The University of the State of New York

The State Education Department
State Review Officer
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No. 24-610

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

Appearances:
Liberty & Freedom Legal Grp., Ltd., attorneys for petitioners, by Richa Raghute, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request for respondent (the district) to fund the costs of their daughter's tuition at the International Academy for the Brain (iBrain) for the 2024-25 school year. The district cross-appeals from that portion of the IHO's decision which determined that the district failed to offer appropriate educational programming to the student for the 2024-25 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 student in this case has been the subject of five prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 24-455, Application of a Student with a Disability, Appeal No. 24-359; Application of a Student with a Disability, Appeal No. 24-187; Application of the Dep't of Educ., Appeal No. 24-065; Application of a Student with a Disability, Appeal No. 22-062; Application of a Student with a Disability, Appeal No. 21-156). Accordingly, the parties' familiarity with the student's educational history is presumed and will not be repeated in detail.

Briefly, the student is nonverbal and nonambulatory, and has received diagnoses of neuronal ceroid lipofuscinosis (Batten disease), optic atrophy, retinal degeneration, focal epilepsy, scoliosis, intermittent nystagmus, global hypotonia, external ophthalmoplegia, strabismus, cortical visual impairment, global developmental delay, and cognitive impairment (Parent Ex. E at pp. 1, 39; Dist. Ex. 9 at p. 2). The student communicates using augmentative and alternative communication (AAC) and receives nutrition via g-tube feedings throughout the day (Parent Ex. E at pp. 2, 4). She attended iBrain during the 2023-24 school year (id. at p. 1).

On January 11, 2024 the CSE convened, found the student eligible for special education as a student with multiple disabilities, and recommended an educational program with an implementation date of January 29, 2024 (Parent Ex. D at pp. 1, 49).[1, 2] The January 2024 CSE recommended that the student attend a 12-month program in a 12:1+(3:1) special class in a district specialized school with three periods per week of adapted physical education and further recommended that the student receive related services consisting of four 60-minute sessions per week of individual occupational therapy (OT), five 60-minute sessions per week of individual physical therapy (PT), five 60-minute sessions per week of individual speech-language therapy, and three 60-minute sessions per week of individual vision education services (id. at pp. 42-44). The January 2024 CSE also recommended that the parents be provided with one 60-minute session per month of group parent counseling and training (id. at p. 43). Additionally, the January 2024 CSE recommended that the student be provided with the assistance of full-time, individual paraprofessional services for health, ambulation, and safety (id. at pp. 43-44). The CSE also recommended the student for assistive technology devices identified as a switch and mount and one 60-minute session per week of individual assistive technology services (id. at p. 44).

In a letter dated June 10, 2024, the parents indicated they rejected "the most recent proposed IEP and school placement for the 2024-25 school year (see Parent Ex. A-A). The parents advised the district that they were re-enrolling the student at iBrain and would seek public funding for that placement, and also requested pendency for the extended school year (id.).

In a June 11, 2024 prior written notice, the district informed the parents of the recommendations made by the January 2024 CSE (Dist. Ex. 5). In a school location letter dated June 11, 2024 the district notified the parents of the specific school location the student was assigned to attend for the 2024-25 school year (Dist. Ex. 6). [3]

The parents electronically signed a nursing services agreement with B&H Health Care Services, Inc. (B&H Health Care), on June 18, 2024 (see Parent Ex. A-G). The parents also

[1] Two copies of the January 2024 IEP were admitted into the hearing record (compare Parent Ex. D, with Dist. Ex. 1). For purposes of this decision the parent exhibit will be cited (see Parent Ex. D).

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

[3] The June 11, 2024 prior written notice and school location letter were translated into Spanish (see Dist. Exs. 5 at pp. 7-11; 6 at p. 4).

electronically signed an agreement with Sisters Travel and Transportation Services, LLC (Sisters Travel) on June 19, 2024 (see Parent Ex. A-F).

On June 26, 2024, the parents signed an enrollment contract for the student to attend iBrain during the 2024-25 school year (see Parent Ex. A-E).[4]

A. Due Process Complaint Notice

In a due process complaint notice dated July 2, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (Parent Ex. A). More specifically, the parents alleged that the district failed to appropriately classify the student and that the recommended 12:1+(3:1) special class was "grossly inappropriate" because it was too large and too crowded to provide the student with the quiet, distraction-free environment she needed in order to make progress, the recommended classroom did not offer the appropriate amount of individualized instruction, and the student needed to be in a class with no more than six students (id. at p. 7). Further, the parents alleged the recommended school location was not appropriate because the student would not have been placed with peers who had similar needs, and the student would have been deprived of access to peers who were working on similar goals and who had similar needs (id. at p. 8). The parents also alleged that the district failed to adequately consider a nonpublic school placement for the student in violation of its operating procedures and failed to recommend individual nursing services and music therapy (id.). Additionally, the parents alleged that they were denied a meaningful participation in the IEP process because the district failed to send a prior written notice or a school location letter, and the January 2024 IEP recommended placement was predetermined because the district failed to consider alternative placement options at the IEP meeting (id. at p. 10). The parents also alleged that the district failed to recommend adequate transportation accommodations by failing to recommend a 1:1 travel nurse, an air-conditioned vehicle, and limited travel time (id.).

Additionally, the parents alleged the district failed to evaluate the student in all areas of suspected disability because it failed to assess the student's specific educational needs six months prior to any potential CSE meeting for the 2023-24 school year and failed to conduct a neuropsychological evaluation (Parent Ex. A at p. 9). The parents requested that the district fund independent education evaluations (IEEs) consisting of an independent psychological assessment, an educational needs assessment, an assistive technology evaluation, and a neuropsychological evaluation (id.).

As relief, the parents requested an interim order on pendency, and an order directing the district to pay for the student's tuition at iBrain for the 2024-25 school year; an order directing the district to directly pay Sisters Travel; an order directing the district to directly pay for 1:1 nursing services; an order directing the district to reconvene the CSE to update its recommendations; an order directing the district to reevaluate the student and to provide assistive technology services and devices; and an order for the district to fund an IEE (Parent Ex. A at pp. 11-12).

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

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 2, 2024 and concluded on September 20, 2024 after four days of proceedings including a prehearing conference (Tr. pp. 1-301).[5] In a decision dated November 15, 2024, the IHO found that the district denied the student a FAPE for the 2024-25 school year because the January 2024 CSE failed to recommend 1:1 nursing services (IHO Decision at pp. 2, 13-15). The IHO also determined that iBrain was not an appropriate placement for the student and that equitable considerations did not favor the parents (id. at pp. 2, 18-21, 23-28). Additionally, the IHO noted that the district's motion to dismiss was denied (IHO Decision at p. 26; see Tr. pp. 42-43). Accordingly, the IHO denied direct funding for the student's tuition at iBrain for the 2024-25 school year; denied direct funding for 1:1 nursing services, and denied direct funding to Sisters Travel (id. at pp. 28, 31).

As for pendency, the IHO determined that a prior SRO decision, Application of a Student with a Disability, Appeal No. 24-187, served as the basis for the student's pendency program (IHO Decision at p. 29). The IHO also determined that the district's offer to transport the student to and from her pendency program consistent with the last agreed upon transportation program was not a material alteration to the student's educational program (id. at pp. 29-30). Therefore, the IHO ordered the district to provide the student's pendency program for the 12-month school year, which consisted of tuition and related services at iBrain, individual nursing services, and round trip special transportation from the closest safe curb location to iBrain, including 1:1 paraprofessional services during transportation; a lift bus; limited travel time of no more than 60 minutes each way; and air conditioning (id. at p. 31).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in determining the student's unilateral placement at iBrain was not appropriate because she applied a "double standard." The parents argue that the January 2024 IEP copied the annual goals from the iBrain report and education plan (iBrain plan) and that because the IHO found that the related services and measurable annual goals listed on the January 2024 IEP were appropriate, she should have also found iBrain's related service recommendations appropriate. The parents contend that the IHO erred in discrediting the testimony of the iBrain director of special education. The parents also argue that the IHO erred in finding that the parents' transportation contract and the nursing services agreement did not identify appropriate services for the student. Additionally, the parents assert that the IHO erred in finding that they did not have a recognizable financial obligation to iBrain, Sisters Travel, or B&H Health Care. The parents further argue the IHO erred in finding that equitable considerations did not favor the parents because they did not provide requested medical documentation to the district, arguing the January 2024 IEP acknowledged that the student required nursing services and that the record contained no evidence that the CSE sent the parents the forms it supposedly required to recommend nursing services. The parents argue that the district's actions improperly placed the

[5] The district filed a motion to dismiss, dated August 19, 2024, asserting that the parents failed to participate in a resolution meeting (Dist. Mot. to Dismiss). The parents' responded to the district's motion on August 21, 2024 (Response to Dist. Mot. to Dismiss). The district's motion and parents' response were submitted with the hearing record as supplemental documents.

responsibility on them to provide the information necessary to make a recommendation. Additionally, the parents argue that the IHO erred in finding the cost of the student's private program was unreasonable. The parents also raise a procedural matter related to the conduct of the hearing, arguing that the IHO erred by admitting the district's evidence as it was not provided to the parents five days prior to the hearing and further erred in accepting the district's transcript of the CSE meeting as it was inaccurate. Lastly, the parents argue the IHO erred in her pendency determination, by finding that the district's offer to provide transportation "supplanted" the SRO decision and by failing to address nursing services, which the parents contend were ordered as part of the SRO decision establishing pendency. As relief, the parents request reversal of the IHO determinations regarding the appropriateness of iBrain and equitable considerations and for pendency to be modified so that the student's pendency program is the program set forth in the SRO decision in Application of a Student with a Disability, Appeal No. 24-187.

The district cross-appeals arguing the IHO erred in determining that it failed to offer the student a FAPE by failing to recommend nursing services for the 2024-25 school year. The district argues that the IHO only found that "'the IEP at [i]ssue acknowledge[d] that [the s]tudent needed nursing services but did not recommend any,'" asserting that the IHO impliedly rejected the parents' argument that the CSE making nursing services contingent on the parents' provision of medical forms was illegal. Additionally, according to the district, the medical forms were sent to the parents prior to the CSE meeting and the parents failed to return the completed medical forms, the hearing record did not include documentation of the student's need for nursing services as of the time of the January 2024 CSE meeting, and the remainder of the January 2024 IEP was appropriate for the student at the time it was developed. The district argues the IHO's determinations that iBrain was inappropriate and equitable considerations did not favor the parents should be affirmed. Regarding pendency, the district argues the IHO was correct to find that the district's offer to transport the student was valid, because determinations on how the pendency services were to be provided remains with the district and thus should be affirmed. As for the admission of evidence after the five-day disclosure rule, the district argues the parents were not prejudiced by the admission of documents because the parents were in possession of many of the documents the district was seeking to admit, as they were referenced in the parents' due process complaint notice, and the IHO provided the parents an opportunity to adjourn the case to review the documents, which they declined.

In a reply and answer to the cross-appeal, the parents contend the IHO correctly found that the district denied the student a FAPE.

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]).[6]

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

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

VI. Discussion

A. Preliminary Matters – Disclosure of Evidence

The parents argue that the IHO erred by admitting district exhibits 1 through 14 into the hearing record in violation of the five-day disclosure rule because it prejudiced the parents in that their attorney was unable to prepare adequately within the time allowed as a result of the delayed disclosure. Regarding district exhibit 14 specifically, the parents argue it is not an accurate transcription of the January 2024 CSE meeting as it was produced by a program rather than a human transcriber.

[6] 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).

The district argues the IHO had discretion to admit the district's evidence; that the parents were not prejudiced because they had an opportunity to adjourn the case to review the documents; and the parents were in possession of many of the documents admitted.

Federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). However, courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., Tp. High Sch. Dist. 113, 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

Accordingly, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]).

Here, during the August 26, 2024 impartial hearing, the district representative explained that the district intended to timely disclose exhibits 1 through 13 via an email dated August 19, 2024 with an "Adobe link" attachment (Tr. p. 59). The district representative acknowledged that the link appeared to not have uploaded properly; however, he also did not receive any notice from the parents that they could not access the exhibits or that they did not see the link (Tr. pp. 59-60). The district representative also explained that the August 19, 2024 email further indicated that the district intended to introduce exhibits 14 and 15 but those exhibits were not available and would be disclosed the following day (Tr. pp. 57-58). According to the district representative, exhibits 14 and 15 were disclosed within about twelve hours after the August 19, 2024 email (Tr. p. 58). The district representative then stated that if parents' counsel insisted on making a timeliness argument, the district would move for an adjournment until the timeliness issue was cured (Tr. p. 60). The IHO stated she was inclined to admit the district's exhibits and also agreed to adjourn the hearing to allow parents' counsel the opportunity to review the documents, which the parents' counsel declined (Tr. pp. 61-62). The IHO further indicated that there were no timeliness issues regarding district exhibits that were duplicates of parent exhibits or the documents mentioned in the parents' due process complaint notice, such as a prior written notice and a school location letter both dated June 11, 2024 (Tr. pp. 63-64).

Upon review of the hearing record, there is insufficient basis to find the IHO abused her discretion in admitting the district exhibits over the parents' counsel's objections.

B. January 2024 IEP

The IHO determined the district failed to offer the student a FAPE for the 2024-25 school year by failing to recommend nursing services despite the January 2024 CSE's acknowledgement that the student needed nursing services in order to receive a FAPE (IHO Decision at p. 15).

The district argues that there was no evidence before the January 2024 CSE of the student needing 1:1 nursing services and that it was permissible for the district to request the completion of medical forms to support a recommendation for nursing services prior to recommending the service. The district further asserts that although medical forms were provided to the parents, the parents never returned the completed medical forms. According to the district, the remainder of the January 2024 IEP was appropriate for the student at the time it was developed.

The parents argue to uphold the IHO's FAPE determination as there is no evidence that the district sent the parents the required medical forms. The parents also argue the CSE improperly pushed responsibility for providing the information necessary to make a recommendation for nursing services onto the parents.

Although not in dispute on appeal, a brief description of the student's needs as they relate to nursing services is warranted to resolve the issue of whether the district failed to offer the student a FAPE for the 2024-25 school year by failing to recommend nursing services.

1. The Student's Needs

The December 2023 iBrain plan was substantially incorporated into the district's January 2024 IEP (compare Parent Ex. D, with Dist. Ex. 10). The January 2024 IEP indicated that the student "require[d] a 1:1 paraprofessional and 1:1 nurse to support her medical, physical, cognitive, and sensory needs throughout the day" and "a 1:1 nurse to administer emergency medications, aid in safety, and monitor for seizure activity" (Parent Ex. D at p. 13).

Regarding oral motor skills, the January 2024 IEP stated that the student was "NPO (nothing by mouth)," and presented with "grossly low tone," evidenced by an "open-mouthed posture at rest," and "poor secretion management and anterior spillage of secretions" (Parent Ex. D at p. 7). Additionally, the IEP indicated that the student had "intermittent difficulty coordinating her breath and swallow as evidenced by her occasionally coughing on her own secretions" (id.).

According to the January 2024 IEP, the student "had a developmental regression at the onset of her seizures" and received her nutrition, hydration, and medications via g-tube (Parent Ex. D at p. 14). The IEP indicated that the student required a 1:1 nurse throughout the school day to attend to the student's g-tube feeds, and when the student's OT sessions coincide with the student's feeding, it was necessary to collaborate with her nurse regarding optimal positioning (id.). Additionally, the student required a 1:1 nurse during her PT sessions to "attend[] to [the student's] safety during positioning and handling, and intervene[] when needed" (id. at p. 17).

The January 2024 IEP indicated that the student "benefit[ted] from support from her nurse for various physical and medical needs during sessions" (Parent Ex. D at p. 9). The IEP stated the 1:1 nurse would attend to the student's physical and medical needs and would "attempt to reposition her to try and make her more comfortable" (id. at pp. 10, 11). In the speech development section of the student's IEP it stated that "[i]t [wa]s important to note that [the student]'s performance [wa]s correlated with her arousal level, positioning, motivation and medical status" thus, "a familiar caregiver, such as her paraprofessional and her 1:1 nurse [were] needed to interpret her various vocalizations and facial expressions" (id. at p. 11).

Regarding recommendations, the January 2024 CSE identified modifications and resources needed to address the student's management needs including a specific management need noting that the student "require[d] 1:1 nursing for G-tube feeding, managing secretions and due to her medical complexity" (Parent Ex. D at p. 21). Parental concerns documented in the January 2024 IEP stated that the parents were not in agreement with the CSE's proposed programming and that they believed the student needed a specialized private school due to her medical needs (id. at p. 52). The representatives from iBrain who attended the January 2024 CSE meeting also expressed concerns about the student needing a 1:1 nurse (id.).[7]

2. Related Services – Nursing Services

An IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" (20 U.S.C. § 1401[26][A]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]).

Generally, a student who needs school health services[8] or school nurse services[9] 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

[7] The IEP noted that the CSE discussed medical documentation required for making a recommendation for 1:1 nursing services and further indicates that forms were provided to the parents and school staff (Parent Ex. D at p. 52). Although it is unclear when or if the district received the completed documentation back from the parents, the hearing record also includes medication administration forms that were signed by the student's physician on June 21, 2024, June 24, 2024, June 25, 2024, and August 2, 2024 and then provided by iBrain to the district (Parent Ex. J; see Tr. pp. 183-84). According to the June 21, 2024 iBrain physician's order, the student required "a 1:1 nurse to ensure safety and that the [student] remain[ed] in optimal health, free of injury with all of [her] needs met during the hours that [she] [was] receiving services" at iBrain (Parent Ex. J at p. 13). The physician's order indicated that the student was nonverbal and non-ambulatory "with full dependence on her nurse to prepare her feeds and disconnect her" from her g-tube, monitor, check the g-tube for placement, and suction her frequently "to ensure airway patency" (id.).

[8] "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]).

[9] "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).

Prior to reaching a conclusion, I note that neither party described the factors they relied upon when deciding 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 evidence in the hearing record, as discussed above, the student's need for nursing services was well documented by the January 2024 CSE (see Parent Ex. D at pp. 9-11, 13-14, 17, 21, 52). However, the January 2024 IEP does not reflect a recommendation for nursing services (see Parent Ex. D). According to the district representative, the CSE required medication administration forms and the CSE did not have those forms at the time of the meeting (Tr. pp. 95-96). The district representative explained that once the CSE receives the forms, in order to make appropriate recommendations for nursing services, they "consult with the nursing services unit" and "consult with the physician if necessary" (Tr. p. 96).

The January 2024 IEP reflected that the student "require[d] a 1:1 nurse; the team discussed the medical documentation required for this recommend[ation] and relevant forms were provided to the parent and school" (Parent Ex. D at p. 52). According to the transcript of the January 2024 CSE meeting, the district school psychologist, who also served as the district representative at the meeting, stated the CSE was "not able to initiate any nursing services as the forms [the district] received this morning [we]re not for the current school year" and therefore the CSE was "unable to submit [the forms] for review for nursing consideration" (Dist. Exs. 14 at pp. 1, 94; 15). The district representative further stated that she would "make sure to send [the parent] the correct forms and as soon as those [we]re returned to [the district], [the CSE] c[ould] revisit the consideration for nursing" (id. at p. 95). The district representative testified that she did not recall receiving any forms after the January 2024 CSE meeting (Tr. p. 148).

However, this is not the process called for under IDEA because it is the CSE that is required to make the determination of which services should be placed on a student's IEP and it is the district's responsibility to ensure that the CSE has sufficient information about the student's needs and that individuals who can make appropriate decisions are part of the CSE process. Placing the onus on the parent, rather than the district, to obtain the required medical forms is problematic since the district may not delegate its responsibilities to the student under IDEA to the parents (see 8 NYCRR 200.4[b][3]). The district members of the CSE in this case failed to appreciate that they were the individuals responsible to determine whether the student needed nursing services in order to receive a FAPE. A district is authorized to conduct necessary medical assessments in order to provide appropriate special education programming to a student with a disability (see Shelby S v. Conroe Indep. Sch. Dist., 454 F.3d 450, 454 [5th Cir. 2006]).

Here the January 2024 IEP indicated, in numerous locations, that the student needed 1:1 nursing services throughout the school day (Parent Ex. D at pp. 5, 7, 9-14, 17, 21, 41, 52). However, the district school psychologist who also served as the district representative testified that the CSE could not make a recommendation for nursing services without first obtaining medical forms from the parent (Tr. pp. 95-96).[10] Accordingly, the evidence in the hearing record supports the IHO's finding that the student required the support of 1:1 nursing services, and the

[10] The CSE meeting notice invite for the January 2024 meeting did not include any medical or nursing staff from iBrain or the district and simply stated "iBrain staff" (Dist. Ex. 7 at pp. 1-5). The attendance log from the January 2024 CSE meeting showed that no medical staff from iBrain were present, nor did any district medical staff participate (Dist. Ex. 2 at p. 1).

district's failure to recommend 1:1 nursing services for the student denied the student a FAPE for the 2024-25 school year.

C. Unilateral Placement

Next, I must address the parties' dispute as to whether iBrain was an appropriate unilateral placement for the student for the 2024-25 school year.

The IHO determined iBrain was not appropriate for the student because the hearing record lacked properly qualified witnesses to explain the appropriateness of the student's special education and related services program at iBrain or the appropriateness of the parents' unilaterally obtained private 1:1 nursing services and private transportation services (IHO Decision at p. 19). The IHO also found there was no evidence of the "essential details" of the student's program, including how and why the student was placed in a 6:1+1 special class or why certain related services were recommended for the student (id.). The IHO noted that the student's iBrain education plan and two progress reports were admitted into the hearing record but lacked details on how the student's program was specially designed to meet her unique needs, and how iBrain or the private nursing and transportation companies were providing the student's services (id. at p. 20).

The parents argue the IHO erred in finding iBrain was not an appropriate unilateral placement for the student because the January 2024 CSE recommended similar if not the same goals from the iBrain education plan; there was sufficient evidence to support the appropriateness of the related services recommended by iBrain; and there was sufficient evidence to support that the student made meaningful educational progress at iBrain. The parents also argue that the student's private nursing services and transportation services were appropriate and the IHO erred in finding to the contrary.

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). 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 (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show

that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. iBrain

As a part of the IHO's finding related to the appropriateness of the unilateral placement, the IHO determined that the deputy director of special education at iBrain was not credible (IHO Decision at pp. 15, 18-19, 23).

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

The parents object to the IHO's credibility findings because, according to the parents, the IHO based her determination on the iBrain deputy director of special education's inability to read a date on a document and his qualifications as a director of special education (Req. for Rev. ¶¶ 17-18). However, a review of the IHO decision shows that the IHO weighed the witness' demeanor in that he "avoided answering questions," with the refusal to identify the date on the student's physician's request for 1:1 nursing services for the student as an example of the witness' evasiveness (IHO Decision at p. 19; see Tr. p. 195; Parent Ex. J at p. 13). The parents' contention that counsel for the parents may have provided the IHO with an easier to read copy of the parents' exhibit than what was provided to her own witness during the hearing does not detract from the IHO's reading of the witness' behavior during the hearing. Additionally, nontestimonial evidence in the hearing record does not support overturning the IHO's credibility finding.

However, as discussed in detail below, review of the documentary evidence alone without use of the noncredible testimony of the iBrain director of special education, supports a finding that iBrain was appropriate to meet the student's needs.

Specifically, review of the April 20, 2024 iBrain education plan developed for the 2024-25 extended school year shows that iBrain staff conducted assessments and identified the student's cognitive, academic, social/emotional, communication, vision, adaptive, and motor present levels of performance (see Parent Ex. E at pp. 1-34). Regarding the student's cognitive skills, the iBrain education plan indicated that she was aware of her environment, smiled when she participated in preferred activities, responded to her name, followed "directions in steps," and was working on color identification (id. at pp. 1-2). Academically, in reading, the student attended to a three-minute story and answered comprehension questions using her AAC device, and was working on letter identification (id. at p. 2). In math, the student demonstrated understanding of the concept of more or less, identified quantities of 0 and 1 using objects, and was working on number identification (id.). Socially, the student worked on demonstrating expression of preferred activities and attending to them (id.). The iBrain education plan indicated that the student communicated using assistive technology and was able to scan through prerecorded choices presented auditorily in "fields of up to 3-6" to make choices and was working on answering questions, greeting, expressing herself, and responding with her AAC device (id. at pp. 3, 6-7).

According to the iBrain education plan, the student was dependent for all activities of daily living, required "total assistance" with fine motor tasks and transitions, and used a manual tilt in space wheelchair for mobility (Parent Ex. E at pp. 3-6, 10). Additionally, the student had "several conditions that impact[ed] her visual system and educational performance" such that her "vison [wa]s highly limited" (id. at p. 13). Therefore, the student "seem[ed] to have the greatest potential for reliable interaction with teachers and her peers at school by using both her auditory and tactual sensory channels" (id. at pp. 1, 13).

The April 2024 iBrain education plan also included a management needs section where iBrain defined the student's academic, social, and physical needs and the human, environmental, and material resources required to address those needs (Parent Ex. E at pp. 35-37). Further, iBrain developed an individualized health care plan that identified the student's diagnoses, medical history, objectives to manage the student's health needs and the interventions/staff responsible, and the timeline by which the plan will be evaluated (id. at pp. 38-44).

Next, review of the iBrain education plan shows that iBrain staff developed annual goals for the student to address the special education needs described above (Parent Ex. E at pp. 45-59). The April 2024 iBrain education plan recommended 12-month programming consisting of a 6:1+1 special class extended school day (id. at pp. 65). iBrain staff also recommended that the student receive the following weekly related services: four 60-minute sessions of individual OT, five 60-minute sessions of individual PT, five 60-minute sessions of individual speech-language therapy, three 60-minutes sessions of individual vision education services, two 60-minute sessions of individual music therapy, one 60-minute session of group music therapy, and one 60-minute session of assistive technology services (id. at pp. 57, 65, 66). Additionally, the student was recommended to receive full-time, daily, individual 1:1 paraprofessional services, 1:1 nursing services, and specifically identified assistive technology devices and adaptive seating (id. at p. 66). iBrain staff also recommended that the parents receive parent counseling and training monthly as one 60-minute "individual/group" session (id.).

Turning to the specially designed instruction offered at iBrain, the April 2024 iBrain education plan provided for a daily, 1:1 direct instruction model in a private learning space with adapted and multisensory materials, including use of real objects to support instruction, presentation of materials against a black background and slant board, and a flashlight as a spotlight (Parent Ex. E at pp. 7, 15). To support the student's physical needs, the iBrain plan reflected that the student utilized a wheelchair and various therapeutic equipment such mats, cube chairs, wedges, balls, swings, bolsters, benches, scooters, stander, ankle foot orthoses (AFOs), knee immobilizers, and a gait trainer (id. at pp. 6-7, 29-30).

The student utilized an AAC device (iPad) connected to two jellybean switches mounted on her wheelchair (Parent Ex. E at pp. 6-7). The April 2024 iBrain education plan stated, "[the student wa]s most successful and preferred access point [wa]s on each side of her head (temples) and scan[ned] through various prerecorded choices presented with auditory fields of up to 3-6" (id.). The student also "required the use of assistive technology (i.e. built up handles, slant board, contrast, angled utensils, 3-D items, etc.) for best participation in activities" (id. at pp. 7-8).

Additionally, the April 2024 iBrain education plan identified instructional strategies for the student such as that she "benefit[ed] from engaging in a multi-sensory environment to increase attention, body awareness, and motivation for participation in functional activities" (Parent. Ex. E p. 7). The student also required breaks to maintain attention, increase arousal level and active engagement, extended time to aid in motor planning and cognitive processing, and modeling (id.). The education plan also noted that the student "require[d] access to a quiet, isolated environment to work towards skill acquisition before generalizing to the classroom environment as she bec[ame] easily distracted by added visual and auditory input" (id.). iBrain staff reported that the student was "highly motivated by musical activities and auditory stimuli," and that they used maximum verbal prompting, tactile cues, sensory breaks, repetition, and increased processing/response time (id. at pp. 19, 22, 26).

Regarding special transportation services, the IHO determined that the hearing record lacked "material detail[s]" regarding the student's transportation (IHO Decision at p. 21). The parents argue the transportation services provided by Sisters Travel were appropriate.

Here, it is undisputed that the student required special transportation services (see Parent Exs. D at pp. 48-49; E at p. 64). Specifically, the medical administration forms signed by the student's physician, on June 25, 2024, indicated that the student required special transportation accommodations (Parent Ex. J at p. 8). Additionally, according to a request for medical transportation accommodation form signed the student's physician on June 21, 2024, due to the severe nature of the student's brain injury, she required special transportation including a lift bus/wheelchair ramp, air conditioning, wheelchair accessibility, and flexible pick-up/drop-off times/locations; additionally, the form indicated the student needed a 1:1 transportation nurse due to being fully dependent for tracheostomy and vent monitoring and required management and support during transportation including suctioning and management of her gastrostomy and seizure activity (id. at p. 12).

According to the travel agreement, Sisters Travel agreed to provide transportation services that met "any and all standards required by federal and state law" and that the vehicle would maintain the following conditions: air conditioning, regular-size wheelchair accessibility (e.g., lift-bus/wheelchair ramp), and sitting space to accommodate a person to travel with student, as needed (Parent Ex. A-F at p. 2). The agreement also stated that if the student required additional equipment for transportation, the vehicle would accommodate those additional needs of the student (id.). Additionally, according to the nursing agreement with B&H Health, the agency would provide a 1:1 transportation nurse for the student (Parent Ex. A-G at p. 1).

The IHO also determined that the hearing record lacked material details regarding the 1:1 nursing services provided to the student during the 2024-25 school year (IHO Decision at p. 21). However, as discussed at length above, it is undisputed that the student required nursing services during the 2024-25 school year (Parent Exs. D at pp. 5, 7, 9-14, 17, 21, 41, 52; E at p. 66).

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, as identified above, the hearing record includes medication administration forms that were signed by the student's physician on June 21, 2024, June 24, 2024, June 25, 2024, and August 2, 2024 which indicate the student needed the support of 1:1 nursing services (see Parent Ex. J). Further, both the April 2024 and December 2023 iBrain education plans noted the student's need for 1:1 nursing services, with the inclusion of a health plan identifying goals and nursing interventions for the student (Parent Ex. E at pp. 1, 36, 38; Dist. Ex. 10 at pp. pp. 1, 33, 35). According to the nursing agreement with B&H Health, the agency was contracted to provide 1:1 nursing services for the student during school hours (Parent Ex. A-G at p. 2).

Overall, based on the totality of the circumstances, the evidence in the hearing record reflects that iBrain, along with the separate companies providing the student with transportation and nursing services, provided the student with specially designed instruction that addressed her identified special education needs. Although, the IHO determined the director of iBrain was not credible and no other qualified witnesses testified about the student and her progress, review of the student's April 2024 iBrain education plan shows that it identified and addressed the student's developmental, academic, functional, social and physical needs (see Parent Ex. E). To the extent the IHO would have preferred testimony from the student's providers or parents, there is no

requirement that parents must present particular forms of evidence in order to meet their burden under the Burlington-Carter standard. Rather, a "totality of the evidence" standard should be employed when determining the appropriateness of a unilateral placement. Here, in order to meet their evidentiary burden, the parents relied on the iBrain education plan, a detailed and comprehensive document which included descriptions of every area of the student's needs, the instruction provided, and the related services being used to address those needs at iBrain. Accordingly, the IHO's determination that the evidence did not support that iBrain was an appropriate unilateral program for the student must be reversed.[11]

D. Equitable Considerations

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

The IHO determined that equitable considerations did not weigh in favor of the parents for four separate reasons: (1) the parent withdrew her testimony; (2) the parent refused to attend a resolution meeting with the district; (3) the parent sent a 10-day notice before the district recommended a placement for the 2024-25 school year; and (4) the cost of student's program at iBrain, the nursing contract, and the transportation contract were unreasonable and excessive (IHO Decision at p. 25). The IHO also determined that the parents delayed providing any completed medical forms to the CSE until well after they sent the district their 10-day notice for the 2024-25

[11] To the extent that the found there was insufficient evidence to show how the student's iBrain educational plan was implemented during the 2024-25 school year, the hearing record includes an iBrain enrollment contract as well as contracts for the delivery of nursing services and transportation services (Parent Exs. A-E; A-F; A-G). Although it would have been preferable for the hearing record to include either testimony as to the delivery of services or progress reports completed during the 2024-25 school year, it is worth noting that the last day of the hearing concluded on September 20, 2024 so that only a report as to a small portion of the school year would have been available. Additionally, the district should have information regarding implementation of services for the student during the 2024-25 school year as the district has been funding the student's placement at iBrain under pendency (see IHO Decision at pp. 28-31).

extended school year and too late for the CSE to revise the student's IEP before the beginning of school year (id.). The IHO determined the CSE meeting took place approximately five months prior to the start of the 2024-25 extended school year and thus there was no question that the parents could have completed and returned the district's forms in time for any necessary revision of the IEP months before the school year at issue began (id. at p. 26).

The parents argue the IHO erred in finding that equitable considerations did not favor them because they did not provide the requested medical documentation to the CSE. The parents argue the IHO erred in determining they did not have a recognizable financial obligation and erroneously reasoned that the transportation contract and nursing contract allowed for subcontracting of responsibilities and was thus inappropriate. The district argues that the IHO's determinations as to equitable consideration should be upheld.

1. Ten-day Notice

Initially, I will address the IHO's determination that the parents sent a ten-day notice before the district recommended a placement for the student for the 2024-25 school year and that doing so was improper (see IHO Decision at p. 25).

The Second Circuit has emphasized that "[t]he ten-day notice requirement gives school districts an opportunity to discuss with parents their objections to the IEP and to offer changes to the IEP designed to address those objections—all before the parents enroll their child in a private school and file a due process complaint" (Bd. of Educ. of Yorktown Cent. School Dist. v. C.S., 990 F.3d 152, 171 [2d Cir. 2021]; see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]; Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004] [noting that the statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools"]). During the ten-day notice period, a district "may seek to correct the IEP" after it has been given notice of the parents' objections and "may defend against a claim for tuition reimbursement by pointing out that parents did not cooperate in the revision of the IEP, or that the corrected IEP, if accepted by the parents, would have provided the child with a FAPE" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171).

Here, the parent's 10-day notice disagreeing with the January 2024 IEP was dated June 10, 2024 (see Parent Ex. A-A). The June 10, 2024 letter specifically stated that the purpose was to provide "notice of the [p]arents' rejection of the most recent proposed [IEP], recommended program and school placement, for the 2024-25 extended school year" and of their intent to maintain the student's placement at iBrain (Parent Ex. A-A at p. 1). The letter further stated that the district had not issued a school location letter for the 2024-25 extended school year and that if the district recommended the same public school as last year, "the [p]arents have previously rejected that location because it was not appropriate for the [s]tudent" (id.).[12] The letter also stated that the parents were concerned with the appropriateness of the recommended placement for reasons including, but not limited to, class size ratio, class functional and academic grouping,

[12] The district sent a prior written notice and school location letter dated June 11, 2024 (Dist. Exs. 5-6).

staffing, accessibility, availability of adequate resources, and the lack of individualized attention and support (id. at p. 2).

The January 2024 IEP had an implementation date of January 29, 2024 with a projected annual review date of January 11, 2025; therefore, the January 2024 IEP would have been the IEP in place at the start of the 2024-25 school year when the parent determined to unilaterally place the student at iBrain (see Parent Ex. D at p. 1).[13] The parents timely expressed their objections to the recommended program for the 2024-25 school set to begin in July 2024. As indicated above, the IDEA provides that parents notify the district "they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]). Accordingly, the parents complied with the 10-day notice requirement and equitable considerations do not warrant a reduction, or denial of funding based on the lack of a 10-day notice.

2. Parent Cooperation and Resolution Meeting

Turning next to the parents' argument that the IHO erred in finding equitable considerations do not favor them because they did not provide the requested medical documentation to the CSE, placing the onus on the parents, rather than the district, to obtain the required medical forms is problematic since the district may not delegate its responsibilities to the student under the IDEA to the parents (see 8 NYCRR 200.4[b][3]). Nevertheless, tuition may be reduced or denied if a parent fails to make the student 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]). This case is unusual insofar as, for most parents across the State, it is routine to obtain and provide physical and medical documentation from their children's personal physicians at the request of evaluating district personnel in a cooperative fashion, rather than subjecting their children to assessment by private clinicians then later, duplicative physical or medical assessment procedures by the district. Similarly, district personnel across the State routinely conduct appropriate consultations with district medical directors, school nurses and student's private health care providers so that upon meeting the CSEs are prepared to complete an appropriate IEP for each student with a disability. In this instance, the more common cooperative procedures appear to have broken down and the hearing record indicates that the parents obtained medical documentation in support of the student's need for nursing services and special transportation services by June 2024; however, the hearing record indicates that this documentation was never delivered to the district (see Tr. pp. Parent Ex. J). Conversely, the district relied solely on the information provided by iBrain and the parents and did not attempt to obtain any assessments of the student (see Tr. pp. 108-09). Under these circumstances, the IHO's finding that equitable considerations do not favor the parents because they did not provide the requested medical documentation to the CSE is reversed.

[13] The Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unliterally] place" their child (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]).

The IHO also determined that equitable considerations did not favor the parents because they did not cooperate during the resolution period (IHO Decision at pp. 25-26). The IDEA, as well as State and federal regulations provide that, within 15 days of the receipt of the due process complaint notice, the district shall convene a resolution meeting where the parents discuss their complaint and the school district has an opportunity to resolve that complaint with the parents and the relevant members of the CSE who have specific knowledge of the facts identified in the complaint, including a representative of the school district who has decision-making authority, but not including an attorney of the school district unless the parents are accompanied by an attorney (20 U.S.C. § 1415[f][1][B][i]; 34 CFR 300.510[a]; 8 NYCRR 200.5[j][2][i]). The resolution period provision allots 30 days from the receipt of the due process complaint notice for the district to resolve the complaint to the parent's satisfaction or the parties may proceed to an impartial hearing (20 U.S.C. § 1415[f][1][B][ii]; 34 CFR 300.510[b][1]; 8 NYCRR 200.5[j][2][v]). Except where the parties have agreed to waive the resolution process or use mediation, a parent's failure to participate in a resolution meeting "will delay the timeline for the resolution process," as well as the timeline for the impartial hearing, until the meeting is held (34 CFR 300.510[b][3]; 8 NYCRR 200.5[j][2][vi]). Further, a school district may request that an IHO dismiss a due process complaint notice if, at the conclusion of the 30-day resolution period and notwithstanding reasonable efforts having been made and documented, the district was unable to obtain the participation of the parent in the resolution meeting (34 CFR 300.510[b][4]; 8 NYCRR 200.5[j][2][vi][a]). On the other hand, if the district fails to convene the resolution meeting within 15 days of receipt of the parent's due process complaint notice or fails to participate in the resolution meeting, the parent may seek the intervention of the IHO to begin the impartial hearing timeline (34 CFR 300.510[b][5]; 8 NYCRR 200.5[j][2][vi][b]). If a parent does not feel that their concerns have been adequately addressed at the resolution meeting, the parent is free to proceed with the due process proceedings and seek what they feel will adequately remedy them (see Polanco v. Porter, 2023 WL 2242764 at *5 [S.D.N.Y. Feb. 27, 2023] [noting that the resolution period is a time where the district may remedy any alleged deficiencies in the IEP without penalty, but if the parent feels their concerns have not been adequately addressed, and a FAPE has still not been provided, then the parent may continue with the due process proceeding and seek reimbursement]).

As for the district's motion to dismiss for the parents failure to participate in the resolution meeting, as a general matter, summary disposition procedures akin to those used in judicial proceedings are a permissible mechanism for resolving certain proceedings under the IDEA (see, e.g., Application of a Student with a Disability, Appeal No. 19-102; Application of the Dep't of Educ., Appeal No. 11-004),[14] but generally regulations do not address the particulars of motion practice.[15] Instead, unless specifically prohibited by regulation, IHOs are provided with broad

[14] While permissible, summary disposition procedures should be used with caution and they are only appropriate in instances in which "the parties have had a meaningful opportunity to present evidence and the non-moving party is unable to identify any genuine issue of material fact" (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]).

[15] The exception is a sufficiency challenge, which addresses a complaint on its face and whether the complaint lacks the elements required by the IDEA (8 NYCRR 200.5[i]; see 20 U.S.C. § 1415[b][7], [c][2]; 34 CFR 300.508); however, there is no allegation in the present matter regarding the sufficient of the parent's due process complaint notice.

discretion, subject to administrative and judicial review procedures, in such matters, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]).

There is no dispute that a resolution meeting was not held in this matter. The district filed its motion to dismiss on August 19, 2024 (see SRO Ex. A). In opposition to the district's motion, the parents argued that the district did not include what the parent believed were necessary district participants nor indicate who the district intended to have at the resolution meeting in violation of the IDEA (SRO Ex. B at p. 6-7).

As set forth in 8 NYCRR 200.5[j][2][vi][a], the remedy for a school district that is unable to obtain the participation of a parent at a resolution meeting after it makes and documents its reasonable efforts to do so is to request that the IHO dismiss the parent's due process complaint notice (see 8 NYCRR 200.5[j][2][vi][a]). It is then within the IHO's discretion to determine whether the motion to dismiss should be granted. Here the IHO denied the district's motion to dismiss and the parties proceeded to an impartial hearing on the merits of the parents' claims (IHO Decision at p. 26; see Tr. pp. 42-43; see generally Tr. pp. 37-301).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073).

It is also worth noting that federal regulation specifically provides that "the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held" (34 CFR 500.10[pb][3]), and, at this point, the hearing has been held. Accordingly, the parents' failure to appear for the resolution meeting has already resulted in a delay in the hearing process. Although it may have been permissible for the IHO to have dismissed the parents' due process complaint notice after the conclusion of the resolution period, which would have required the parents to refile their due process complaint notice and begin the timelines again, at this juncture, such an action would be counterproductive to the efficiency of the administrative process. Accordingly, the delay in the hearing process should not be held against the parents when considering the equities of the matter as the IHO's exercise of her discretion in allowing the proceeding to move forward was permissible and the ultimate decision of the IHO, not the parents.

3. Excessive Costs

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]). An 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 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"]).

The IHO determined that the parents' requested relief "in excess of $750,000 for one year's worth of tuition, related services, transportation and nursing services expenses" was "staggering" and could not "pass without mention" (IHO Decision at p. 27).

The parents argue that the IHO erred by suggesting that the costs for the student's private program was unreasonable and that the IHO failed to cite to the hearing record to support her determination.

The district argues the IHO correctly relied on controlling Second Circuit precedent, which according to the district, states that "[t]he appropriate amount [of reimbursement] bears a relationship to the quantum of services that the state would have been required to furnish, as well as the fees charged by [the parent's chosen] providers for their services" rather than requiring reimbursement for all services the parent chose to provide" (Answer and Cross-Appeal ¶19; see L.K 674 Fed. App'x 100 at 101, citing C.F. ex rel. R.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 73 [2d Cir. 2014]).

Generally, an excessive cost argument focuses on whether the rate charged for service was 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. Overall, the IHO erred by conducting a cost analysis without any fact evidence to support it, especially as the IHO specifically noted that "neither party submitted any quantitative information in respect of reasonableness of costs" (IHO Decision at p. 27). The hearing record shows that the base tuition cost for iBrain is reflected in the enrollment contract, and the hearing record failed to contain any evidence—such as the amount that other nonpublic schools charged for similar instructional services—upon which to analyze whether iBrain's base tuition was excessive (see generally Tr. pp. 1-301; Parent Exs. A-G; J-K; Dist. Exs. 1-15).

In this instance, although the hearing record includes the contracted for amounts for the costs of the student's tuition at iBrain, transportation, and nursing services, the hearing record lacks any evidence of what a reasonable rate for either tuition, related services, transportation, or nursing services would be. Accordingly, the IHO's finding that equitable considerations weighed against the parents and, therefore, denied direct funding of the tuition, transportation and nursing service costs for iBrain during the 2024-25 school year based on excessive costs must be reversed.

4. Financial Obligation

The parents argue that the IHO erred in determining they did not have a recognizable financial obligation and erroneously reasoned that the transportation contract and nursing contract allowed for subcontracting of responsibilities and was thus inappropriate.

In Burlington, the Court stated that "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under the IDEA (20 U.S.C. § 1412[a][10][iii]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

When the element of financial risk is removed entirely and the financial risk is borne entirely by unregulated private schools or agencies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district, it has practical effects because parents begin seeking the best private placements possible with little consideration given to what the child needs for an appropriate placement as opposed to "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]). As the First Circuit Court of Appeals noted, "[t]his financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district (Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 [1st Cir. 1984], aff'd, Burlington, 471 U.S. 359, 374 [1985] [noting the parents' risk when seeking reimbursement]; see also Forest Grove Sch.

Dist. v. T.A., 557 U.S. 230, 247[2009] [citing criteria for tuition reimbursement, as well as the requirement of parents' financial risk, as factors that keep "the incidence of private-school placement at public expense . . . quite small"]). Further, proof of an actual financial risk being taken by parents tends to support a view that the costs of the contracted for program are reasonable, at least absent contrary evidence in the hearing record.

Regarding proof of financial risk, the Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 458 [2d Cir. 2014]). In New York, a party may agree to be bound to a contract even where a material term is left open but "there must be sufficient evidence that both parties intended that arrangement" and an objective means for supplying the missing terms (Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 590 [1999]; 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]).

Here, the IHO determined that there was no evidence that the parents had incurred any obligations under either the transportation contract or the nursing contract; the IHO noted that there was nothing in the hearing record to show what the transportation and nursing providers actually did to perform their respective contracts (IHO Decision at p. 27). However, contrary to the IHO's findings and as noted above, the hearing record includes the three contracts the parents entered into: one with iBrain dated June 26, 2024; one with Sisters Travel dated June 20, 2024; and one with B&H health care dated June 18, 2025 (Parent Exs. A-E; A-F; A-G).[16] All of the contracts include sections on the parents and the providers' obligations (id.). Although the hearing record is limited as to what occurred during the 2024-25 school year, the district has not asserted that the student has not been receiving the contracted for services and as the parents are entitled to funding for at least a portion of those services under pendency, the district should be aware of the services the student has received. Without an argument from the district, setting forth an explanation of what services it has been paying for under pendency and what services it believes the student has not received up to this point, there is not a sufficient reason in the hearing record or on appeal to limit the funding awarded to the parents under the transportation and nursing services contracts.

Additionally, the IHO noted that the enrollment contract with iBrain was unclear as to the extent of the parents' obligations (IHO Decision at p. 27). According to the iBrain enrollment contract, the full tuition for the 2024-25 school year was inclusive of base tuition and supplemental tuition for a total of $337,124.20; the contract further stated under the payment obligation section

[16] According to the transportation contract with Sisters Travel, the annual rate for transportation services for the 2024-25 extended school year from July 2, 2024 to June 27, 2025 was $127,333.00 (Parent Ex. A-F at pp. 1-2). The contract further indicated that the parent "underst[ood] and accept[ed]" the fees whether the student used the transportation services or not, unless Sisters Travel was at fault for the student not utilizing the transportation services (id.). According to the nursing services contract with B&H Health Care, the annual rate for 1:1 nursing services, including a 1:1 travel nurse, for the 2024-25 extended school year from July 2, 2024 to June 27, 2025 was $303,280 (Parent Ex. A-G at p. 2). The contract further stated under the fees and payment for services section that the parents "underst[ood] and accept[ed]" the fees and that the obligation to pay the fees were "unconditional" and could not be "apportioned or mitigated" (id.).

that the parents "understood and agreed the enrollment of [the s]tudent [wa]s for the full academic year and the obligation to pay tuition [could not] be apportioned or mitigated except as expressly provided" within the contract (Parent Ex. A-E at p. 2). The iBrain enrollment contract allowed the parents to terminate the contract upon receipt of a written termination notice and provided that tuition would be refunded depending on when such notice was received (id. at pp. 3-4).

Based on the foregoing, the evidence in the hearing record does not support the IHO's conclusions as to the contracts; accordingly, a denial of the parents' requested relief is not warranted on this ground. However, it is reasonable to limit district funding for the student's unilateral placement at iBrain, including special transportation provided by Sisters Travel and 1:1 nursing services provided by B&H Health Care for the entire 12-month 2024-25 school year upon presentation of proof that the services were delivered to the student.

E. Pendency

In regard to pendency, the IHO determined that there was no dispute that the SRO decision in Application of a Student with a Disability, Appeal No. 24-187 was the basis of the student's pendency program and that the district had independent authority to determine how to provide the student's most recently agreed upon educational program (IHO Decision at p. 29). The IHO found that the district's July 11, 2024 letter that offered to transport the student was a valid offer to implement the student's pendency program (id.). Accordingly, the IHO ordered the district to provide, as pendency during the 12-month 2024-25 school year, the cost of tuition and related services at iBrain; individual nursing services; and round trip special transportation from the closest safe curb location to iBrain, including 1:1 paraprofessional services, a lift bus, limited travel time of no more than 60-minutes each way, and air conditioning (id. at p. 31).

The parents argue that the IHO erroneously decided that the district's July 11, 2024 offer to transport the student, after the start of the 2024-25 school year, supplanted the prior SRO decision. The parents further argue the IHO failed to address the student's nursing services. The parents argued in their reply to the district's answer and cross-appeal that the IHO erred in permitting a "piecemeal" version of pendency which allowed the district to pick and choose what portions of the student's pendency program it provided.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[17] Pendency has the effect of an automatic injunction, and

[17] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement

the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46,709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current

based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

The parties agree that the student's pendency program in this matter is based on Application of a Student with a Disability, Appeal No. 24-187, which directed the district to fund the costs of the student's tuition at iBrain, nursing services, and transportation services. On July 11, 2024, the district offered to transport the student to and from iBrain pursuant to the student's February 15, 2024 IEP (IHO Ex. II at p. 10). However, the hearing record does not include a February 2024 IEP. Accordingly, the exact contours of the district's offer of transportation are not clear and it is not clear if the district's offer of transportation would have been equivalent to the transportation services awarded to the student in Application of a Student with a Disability, Appeal No. 24-187.

Regarding nursing services, the parents are correct that the IHO did not specifically address nursing services as part of the student's pendency program but rather ordered the district to provide individual nursing services (IHO Decision at p. 31). It is unclear from the IHO's order whether she intended leave the implementation of nursing services to the district's discretion or whether she intended to have the district fund individual nursing services consistent with the parents' contract with B&H Health Care. The parents argue on appeal that the student's individual nursing services should be funded by the district in accordance with the terms of the nursing contract as part of pendency.

As the student's pendency program continues to the program established in Application of a Student with a Disability, Appeal No. 24-187, the district is required to ensure that it provides pendency services consistent with that decision during the pendency of this proceeding. However, as indicated above, the student's unilateral placement at iBrain with the contracted transportation services and nursing services was an appropriate program for the student for the 2024-25 school year and equitable considerations favor the parents. Accordingly, the district shall be ordered to fund the student's unilateral placement at iBrain, including special transportation provided by Sisters Travel and 1:1 nursing services provided by B&H Health Care for the entire 12-month 2024-25 school year upon proof that such services were delivered to the student during the 2024-25 school year.[18]

VII. Conclusion

Based on the above, while I agree with the IHO that the district failed to offer the student a FAPE for the 2024-25 school year by failing to offer nursing services, the evidence in the hearing record does not support the IHO's finding that iBrain was not an appropriate unilateral placement for the student for the 2024-25 school year or that the equitable considerations did not favor the parents' requested relief, including tuition, transportation costs, and the costs of nursing services.

[18] This decision should not be read as an interpretation of the transportation contract which requires funding for transportation services whether the student uses the services or not; rather, the parents must present proof of delivery of services to show that the companies delivered under their obligations to the parents. The district should not be required to pay for services that were not delivered to the student because of a failure of the private company to either deliver the service or present sufficient proof that the service was delivered to the student.

I have considered the parties' remaining contentions and find they are unnecessary to address in light of my above determinations.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated November 5, 2024 is modified by reversing those portions which found that iBrain was not an appropriate unilateral placement for the student for the 2024-25 extended school year and that the equitable considerations did not favor the parent; and

IT IS FURTHER ORDERED that district shall directly fund the costs of the student's full program at iBrain during the 2024-25 extended school year, including tuition, related services, special transportation services provided by Sisters Travel, and 1:1 nursing services provided by B&H Health Care at the contracted for rates, upon the submission of proof of the delivery of the services to the student**.**

Dated: **Albany, New York**
May 27, 2025

STEVEN KROLAK
STATE REVIEW OFFICER