerations weighed in favor of the parent's requested relief, but "not the total costs of the services" (id. at p. 11). As relief, the IHO ordered the district to fully fund the costs of the student's tuition ($164,736.85) but reduced the amount of funding awarded for the costs of the student's related services (i.e., supplemental tuition) by $50,000.00 (id. at pp. 11-12). In addition, the IHO ordered the district to provide the student with round-trip transportation services with a transportation nurse and/or paraprofessional, to perform a neuropsychological evaluation of the student, and to convene a CSE meeting to generate a new IEP for the student within seven days from receipt of the IHO's order (id. at p. 12).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred by reducing the amount of supplemental tuition awarded for the costs of the student's related services delivered via telehealth by iBrain during the 2022-23 school year. The parent also argues that the IHO erred by requiring the submission of affidavits prior to receiving direct payment of iBrain's tuition and related costs. Finally, the parent asserts that the IHO failed to address her request to recover the costs of the student's nursing services for the 2022-23 school year and seeks an order directing the district to fund the nursing services consistent with the "Nursing Service Agreement." The parent submits additional documentary evidence to support an award of funding for the nursing services the student purportedly received.[12]

[12] 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]). Upon review, the additional documentary evidence, i.e., the Nursing Service Agreement, was already entered into the hearing record as evidence at the impartial hearing as parent exhibit "L," therefore, there is no need to accept the proffered document at this time.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. Initially, the district affirmatively asserts that it is not challenging the IHO's findings that the district failed to offer the student a FAPE and that iBrain was an appropriate unilateral placement for the student for the 2022-23 school year. As a cross-appeal, the district contends that equitable considerations warrant a reduction in the tuition charged by iBrain, especially given the changes in the student's educational program in or around May 2023. The district also argues that equitable considerations warrant a reduction in the supplemental tuition charged by iBrain where, as here, the student received telehealth therapies and the hearing record lacked any evidence of the student's actual attendance or documentation concerning what services she actually received. Thus, the district seeks an order denying the parent's request for funding for iBrain's tuition in full. Next, the district contends that the parent has not appealed the IHO's failure to address reimbursement or funding of the student's nursing services in the decision, and as a result, the SRO has no jurisdiction to award such relief. Relatedly, the district asserts that the hearing record lacks evidence that the student received nursing services and the parent's attempt to submit additional documentary evidence must be foreclosed. Finally, the district asserts that the IHO erred by awarding the IEE to the parent and by ordering the development of a new IEP for the student.

In a reply and answer to the district's cross-appeal, the parent responds to the district's allegations. The parent argues that, contrary to the district's assertions, the issue concerning the IHO's determination to reduce the reimbursement awarded for the student's related services was "not one of equity, rather, it [wa]s one of appropriateness." The parent further argues that the majority of the district's assertions in its cross-appeal were not made before the IHO, and therefore, the district should be precluded from raising such arguments for the first time on appeal. For example, the parent specifically notes that the district did not raise any issues at the impartial hearing with regard to the costs of iBrain's programming, whether the parent's reimbursement award should be limited to days the student actually attended school, or with respect to the costs of the student's 1:1 nursing services. Consequently, the parent contends that the district did not properly preserve these arguments. Next, the parent contends that the district mistakenly asserts that equitable considerations require a reduction in the costs of the student's tuition and related services as unreasonable or excessive. The parent notes, however, that this argument must fail because the IHO did not make any findings of unreasonableness or excessive costs in the decision. In addition, the parent notes that the hearing record lacked any evidence upon which to compare iBrain's costs in order to make a finding of unreasonable or excessive costs. In addition, the parent argues that the hearing record contains sufficient evidence to find that the delivery of the student's related services via telehealth during her home-based programming was appropriate.

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 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (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., 459 F.3d at 364; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir.

2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

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

Initially, neither the parent not the district challenges the IHO's findings that the district denied the student a FAPE for the 2021-22 and 2022-23 school years, or that iBrain was an appropriate unilateral placement for the student for the 2022-23 school year; as such, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The gravamen of this appeal and cross-appeal is whether the parent is entitled to be fully reimbursed for the costs of the student's unilateral placement at iBrain for the 2022-23 school year, including related services and nursing services. Before turning to the parties' respective arguments, the IHO's decision must be further examined, as the parties present differing views of the basis for the IHO's reduction in the amount of reimbursement awarded for the student's related services during the 2022-23 school year.

In his decision, the IHO found iBrain was an appropriate unilateral placement and provided the student with specially designed instruction (see IHO Decision at p. 9). However, the IHO questioned the implementation of the student's related services via telehealth or telepractice, but nevertheless, determined that the parent "met the second of the three Burlington/Carter criteria for tuition reimbursement, save for the related services" (id.).

With respect to equitable considerations, the IHO indicated that whether "equitable factors support[ed] a parent's claim for tuition reimbursement hinge[d], in large part, on whether the parent cooperated with the CSE and the manner the related services were implemented" (IHO Decision at p. 9). The IHO found that the parent timely provided the district with a 10-day notice of unilateral placement (id.). The IHO noted, however, that the district had raised issues "regarding the way services were provided that would limit or preclude tuition reimbursement" through cross-examination, which demonstrated "why full payment for services should be reduced or denied on equitable grounds" (id. at pp. 9-10). More specifically, the IHO indicated that the parent witness's testimony revealed that the student's related services were being "rendered by a paraprofessional who was not trained by the service providers rendering the services via telehealth" (id. at p. 10). The IHO was persuaded by the district's argument that any reimbursement for related services should be denied "because the service providers could not have rendered the related services remotely" and then pointed to the Second Circuit's holding in Frank G. and the Third Circuit's holding in Bucks County to support a reduction in the amount of reimbursement awarded (id.).[13]

Next, the IHO returned to the issue of equitable considerations, and found that the parent met the third criteria for tuition reimbursement and "there [we]re no equitable issues that would preclude or limit tuition reimbursement" for the student's unilateral placement at iBrain (IHO Decision at pp. 10-11). Overall, the IHO concluded that the parent, "[h]aving partially satisfied all three of the Burlington/Carter criteria," was entitled to "full reimbursement" for the costs of the student's unilateral placement at iBrain for the 2022-23 school year, "but not the total costs of the services" (id. at p. 11).

The IHO then noted that while the parent's request to be reimbursed for the costs of the student's related services should be "denied in its entirety," the IHO balanced this against the district's failure to offer the parent with providers, and therefore, reduced the amount of

[13] The IHO also noted that the hearing record was "silent as to progress made by the student as no progress reports were submitted" as evidence (IHO Decision at p. 10). To the extent that the IHO relied, in part, on the absence of evidence of the student's progress, 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, 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 addition, the IHO's finding ignores the director's testimony at the impartial hearing about the student's progress in mathematics (see Tr. pp. 68-69). He explained that iBrain had "QPRs, quarterly progress reports, that would certainly display evidence of goal achievement" (Tr. p. 71). The director acknowledged, however, that the hearing record did not include any quarterly progress reports from iBrain or a class schedule for the student (see Tr. pp. 72, 74). In addition, the director testified about the student's progress in her social skills and literacy skills, in the area assistive technology (i.e., switch on a jelly-bean device/augmentative and alternative communication device [AAC]), progress made related to music therapy, and progress in her related services of OT, PT, speech-language therapy, and vision education services (see Tr. pp. 85-89, 91).

reimbursement for the student's related services by $50,000.00 "for services rendered" (IHO Decision at p. 11).

A. Unilateral Placement

The Second Circuit Court of Appeals has recently held it is error for an IHO to apply the Burlington/Carter test by weighing equitable considerations in 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]).

1. Delivery of Related Services

As previously indicated, the student began receiving home-based instruction on May 15, 2023 pursuant to a recommendation for home-based services in her May 2023 iBrain education plan (see Tr. pp. 53-54; Parent Ex. K at pp. 2, 67).[14] At the impartial hearing, the director of special education at iBrain (director) explained that, prior to receiving home-based instruction, iBrain's standard operating procedures required ensuring that the "parent's space [wa]s able to accommodate home services" and the "paraprofessional w[ould] bring any necessary equipment to the student's home," such as a "communication device" (Tr. pp. 54-55). When receiving services at home, a paraprofessional would be present in the home (see Tr. pp. 55-56). For example, the director explained that students receiving home-based instruction received the instruction via telehealth, and the "providers would be the one providing the service while the paraprofessional w[ould] be facilitating any actions that the providers [we]re instructing" and the paraprofessional would be "actually physically putting hands" on the student to assist (Tr. p. 56). The director also testified that "the student would also have a nurse with them who would attend to their medical needs, in this case for [the student]" (id.). Next, the director testified that the therapists would be able to communicate "real-time feedback" to the paraprofessionals during therapy sessions (Tr. p. 57). According to the director, the student received OT, PT, speech-language therapy, and vision education services via telehealth with the paraprofessional delivering hands-on therapy directed by the respective therapists (see Tr. pp. 63-64). In addition, the director testified that neither the paraprofessional nor the nurse attending to the student at home was trained in the related services the student received (see Tr. pp. 58-64). According to the director, the decision to recommend home-based services for the student in May 2023 was a "medical decision" so that the student would no longer have to endure the demands of travel and exposure to germs (Tr. p. 67). He explained that the student began receiving telehealth services when she was transferred to home-based services (see Tr. p. 83). The director also testified that the use of telehealth services had not affected the progress made by students who received such services and "from our vantage point at iBrain, telehealth services [we]re just as effective as in-person services" (see Tr. p. 85). The

[14] At the impartial hearing, the director confirmed that, in his affidavit, he described the student during the 2022-23 school year at iBrain as attending a 6:1+1 special class and that she remained in a 6:1+1 special class through the end of the 2022-23 school year (see Tr. pp. 44-45; see generally Parent Ex. M). He also testified that if a September 2022 iBrain education plan existed, it had been developed prior to when he began working at iBrain, which was in February 2023 (see Tr. pp. 45-46; see generally Parent Ex. J).

director explained that his statement concerning the efficacy of the telehealth services was based on "tracking students' progress in their progress reports" and from "communicating with their therapists and their teachers" (Tr. pp. 92-93).

Based on the above, the IHO erred in finding that the delivery of related services via telehealth or telepractice to the student for the 2022-23 school year, or a portion therefore, was not an appropriate service for the student.[15]

2. Nursing Services

The parent contends that the IHO failed to address her request to be reimbursed for the costs of the student's 1:1 nursing services during the 2022-23 school year. The district agrees, but argues that the parent fails to appeal the merits of this issue—such as the appropriateness of the nursing services, the cost of the services, or the contract for nursing services—and therefore, the SRO is without jurisdiction to address this on appeal. In addition, the district contends that the hearing record lacks evidence that the student received 1:1 nursing services during school hours, and alternatively, any award thereto must be limited to dates the student actually received the services.

Initially, and contrary to the district's assertion, a review of the parent's request for review includes a section dedicated to the IHO's failure to address this issue that the parent raised in her due process complaint notice. In addition, the parent asserts in her reply that the director testified about the student's need for nursing services and the district's attorney cross-examined the director on this issue (see Reply & Answer to Cr. App. ¶ 17).

Generally, a student who needs school health services[16] or school nurse services[17] to receive a FAPE must be provided such services as indicated in the student's IEP (see School Health Services and School Nurse Services, 71 Fed. Reg. 46,574 [Aug. 14, 2006]; see also 34 CFR

[15] In the request for review, the parent makes much of the undersigned's purported approval of the remote or telehealth related services that occurred in Application of a Student with a Disability, Appeal No. 23-041, but in that proceeding the IHO had found that the related service providers at iBrain were merely unqualified, with evidence regarding remote, teletherapy, or virtual services arguments presented as an afterthought. The undersigned issued no blanket approval of remote services. Neither the district nor parents who selected iBrain in that case or this proceeding discussed the state's requirements regarding telepractice for specific types of therapies and, if disputed, it is incumbent on the parties and an IHO to engage in record development about the extent to which telepractice is appropriate regarding a student's individual needs and ability to benefit from them (Pub. Health Law § 2999-cc[2], [4]; see "Telepractice Guidance" available at https://www.op.nysed.gov/telepractice-guidance; "Telepractice Memo – What is Telepractice?," at p. 1, Office of the Professions Mem., available at https://www.op.nysed.gov/sites/op/files/covid19_telepractice%20memo.pdf). In this case, the district explicitly conceded that iBrain provided appropriate services to the student, thus once again, there is little reason to belabor the point.

[16] "School health services means health services provided by either a qualified school nurse or other qualified person that are designed to enable a student with a disability to receive a [FAPE] as described in the [IEP] of the student" (8 NYCRR 200.1[ss][1]).

[17] "School nurse services means services provided by a qualified school nurse pursuant to section 902(2)(b) of the Education Law that are designed to enable a student with a disability to receive a [FAPE] as described in the [IEP] of the student" (8 NYCRR 200.1[ss][2]).

300.34[a], [c][13]; 8 NYCRR 200.1[qq], [ss]; Cedar Rapids Community Sch. Dist. v. Garret, 526 U.S. 66, 79 [1999] [indicating that school districts must fund related services such as continuous one-on-one nursing services during the school day "in order to help guarantee that students . . . are integrated into the public schools"]). State guidance indicates that, in determining whether a student needs a 1:1 nurse, a CSE must obtain evaluative information in all areas of the student's disability or suspected disability; generally, it is expected that "[t]his information may include information from a physician, such as a written order to the school nurse from a student's health care provider" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 2, Office of Special Educ. Mem. [Jan. 2019], available at https://www.nysed.gov/sites/default/files/programs/special-education/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf). In providing school nurse services, "the school remains responsible for the health and safety of the student and ensuring the care provided to the student is appropriate and done in accordance with healthcare provider orders" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 5). However, there is also State guidance indicating that "[i]f the CSE/CPSE determine that a student's health needs in accordance with provider orders for treatment can be appropriately met by the school's building nurse, a shared nurse, [or] a 1:1 aide to monitor and alert the school nurse, then a 1:1 nurse is not necessary" ("Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs," at pp. 11-12, Office of Student Support Servs., [Jan. 2019], available at https://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf). To determine whether a student requires the support of a full-day, continuous 1:1 nurse, State guidance indicates the CSE "must weigh the factors of both the student's individual health needs and what specific school health and/or school nurse services are required to meet those needs" and provides the following set of factors to consider when making that determination:

- The complexity of the student's individual health needs and level of care needed during the school day to enable the student to attend school and benefit from special education;
- The qualifications required to meet the student's health needs;
- The student's proximity to a nurse;
- The building nurse's student case load; and,
- The extent and frequency the student would need the services of a nurse (e.g., portions of the school day or continuously throughout the day).

("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at pp. 2-3).

Turning to the evidence in the hearing record, the student's need for nursing services is well documented. For example, an annual educational report, dated January 2021 and created during the 2020-21 school year when the student was a preschooler, reflects that the student required a 1:1 nurse to "address all her medical needs on the bus and in [the] classroom" (Dist. Ex. 3 at pp. 1, 5). In addition, the educational report indicates that the student had been diagnosed as having "Extreme Microcephalic, Ptosis of Eyelid, Contracted Spasticity, Optical blindness, Seizure Disorder, Spastic Quadriplegia, Obstructive Sleep Apnea, Respiratory Insufficiency and Profound Global Delays across all domains"; the report also noted that the student was "non-ambulatory, non-verbal, and exhibit[ed] poor head and body control" (id. at p. 5). According to the educational

report, the student had a "G-tube (October 2020) due to Aspiration and to prevent Aspiration Pneumonia"(id.). The educational report noted also pointed to a "1:1 Nurse Justification letter written by [the] School Nurse" (id.). In addition, the educational report further reflects that the student was "fed by G-tube but w[ould] gradually eat pureed food as well" and the student, at that time, was "reliant on adult intervention for all [activities of daily living (ADL)] skills" (id. at p. 7).

For the 2021-22 and 2022-23 school years, the student's IEPs included recommendations for a 1:1 health paraprofessional but did not include a recommendation for either a 1:1 nurse or school nurse services (see Parent Ex. C at pp. 12-13; Dist. Ex. 1 at pp. 13-14). However, the evidence in the hearing record also reveals that the student received home-based instruction delivered remotely during the 2020-21 and 2021-22 school years, at the parent's request (see Parent Ex. C at p. 1; Dist. Exs. 1 at pp. 1-2; 3 at pp. 5, 10, 14).

According to the September 2022 iBrain education plan, the student was attending a 6:1+1 special class with a "1:1 paraprofessional and 1:1 nurse, due to the extensive nature of her brain injury, which severely affect[ed] his (sic) physical and cognitive capabilities, as well as his (sic) health" (Parent Ex. J at p. 1). The education plan indicates that the student required the "support of her paraprofessional who [wa]s able to facilitate sessions with the therapists and provide [the student] with consistency throughout his (sic) day" (id.). With respect to a 1:1 nurse, the September 2022 iBrain education plan noted that the student required "maximal assistance from her paraprofessional, teacher, 1:1 nurse, and her family with her mobility, transfers, safety awareness, hygiene, and alternate [ADL skills] at home and at school" (id. at p. 6). As reported in the management needs, the student required 1:1 nursing services for "G-tube feeding, managing secretions and due to her medical complexity," as well as the assistance of a 1:1 paraprofessional for "assistance in mobility and transfers and to support [the student's] head when working against gravity" (id. at pp. 23, 25). The September 2022 iBrain education plan included an individualized health plan (IHP), which documented the student's need for a 1:1 nurse due to her risks for aspiration, skin integrity, and injury related to seizures (id. at pp. 26-28). According to the education plan, the student also required 1:1 nursing services related to her impaired physical mobility, communication, social interactions, and delayed growth and development (id. at pp. 28-29).[18] The iBrain plan included recommendations for both a 1:1 paraprofessional and a 1:1 nurse throughout the school day, as well as a 1:1 nurse for transportation purposes (id. at pp. 52-53).

At the impartial hearing, the director testified that, based on his review of the September 2022 iBrain education plan, the student required one-to-one nursing services for "'G-Tube feeding, managing secretions, and due to her medical complexity'" (Tr. p. 51; Parent Ex. J at p. 25).

With respect to the May 2023 iBrain education plan, it was noted that the student had attended iBrain from "September through January" (Parent Ex. K at p. 2). According to the plan, the student was being recommended for "home-based services and implementation of all programming and interventions outlined [therein] in the home setting" due to her "current medical needs" (id.). In describing the student's present levels of performance in the area of assistive technology, it was noted that when the student "received telehealth sessions," she "consistently

[18] The September 2022 iBrain education plan also noted a food allergy; however, that portion of the education plan referred to a different student (see Parent Ex. J at p. 30).

appeared more alert and engaged during the therapy sessions" (id. at pp. 14-15).[19] It was further noted that the student appeared to be "more relaxed and alert when in the safety and comfort of her own home" (id. at p. 15). Additionally, the iBrain plan indicated that the student's "paraprofessional and nurse [we]re essential during all therapeutic sessions in regard to positioning, carryover of [assistive technology] skills and monitoring medical state during the session and throughout the school day" (id.).

Notwithstanding the recommendation for home-based services, the May 2023 iBrain education plan included a recommendation for the student to receive 1:1 nursing services, in part, due to the student's need for "G-tube feeding, managing secretions and due to her medical complexity" (Parent Ex. K at pp. 37-38, 65, 67-68). In addition, the iBrain education plan continued to recommend 1:1 nursing services as documented in the IHP within the education plan (id. at pp. 39-43). However, the IHP does not appear to have been adapted for the student to receive a home-based program as it included a number of goals connected with the student attending a school program, such as that the student would "have his [sic] needed asthma medication available and accessible at school," would "remain safe and free of injuries while at school," would be "safe in all school environments," and "would have access to and from classes and therapy services" (id. at pp. 39-43).

Prior to reaching a conclusion, I note that neither party described the factors they relied upon when making a determination as to whether the student required 1:1 nursing services (see, e.g., "Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 3, Office of Special Educ. Mem. [Jan. 2019], available at https://www.nysed.gov/sites/default/files/programs/special-education/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf). The State guidance for school district determinations specifically outlines that the student's individual health needs and level of care need to be considered: the qualification required to meet the student's health needs, the student's proximity to a nurse; the building nurse's student case load, and the extent and frequency the student would need the services of a nurse (id.).

Turning to the available evidence, the hearing record supports finding that the student's needs warranted the provision of 1:1 nursing services in order to support the student in school so that the student could benefit from the educational and related services delivered to the student while present at iBrain. In particular, the hearing record includes a January 2021 annual educational report which references a 1:1 nurse justification letter written by the school nurse (Dist. Ex. 3 at p. 5). In addition, as discussed above, the May 2022 IEP identified the student's needs and indicated the student was fed via a G-tube and reliant on adult intervention for all ADL skills (Dist. Ex. 1 at p. 4). Further both the September 2022 and May 2023 iBrain education plans further noted the student's need for both 1:1 paraprofessional services and 1:1 nursing services, with the inclusion of an IHP identifying goals and nursing interventions for the student (Parent Exs. J at pp. 1, 6, 25-30; K at pp. 2, 8, 15, 21, 39-43). As the district did not present evidence, or even an

[19] Similarly, with respect to the student's present levels of performance in speech and language, the May 2023 iBrain education plan reported that the student's "arousal improved" during "home/remote services" (Parent Ex. K at pp. 23-25). The May 2023 iBrain plan included a recommendation that the student "continue to receive five individual sessions [of] 60 minutes in length [] via home/telehealth services to further her rate of progress" (id. at p. 27).

argument, as to why 1:1 nursing services were excessive for the student during the school day or that access to a school nurse would have been sufficient to meet the student's identified health needs, there is no basis for denying funding for nursing services provided to the student while the student attended school at iBrain.

Although not addressed by the IHO, or the parties, as their arguments related to nursing services for the 2022-23 school year are vague with the parent focusing on the IHO's failure to address the issue and the district questioning whether the student actually received 1:1 nursing services during the school year, there is one factor with respect to equitable considerations that must be addressed. The Second Circuit has noted that "parents are not entitled to reimbursement for services provided in excess of a FAPE" (L.K. v. New York City Dep't of Educ, 674 Fed. App'x 100, 101 [2d Cir. 2017]).

Notwithstanding the student's need for school health services in the form of nursing services while present in the school environment, as discussed above the hearing record shows that, at some point during the 2022-23 school year, the student stopped attending iBrain and began receiving home-based instruction. Pertinent to this change in placement, the parent's contract with B&H was for the provision of "a 1:1 Private Duty Nurse for [the student] during the SCHOOL HOURS," which were defined as "[t]he hours of operation for [the student] at the [school]" (Parent Ex. L at pp. 1, 2). The contract further provided that the parent could terminate the contract if the student "relocate[d] outside of local school district or due to health reasons" no longer required the services (id. at p. 3).

To the extent that the student received nursing services at home during the 2022-23 school year, it does not follow that the district should be responsible to pay for these at home services. More specifically, in determining whether a district was responsible for providing clean intermittent catheterization, the Supreme Court laid out a two part test; first, the service must meet the definition of related services, in that it must be "'a supportive service[e] … required to assist a handicapped child to benefit from special education'" and, second, the service must not be excluded as a medical service (Irving Independent Sch. Dist. v. Tatro, 468 US 883, 889-90 [1984]). Following up on its decision in Tatro, the Supreme Court addressed the question of 1:1 nursing services and reaffirmed the position that with respect to the first part of the test, "[a]s a general matter, services that enable a disabled child to remain in school during the day provide the student with 'the meaningful access to education that Congress envisioned'" (Cedar Rapids, 526 US at 73, citing Tatro, 468 US at 891). In both cases, the Court was careful to point out that the school health services had the purpose of assisting the student in attending school rather than remaining at home (Cedar Rapids Cmty. Sch. Dist., 526 U.S. at 73; Tatro, 468 U.S., at 890-91 [explaining that "[a] service that enables a [disabled] child to remain at school during the day is an important means of providing the child with the meaningful access to education that Congress envisioned. The Act makes specific provision for services, like transportation, for example, that do no more than enable a child to be physically present in class"]). However, the Court in Tatro left open that Congress may also have intended to spare public schools from some costs that were unduly expensive and beyond the rage of their competence, citing home and hospital instruction as an example (Tatro, 468 U.S., at 892-93, n. 11). Thus, if individualized school health services are necessary to assist a child with a disability to attend school with his or her peers, the Supreme Court has explained that those services that fall short of excluded medical services (i.e. services performed by a physician) may very well need to be provided by a school district to comply with

the Act. If a child with a disability is hospitalized, it is clear that the child would remain eligible to receive special education services under the Act even while hospitalized (20 USC § 1401[29][a]), but it does not follow that Congress required all non-physician heath-related services and costs to be transferred from the U.S. health care delivery system to the public education system if the patient happened to be a student with a disability under IDEA. The same is true with respect to the delivery of health care services in the student's home. If school health services would enable the student to attend school as envisioned by Congress, the district is responsible for to provide them, but if health care oversight is being provided in the student's home simply because the services are necessary for the child's overall well-being and without regard to whether the child is engaged in educational or noneducational daily activities, it does not follow that Congress sought to transfer the responsibility for the student's non-physician health care to school districts in a child's home setting. Accordingly, in this instance, as the student was receiving instruction at home, the provision of 1:1 nursing services goes beyond the definition of a special education or a related service under the IDEA as outlined by the Supreme Court and it is therefore in excess of what the district would have been required to offer the student a FAPE. Under equitable considerations, I find the award of nursing services will be limited to the portion of the school year that the student required them to physically attend school.B

B. Other Relief

1. IEE

The IHO also ordered the district to "perform a neuropsychological evaluation of the [s]tudent within one month from receipt" of the IHO's decision, and thereafter, if the district failed to complete this evaluation, the IHO indicated that the parent would "secure the evaluation from an independent provider of her choosing at public expense" (IHO Decision at p. 12).[20] The district contends that the IHO erred in this order, because the parents requested an IEE for the first time in the November 2022 due process complaint notice. The parent did not address the district's cross-appeal on this point in the reply and answer to the cross-appeal.

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 have the right to have 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]).

[20] The district offers no information regarding whether it has complied with the IHO's directive to conduct a neuropsychological evaluation of the student (see generally Answer & Cr. App.). The district also does not challenge this portion of the IHO's order as part of its cross-appeal.

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]).

In the November 2022 due process complaint notice, and as repeated in the June 2023 amended due process complaint notice, the parent requested an IEE in the form of an independent neuropsychological evaluation as part of her requested relief (see Parent Exs. A at p. 6; B at p. 6). The parent does not, however, in either the November 2022 due process complaint notice or in the June 2023 amended due process complaint notice, identify what district evaluation, if any, the parent disagreed with, but indicated that the parent "disagree[d] with [the district's] failure to conduct any evaluations of [the student]" (Parent Ex. A at p. 4; B at p. 4). The parent does not allege that there was any request for an IEE made to the district prior to the due process complaint notices.

In past decisions, SROs 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, SROs 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 observed 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];[21] Jefferson Cnty. Bd. of Educ. v. Lolita 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 (Trumbull, 975 F.3d 152, 168-69 [2d Cir. 2020]).[22] Accordingly, based on the continued study of the judicial and administrative guidance on the topic, other SROs have changed the 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 (see, e.g., Application of a Student with a Disability, Appeal No. 23-081). I see no reason to depart from this trend.

Thus, I will sustain the district's cross-appeal on this point and reverse the IHO's order for the district to fund an IEE if the district fails to complete its own neuropsychological evaluation of the student.

2. New IEP

Finally, the IHO ordered the district to "convene a CSE meeting within seven days from receipt of the present order to generate a new IEP to address the student's needs" (IHO Decision at p. 12). The district contends that the IHO erred in this order, because the 2022-23 school year at issue has long since expired and the IHO's order would improperly wade into the 2024-25 school year, which was not at issue in the instant administrative proceedings. The parent did not address the district's cross-appeal on this point in the reply and answer to the cross-appeal.

Although the parent did not explain the basis for this relief in either the November 2022 due process complaint notice or the June 2023 amended due process complaint notice, it is generally consistent with requests to prospectively place students in a particular type of program and placement through IEP amendments, which, under certain circumstances, can have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

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

[22] 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" (975 F.3d at 169).

Here, the parent's requested relief—and the IHO's order thereto—are not supported by the evidence in the hearing record and, as a result, the IHO's award must be vacated. At this point, the school year at issue—2022-23—is over and, in accordance with its obligation to review a student's IEP at least annually, a CSE should have already produced an IEP that will be in effect through the start of the 2024-25 school year, which the district properly notes has not been the subject of a due process proceeding (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

At this juncture, to award specific changes to the student's IEP—or to order a CSE to convene to generate a new IEP for the student that was presumably related to the district's failure to offer the student a FAPE for the 2022-23 school year—would, in effect, provide an additional award for the 2024-25 school year that bears no relation to whether or not the district's recommended program or placement for that year is appropriate. Indeed, such an award would demonstrate that prospective placements almost always serve to circumvent the statutorily required CSE process and generally, except in rare circumstances not present here, constitute an improper usurpation of the CSE's role by the due process system, rather than serve as appropriate remediation for the district's denial of a FAPE to the student for the time periods claimed. Therefore, consistent with the district's argument, the IHO's order for the district to convene a CSE meeting to generate a new IEP for the student must be vacated.

VII. Conclusion

Based on the above, the IHO's determination that the district failed to offer the student a FAPE for the 2022-23 school year is final and binding on the parties, the unilateral placement of the student at iBrain, including the provision of 1:1 nursing services at school, was appropriate for the 2022-23 school year, and the IHO erred in reducing tuition for the student's related services based on equitable considerations, but the provision of home-based nursing services would have been in excess of what the district was required to provide as part of a FAPE. Additionally, the IHO erred in awarding the additional relief of an IEE and a reconvene of the CSE for the 2024-25 school year.[23]

I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated May 15, 2024, is modified by reversing those portions which reduced funding for the related services provided to the student during the 2022-23 school year, directed the district to fund an IEE of the student, and directed the district to convene the CSE to generate a new IEP for the student;

IT IS FURTHER ORDERED that the district shall reimburse the parent for or directly fund the costs of the student's tuition at iBrain for the 2022-23 school year, pursuant to the iBrain

[23] The IHO's award of transportation services is not modified on appeal.

enrollment contract, in the total amount of $164,736.84 for base tuition and $105,056.00 for supplementary tuition; and

IT IS FURTHER ORDERED that the district shall reimburse the parent for or directly fund those portions of the costs of the student's 1:1 in-school nursing services during the 2022-23 school year, upon presentation of proof of delivery of services.

Dated: **Albany, New York**
August 26, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER