The University of the State of New York

The State Education Department
State Review Officer
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No. 24-627

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

**Appearances:**
Liberty & Freedom Legal Group, Ltd., attorneys for petitioner, by Peter G. Albert, Esq. and Lisa K. Eastwood, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. Macleod, Esq.

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied, in part her request for direct payment of the costs of her daughter's attendance at the International Academy for the Brain (iBrain), special transportation services provided by Sisters Travel and Transportation Services, LLC (Sisters Travel), 1:1 nursing services provided by B & H Health Care, Inc. (B&H) for the 12-month 2024-25 school year. Respondent (the district) cross-appeals from those parts of the IHO's decision which found that it did not offer the student appropriate educational programming for the 12-month 2024-25 school year and ordered the district to fund independent educational evaluations (IEEs). The appeal must be sustained. The cross-appeal must be sustained in part.

### II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B];

34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). 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 CSE convened on December 4, 2023, found the student eligible for special education and related services as a student with a traumatic brain injury, and developed an IEP with a

projected implementation date of December 18, 2023 (see Dist. Ex. 1).[1] The December 2023 CSE recommended the student receive 12-month services consisting of 35 periods per week in a 12:1+(3:1) special class in a specialized school for all subjects, with the language of services to be in Spanish; three periods per week of adapted physical education ; five 60-minute sessions per week of individual occupational therapy (OT); five 60-minute sessions per week of individual physical therapy (PT); and five 60-minute sessions per week of individual speech-language therapy (Dist. Ex. 1 at p. 47). The December 2023 CSE also recommended the student receive one 60-minute session per month of parent counseling and training; a daily individual health paraprofessional to assist with the student's ambulation, safety and feeding; assistive technology consisting of a static display and speech generating device (SGD) for daily individual use throughout the school day and at home; one 60-minute session per week of individual assistive technology services; and special transportation services (id. at pp. 47-48, 52-53). The recommended special transportation services included the following: transportation to and from the closest safe curb location to school, 1:1 nursing services, a lift bus, and a regular sized wheelchair (id. at pp. 52-53).

In a prior written notice dated February 28, 2024—which was provided in English and Spanish—the district summarized the recommendations of the December 2023 CSE and notified the parent of the public school site to which the student had been assigned (Dist. Ex. 2 at pp. 1-24).

On June 14, 2024, the parent provided the district with 10-day notice of her disagreement with "the most recent proposed" district IEP and recommended school location for the 12-month 2024-25 school year; of her intention to continue the student's enrollment at iBrain, and to seek public funding for the cost of the student's attendance at iBrain for the 12-month 2024-25 school year (Parent Ex. A-A at p. 1). The parent also requested IEEs of the student to be conducted at public expense including "neuropsychological, physical therapy, occupational therapy, speech-language therapy, special education and assistive technology assessments" (id. at pp. 1-2).

On June 24, 2024, the parent electronically signed an enrollment contract with iBrain for the 2024-25 school year from July 2, 2024 through June 27, 2025; the parent also entered into an agreement with B&H on June 18, 2024 for the provision of 1:1 private duty nursing services during the school day and/or a 1:1 transportation nurse for the 2024-25 school year (see Parent Exs. A-E; A-G).[2] The parent electronically signed an agreement with Sisters Travel on June 25, 2024 (Parent Exs. A-F).

**A. Due Process Complaint Notice**

In a due process complaint notice dated July 2, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 12-month 2024-25 school

[1] The student's eligibility for special education as a student with a traumatic brain injury is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

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

year based on various procedural and substantive violations (see Parent Ex. A at pp. 1-9).[3] The parent requested pendency based on a March 3, 2024 unappealed IHO Decision (id. at p. 2; see Parent Ex. A-C; IHO Pendency Ex. III).[4] Among the parent's claims was an assertion that the district failed to fund IEEs ordered by an IHO in a prior proceeding, specifically, neuropsychological, speech-language therapy, OT, PT, and assistive technology evaluations to be conducted by private providers at their market rates (Parent Ex. A at p. 8). The parent also alleged that iBrain was an appropriate unilateral placement for the student and that equitable considerations warranted an award of all costs associated with the student's placement at iBrain (id.). As relief, the parent requested direct funding for the total cost of the student's attendance at iBrain for the 12-month 2024-25 school year, including special transportation and 1:1 nursing services, as well as district funding for an independent neuropsychological evaluation, and for the CSE to reconvene (id. at p. 9).

**B. Impartial Hearing Officer Decision**

An impartial hearing convened before an IHO from the Office of Administrative Trials and Hearings (OATH) on August 26, 2024, and concluded on September 3, 2024 after three days of proceedings (Tr. pp. 26-224).[5]

In an interim decision on pendency dated August 30, 2024, the IHO determined that the student's pendency services were those "services outlined" in an unappealed March 3, 2024 IHO decision (Interim IHO Decision at p. 3; see IHO Pendency Ex. III). The unappealed March 3, 2024 IHO decision found that the parent's unilateral placement of the student at iBrain for the 2023-24 school year was appropriate, that equitable considerations warranted an award of full funding for the cost of the student's attendance, which consisted of "tuition and fees, including a paraprofessional, and additional related services costs, for the 12-month" school year, direct funding of private nursing services for the 12-month school year, and reimbursement and/or direct funding of private transportation "for the full costs associated with transporting the [s]tudent" (IHO Pendency Ex. III at pp. 20-21). In his interim decision on pendency, the IHO determined that the parent was entitled to funding for tuition at iBrain and funding for the student's transportation to and from iBrain to be provided by Sisters Travel "until such time as the [district] demonstrate[d]" that it was able to begin providing transportation (Interim IHO Decision at p. 4). In an email dated August 30, 2024, the IHO issued "an addendum" to his previous interim decision on pendency, wherein he ordered the district to fund the student's nursing services as outlined in the unappealed March 3, 2024 IHO decision (Aug. 30, 2024 Add. to Interim IHO Decision at p. 1).

In a decision dated November 12, 2024, the IHO found that the district's failure to provide the parent with prior written notices and copies of the IEP in her native language was a procedural

[3] The due process complaint notice was not paginated, for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the first page as page one (see Parent Ex. A).

[4] The hearing record includes eight IHO exhibits, however the IHO exhibits related to pendency and those related to the impartial hearing on the merits are not marked consecutively. To the extent it is necessary to reference the IHO exhibits, they will be cited as IHO Pendency exhibits and as IHO exhibits.

[5] A prehearing conference was held on August 2, 2024 (Tr. pp. 1-25).

violation of the IDEA that rose to the level of a denial of a FAPE because the parent's opportunity to participate in the decision making process regarding the student's education was significantly impeded (IHO Decision at p. 4). The IHO further found that the December 2023 IEP was substantively inappropriate due to the CSE's recommendation of a 12:1+(3:1) special class, rather than a 6:1+1 special class, given that the student's highly intensive management needs were not disputed (id.).

The IHO then considered the appropriateness of the parent's unilateral placement of the student at iBrain (IHO Decision at pp. 5-7). The IHO addressed the parent's requested relief for tuition at iBrain, transportation services from Sisters Travel and nursing services separately "[b]ecause they involve[d] discreet services [sic] with separate contracts" (id. at p. 5). The IHO found that the parent met her burden to establish that iBrain was an appropriate unilateral placement for the 2024-25 school year (id. at p. 6). Next, the IHO determined that the parent had not introduced sufficient evidence regarding transportation and nursing services, finding that "[a]lthough [the p]arent introduced contracts for transportation and nursing, neither of those contracts contain[ed] details about how those services [we]re being provided in practice or if they [we]re even being provided at all" (id.). The IHO noted that the parent's testimony regarding the student's transportation differed from the testimony of the deputy director of special education at iBrain, and that there was no testimony to support that the student's nursing services were delivered appropriately or that the services addressed the student's needs (id.). For those reasons, the IHO found that the parent did not meet her burden to demonstrate that the student's transportation and nursing services were appropriate (id. at p. 7).

With regard to equitable considerations, the IHO found that the parent provided adequate 10-day notice of her intention to unilaterally enroll the student at iBrain and seek public funding for the 2024-25 school year (IHO Decision at p. 7). The IHO further determined that the parent was entitled to direct funding for the balance of unpaid tuition and that the cost of tuition was reasonable (id.).

Lastly, the IHO addressed the parent's request for "funding for a variety of IEEs that were ordered in a previous case" (IHO Decision at p. 7). The IHO found that the district did not initiate an impartial hearing to establish that its evaluations were appropriate or provide the requested IEEs at public expense and ordered the district "to provide any evaluations ordered in [the unappealed March 3, 2024 IHO decision] that have not been provided to date" (id.). The IHO also ordered the CSE to reconvene upon the completion of the IEEs and develop a new IEP that was appropriate and met the student's needs (id.). As relief, the IHO awarded full tuition funding at iBrain for the 2024-25 school year, funding for IEEs consisting of a neuropsychological evaluation, a speech-language therapy evaluation, an OT evaluation, and a PT evaluation previously awarded by an IHO as relief in a prior proceeding concerning the 2023-24 school year, and the IHO also ordered the CSE to reconvene within 30 days of completion of the IEEs (id. at pp. 8-9).

**IV. Appeal for State-Level Review**

The parent appeals and alleges that the IHO erred in finding the parent did not meet her burden of demonstrating that the private transportation services and private 1:1 nursing services

provided to the student for the 2024-25 school year were appropriate.[6] As relief, the parent requests direct funding for the cost of the private transportation services and private 1:1 nursing services according to the contracts for the 12-month 2024-25 school year.

In an answer with cross-appeal, the district asserts that the IHO erred in finding it did not offer the student a FAPE for the 12-month 2024-25 school year. Specifically, the district argues that the IHO erred in determining that the recommended 12:1+(3:1) special class was not appropriate to address the student's needs. Additionally, the district argues the IHO improperly attempted to enforce a prior IHO order by ordering the district to fund IEEs that were previously awarded. The district also argues the IHO exceeded the scope of the impartial hearing by addressing whether or not a copy of the December 2023 IEP was translated into Spanish, as such claim was not raised by the parent in her due process complaint notice, and that, even if it was properly raised, such issue was a procedural violation that did not rise to the level of a denial of a FAPE.[7] As relief, the district requests reversal of the IHO's determination that it failed to offer the student a FAPE and reversal of the IHO's awarded relief. In the alternative, the district requests that the IHO's determinations, specifically those which denied funding for transportation and nursing services be affirmed.

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[6] While not specifically addressed by the IHO as a basis for his finding that the district failed to offer the student a FAPE for the 2024-25 school year, the parent continues to assert on appeal, as she did in the due process complaint notice, that the district also failed to offer the student a FAPE for the 2024-25 school year because the December 2023 CSE did not recommend appropriate nursing services for the student.

[7] Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in the original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). A review of the July 2, 2024 due process complaint notice indicates that the parent did not raise such procedural violations (see Parent Ex. A). When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education, 685 F.3d 217, 250-51[2d Cir. 2012]; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M v. New York City Dep't of Educ., 569 Fed. App'x 57,59 [2d Cir. June 18, 2014]; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]). The hearing record reflects that the issue of whether the parent received the IEP and prior written notices in her native language first arose when the parent's attorney asked the parent whether she received a copy of the student's December 2023 IEP in Spanish (Tr. p. 122). The hearing record does not indicate that the district elicited testimony related to providing the parent with documents in her native language. Therefore, the district did not "open the door" to such issue nor did it agree to expand the scope of the impartial hearing to address such issue. Accordingly, the IHO erred by expanding the scope of the impartial hearing to address this issue, and also by finding that the district's actions constituted a procedural violation of the IDEA which rose to the level of a denial of 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]).[8]

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).

[8] 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).

## VI. Discussion

The district has not appealed from the IHO's decision regarding the appropriateness of iBrain or the award of direct payment of tuition to iBrain for the 12-month 2024-25 school year. Therefore, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

### A. December 2023 IEP

#### 1. Student Needs

Although not in dispute on appeal a brief discussion of the student's needs is necessary to resolve the issue of whether the district provided the student a FAPE for the 12-month 2024-25 school year.

As noted above, the December 2023 CSE found the student eligible for special education and related services as a student with a traumatic brain injury (Dist. Ex. 1 at p. 1). The December 2023 IEP described the student as minimally verbal and non-ambulatory and noted that her performance varied due to seizure activity and arousal levels (id. at pp. 8-9, 18). The IEP noted the student showed some environmental awareness but was easily distracted (id. at p. 9).

Academically, the December 2023 IEP indicated the student was able to follow simple one-step directions and "seem[ed] to have some understanding of cause and effect" (Dist. Ex. 1 at pp. 5, 9). According to the December 2023 IEP, the student reached and grabbed at preferred items such as a cup when thirsty or a toy (id. at pp. 9, 10, 18). The IEP stated that the student knew her name and turned her head around or smiled at the person who called her name (id. at p. 10). The student was characterized as understanding yes and no and wanting "more of something" such as a song or video (id. at pp. 3, 10). The student did not display an understanding of object permanence and did not look for something that was taken away (id.). The student recognized the first three letters of her name but did not understand the concept of book orientation (id.). In math the student did not show an understanding of 1:1 correspondence when counting or identifying numerals (id.).

According to the December 2023 IEP, in speech-language therapy the student worked on yes/no responses and following one-step directions (Dist. Ex. 1 at p. 11). The student initiated cause and effect play interactions by pushing her head towards the clinician and pulling away while smiling (id. at p. 12). The student was described as motivated by music and playing videos and sometimes clapped in response (id.).

Regarding communication, the IEP characterized the student as being minimally verbal and reported that she communicated through gestures, minimal vocalizations, body language, and an augmentative communication device (Dist. Ex. 1 at p. 14). The December 2023 IEP indicated the student was bilingual and understood both Spanish and English, but Spanish was her dominant language, and she answered questions much more accurately in Spanish than English (id. at pp. 9, 10, 12, 15). The student used an SGD in the form of a 10-inch iPad with TDSnap software to communicate that was programmed in Spanish (id. at p. 11, 13, 14). The SGD was mounted to

the student's wheelchair with a key guard (id. at p. 15). The student used the device to greet people by saying hello and goodbye and could select items out of three icons (id.).

The December 2023 IEP noted that physically the student was characterized as non-ambulatory and she used a wheelchair as her primary navigation resource (Dist. Ex. 1 at p. 17). The student used several pieces of adaptive equipment and supports including ankle foot orthotics (AFOs), shoulder orthosis, hand splits, a slant board, Easy hold, and built-up handles (id.). In PT the student worked on skills like standing and walking, and used equipment such as a stander, gait trainer, therapy balls, walker, and swing (id. at pp. 19-20).

It was noted in the December 2023 IEP that the student missed a lot of school and related services due to health reasons and hospitalizations which affected her progress (Dist. Ex. 1 at pp. 15-17). The December 2023 IEP noted that "[i]n the past year" the student had a total of three hospitalizations, "mostly due to the presence of recurrent pneumonia" and that "[t]he most recent hospitalization was for approximately [two] weeks which occurred due to pneumonia which ha[d] affected her cardiopulmonary endurance and activity tolerance" (id. at pp. 18-19).

According to the December 2023 IEP, the student "ha[d] been placed on medication to manage seizure episodes at school" and had "not had a seizure occur recently in school" (Dist. Ex. 1 at p. 11). The student's seizures typically lasted for a few seconds, up to five times per day and presented differently, some as jerking movements and others as absence seizures (id. at p. 17).

The December 2023 IEP indicated that the student was dependent for all activities of daily living (ADLs) and provided a detailed list of human, material, and environmental resources needed to address the student's management needs (Dist. Ex. 1 at pp. 22-23). Regarding human resources the student needed, the December 2023 CSE recommended aided language stimulation, repetitive verbal and physical cues, additional processing time, praise and sufficient motivation to remain engaged and interested in activity, and skilled manual prompting (id.). The IEP indicated the student also required 1:1 nursing and a bilingual 1:1 paraprofessional to translate for her (id. at pp. 18-19, 22).

The December 2023 CSE identified material resources needed to address the student's management needs including access to iPad/AAC device, instructional computer with software about literacy and math, and access to a variety of AAC devices for the student to participate and interact in school activities (Dist. Ex. 1 at p. 23). Physical supports for the student included AFOs, a shoulder sling, a sit-to-stand program, a wheelchair, and an adaptive tricycle for biking (id.).

The December 2023 CSE identified the following environmental resources for the student: one-on-one direct instruction in a small, highly, structured classroom or corner room that is quiet to minimize distractions, multisensory supports, sensory breaks during instruction, repeated directions, modified materials, and brief rest breaks every 15-20 minutes to avoid fatigue (Dist. Ex. 1 at pp. 22-23).

**2. 12:1+(3:1) Special Class**

The district argues the IHO erred in finding that, based on the student's management needs, the special class student-to-teacher ratio recommended by the district was not suitable and could

not address her needs. The district argues in its cross-appeal that the 12:1+(3:1) special class is very supportive and that the student's needs are equally, "if not more" consistent with students with "severe disabilities whose programs consist primarily of habilitation and treatment," which would be provided in the 12:1+(3:1) special class (Answer with Cross-Appeal ¶ 14). The district also argues that the IHO's determination was "at odds" with the testimony of the district's witness (id.).

As the IHO noted, State regulation indicates that the maximum class size for special classes containing students whose management needs are determined to be highly intensive and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction (8 NYCRR 200.6[h][4][ii][a]; see IHO Decision at p. 4). Management needs are defined by State regulations as "the nature of and degree to which environmental modifications and human material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social and physical development (8 NYCRR 200.1[ww][3][i][d]). In contrast, according to State regulation "the maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students" (see 8 NYCRR 200.6 [h][4][iii]). In addition to the teacher, the staff/student ratio shall be one staff person to three students (id.). The additional staff may be teachers, supplementary school personnel, and/or related service providers (id.).

A review of the student's needs reflects that in totality, the program and services recommended by the December 2023 CSE, including the recommendation for a 12:1+(3:1) special class, was likely to result in educational benefit for the student, particularly given her multiple disabilities, as well as needs related to habilitation and treatment.

The December 2023 IEP reflects that the CSE considered and rejected other special class ratios, which included a 12:1+1 special class in a specialized school, an 8:1+1 special class in a specialized school, and a 6:1+1 special class in a specialized school, on the basis that none of those special class recommendations would meet the student's needs as described in the IEP (Dist. Ex. 1 at p. 57).

Turning to the specific assertion that because the student had highly intensive management needs, the CSE was required to recommend placement in a 6:1+1 special class, as stated above, State regulation does provide that "[t]he maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][ii][a]). However, the adult-to-student ratio required in a 6:1+1 special class and a 12:1+(3:1) special class is similar; with the 12:1+(3:1) special class ratio providing slightly more adults in the classroom per student and, additionally, providing for more variety in the type of school personnel working with the student. Accordingly, generally, while the student may exhibit highly intensive management needs and require a high or significant degree of individualized attention and intervention (see 8 NYCRR 200.6[h][4][ii][a]-[b]), the parent's strict adherence to the language in State regulation guiding 6:1+1 special class placements to the exclusion of other appropriate placement options is reductive and overlooks the evidence in the hearing record

showing that the student's highly intensive needs required consistent adult support for her to function in school (see Dist. Ex. 1 at pp. 8-9, 18-19, 22-23).

The December 2023 IEP identified the environmental modifications and human and material resources needed to address the student's management needs as they related to her academic achievement, social development, physical development, and physical health (Dist. Ex. 1 at pp. 22-23). For example, with regard to the student's academic and attending needs the IEP included: a 1:1 paraprofessional in order to benefit from participation in an educational setting; a highly structured classroom or corner room with less stimulus from visual and auditory distraction; a quiet and non-distracting environment for successful comprehension and communication; and noise reduction with limited visual distractions (id.). For the student's social and communication needs the December 2023 IEP included support such as an iPad-based communications tool and access to AAC (id. at p. 23). For physical needs the IEP listed a 1:1 paraprofessional and nursing services; brief rest breaks every 15-20 minutes to avoid fatigue; a sit-to-stand program; wheelchair; adaptive tricycle; and orthosis (id. at pp. 22-23).

The district school psychologist testified that she agreed that the student's management needs were "highly intensive," and that the student required a high degree of individual attention and intervention (Tr. p. 81). In addition, she confirmed that the December 2023 CSE recommended a "[d]istrict 75 specialized school for the student in a classroom with 12 students, 1 teacher, and 4 additional adults, along with related services" (Tr. p. 69). When asked what the basis for the CSE's recommendation was, the school psychologist explained, that given the available continuum, the 12:1+(3:1) special class "was the class that provided the student with access to the most appropriate and comparable peers with similar levels of functioning. As well as the staff that would have the adequate training to handle a student with significant medical and other needs" (Tr. p. 70). The school psychologist also testified that with regard to providing the student a FAPE, "[the December 2023 CSE] felt that [the district's IEP] would afford the student the least restrictive program in which [she] could be successful, as well as access to a [FAPE] that could support … [her] needs as outlined and presented during the meeting" (Tr. p. 78).

The Second Circuit has observed that "[i]n the continuum of classroom options, the [12:1+(3:1) special class recommendation] is the most supportive classroom available" (Navarro Carrillo v. New York City Dep't of Educ., 2023 WL 3162127, at *3 [2d Cir. May 1, 2023], but see Cruz v. Banks, 2025 WL 1108101 at *1, *4-*8 [2d Cir. Apr. 15, 2025][certifying a question of State law to the New York Court of Appeals to determine whether or not the district may choose one class size over another when a student meets the regulatory requirements of two class size regulations, or must the district satisfy both regulations]).

Where a student's needs could be deemed to fit within the definitions for more than one special class ratio, such as a 6:1+1 or a 12:1+(3:1) special class, pursuant to the definitions set forth in State regulation, the student's unique needs must dictate the analysis of whether the CSE recommended an appropriate class size (Carrillo v. Carranza, 2021 WL 4137663, at *17 [S.D.N.Y. Sept. 10, 2021], aff'd sub nom., Navarro Carrillo, 2023 WL 3162127).

A review of the student's needs shows that although a 6:1+1 special class placement may also have been an appropriate placement for the student, and she was recommended for that classroom ratio in the June 13, 2024 iBrain report and educational plan, a 12:1+(3:1) placement

consisting of habilitation and treatment was also an appropriate recommendation given her multiple disabilities and need for a high level of adult support in the classroom (see 8 NYCRR 200.6[h][4][iii]; Parent Ex. B). Accordingly, the December 2023 CSE's determination to place the student in a 12:1+(3:1) special class, along with the other recommended management needs and supports, as well as related services, was reasonably calculated to afford the student educational benefit. Therefore, the IHO's determination that the district did "not present[] any credible evidence that a 12-student classroom [wa]s appropriate for [the s]tudent" and that the recommendation "substantively denied [the s]tudent a FAPE for the 2024-25 school year" was in error.

However, although the district's recommendation of a 12:1+(3:1) special class was appropriate for the student, as addressed further below, a review of the hearing record reflects that the recommendations of the December 2023 CSE failed to address the student's nursing needs throughout the entire school day, (see Dist. Ex. 1 at pp. 52-53) and, as a result, the district failed to offer the student a FAPE for the 12-month 2024-25 school year

**3. Nursing Services**

The parent alleged in her July 2, 2024 due process complaint notice that the district failed to recommend a 1:1 nurse to assist the student despite the student's documented medical needs (Parent Ex. A at p. 6).

Turning to the evidence in the hearing record, the student's need for nursing services was well documented. According to the December 2023 IEP and the prior written notice dated February 28, 2024, the parent expressed concern regarding the student having "a lot of complications recently" and opined that the student "require[d] the nurse to monitor her health needs" (Dist. Exs. 1 at. p. 56; 2 at pp. 4-5). In addition, the parent stated that during the year things had become worse medically for the student and that she felt that nursing services were essential (id.). More specifically the parent indicated that "[i]t ha[d] been a traumatic year[,] and any changes would likely result in regression" (Dist. Exs. 1 at. p. 56; 2 at p. 4). When asked about why the student required nursing, the parent testified that the student suffered from seizures and that during the last year the student was absent often from school due to illness and had been hospitalized three times for pneumonia (Tr. pp. 126-27, 129). According to the December 2023 IEP, the student received multiple medical diagnoses, including traumatic brain injury, hemiparesis of the right side, neuromuscular scoliosis, right flaccid hemiplegia, viral encephalitis, and diabetes type 1 which necessitated 1:1 nursing services to provide continuous medical monitoring and intervention (Dist. Ex. 1 at p. 18).

According to the December 2023 IEP, based on information from the iBrain education plan, the student was accompanied to PT by her paraprofessional and 1:1 nurse to assist throughout with her mobility, transfers, safety awareness, hygiene and alternate ADLs (Dist. Ex. 1 at p. 18). Further, the December 2023 IEP indicated the student required nursing services to support her medical, physical, cognitive, and sensory needs throughout the day; to administer her seizure protocol, monitor seizure activity, and monitor sugar levels; to provide support ranging from minimal to total assistance during all transitions and transfers throughout the day to maximal support for functional mobility and navigation of all environments; maximal assistance for completion of all ADLs; and support throughout the day to aid in attention to tasks, use adapted

devices and assistive technology, don/doff orthotics, position changes, behavior and impulsivity management, and overall safety (id. at p. 21).

The December 2023 CSE also recommended an annual goal for the student's paraprofessional which stated the paraprofessional would consistently consult with the 1:1 nurse regarding close monitoring of the student's medical needs and ensure that the student's toileting, feeding, and ambulation needs were addressed (Dist. Ex. 1 at p. 44).

Among the management needs listed in the December 2023 IEP were that the student required a "1:1 [p]araprofessional and [n]ursing" (Dist. Ex. 1 at pp. 22-23). The December 2023 IEP included a recommendation for a 1:1 health paraprofessional, however the December 2023 CSE did not recommend school nursing or any nursing services (id. at pp. 47-48). The December 2023 CSE recommended 1:1 nursing during transportation but failed to recommend any nursing services during the student's school day (id. at pp. 22, 47-48, 52-53).

The December 2023 IEP included information related to the student's need for nursing services, described the support provided to the student by the 1:1 nurse, and also included an annual goal for the 1:1 paraprofessional to consult with the 1:1 nurse, without recommending nursing services on the December 2023 IEP (see Dist. Ex. 1 at pp. 18, 21, 44, 56). Further, the district offered no evidence of how other supports or related services would have addressed the student's nursing needs. Thus, I am constrained to find that the district failed to offer the student a FAPE for the 2024-25 school year due to the lack of any appropriate nursing services recommendation in the December 2023 IEP.

**B. Unilaterally Obtained Services**

Initially, neither party has appealed from the IHO's finding that iBrain was an appropriate unilateral placement for the student for the 2024-25 school year. Rather, the parties' argument focuses on the appropriateness of the transportation services delivered to the student by Sisters Travel, and the nursing services delivered to the student by B&H. Accordingly, as noted above, the appropriateness of iBrain and funding for iBrain are not at issue on appeal and the analysis will focus on the nursing services and transportation services delivered to the student.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). 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).

After setting forth the correct legal standard for determining the appropriateness of the parent's unilateral placement, the IHO then considered the student's enrollment at iBrain separately from the related services of special transportation and 1:1 nursing "[b]ecause they involve[d] discreet [sic] services with separate contracts" (IHO Decision at p. 5). The IHO then determined that iBrain was an appropriate unilateral placement, which provided the student with specially designed instruction (see IHO Decision at pp. 5-6). Turning to special transportation and nursing services, the IHO questioned the implementation of those services. The IHO noted that the parent had introduced "contracts for transportation and nursing" and stated that "neither of those contracts contain[ed] details about how those services [we]re being provided in practice or if they [we]re even being provided at all" (id. at p. 6). The IHO found that the parent had "not introduced sufficient evidence regarding the transportation and nursing services at issue in this case" (id.).

At the outset, I note that the student's unilateral placement in this matter is comprised of the student's attendance at iBrain and the additional related services provided to the student by

Sisters Travel and B&H. As the Second Circuit has explained, "[t]he first two prongs of the [Burlington/Carter] test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any;" however in this case the IHO considered the request as separate components and made discrete findings for the student's enrollment at iBrain and the related services provided by Sisters Travel and B&H without considering the totality of the circumstances (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024]). This splintering of the IHO's conclusion regarding the appropriateness of the unilaterally-obtained services was in error.

**1. Special Transportation Services**

The parent appeals from the IHO's determination that the hearing record did not support a finding that the transportation services she contracted for with Sisters Travel were appropriate for the 2024-25 school year. More specifically, the IHO found there was no credible evidence regarding how the student's transportation services were being provided (IHO Decision at pp. 6-7).

On review of the hearing record related to the student's need for special transportation, the student's December 2023 IEP noted that the student required special transportation services due to the student's traumatic brain injury, seizure disorder, and other medical needs and recommended accommodations in the form of transportation from the closest safe curb location to school, adult supervision in the form of 1:1 nursing services, and a lift bus that could accommodate a regular size wheelchair (Dist. Ex. 1 at pp. 52-53). The December 2023 IEP documented the parent's concerns noting the student "require[d] specialized supports for… porter service[s] for transportation" (id. at p. 56). The district school psychologist that chaired the December 2023 CSE meeting testified that during the impartial hearing the parent did in fact request porter services for the student (Tr. pp. 74-75). She further explained that porter services were when two individuals were assigned to provide support with the transitioning of a student who was located in a non-wheelchair-accessible building without an elevator and that there would be two adults assigned to carry the student up and down in the wheelchair in order to get the student to the school bus (Tr. p. 75).[9]

According to the June 2024 iBrain educational plan, the student required special transportation services which included adult supervision provided by a nurse and a vehicle that included air conditioning and a lift-bus/wheelchair ramp that could accommodate a regular size wheelchair (Parent Ex. B at p. 66). The June 2024 iBrain educational plan also recommended limited travel time of 60-minutes and porter services (id.).

On June 25, 2024, the parent entered into a contract with Sisters Travel for transportation of the student during the 12-month 2024-25 school year from July 2, 2024 to June 27, 2025 at an annual rate of $280,757 (Parent Ex. A-F at p. 7). The contract provided that services would be billed whether or not the student used the transportation services, unless the transportation provider was at fault for the student not using the services (id. at p. 2). The contract also required Sisters Travel to provide the vehicles, drivers and dispatching necessary to provide the services in accordance with the terms of the agreement; Sisters Travel agreed to use safe and clean equipment

[9] The parent did not dispute or rebut the district school psychologist's description of porter services.

and properly trained and licensed drivers employed by or under contract with Sisters Travel; that the vehicle providing services for the student will "meet any and all standards required by federal and state law;" that the vehicle would also 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 the student, as needed; and that if the student required additional equipment for transportation (i.e., oxygen tanks), the vehicle would accommodate those additional needs of the student (id. at pp. 1-2).

The transportation contract also included assignment/subcontracting provisions, which permitted Sisters Travel to assign or subcontract its performance under the contract or any portion of the contract and it would be binding upon and inure to the benefit of the successors and assignees of Sisters Travel (id. at p. 4).[10]

The parent testified that the student was transported to school by ambulance with a 1:1 nurse (Tr. pp. 119-120, 130-31). The parent also testified to the name of the ambulance company, and when questioned on cross-examination, she testified that the only persons on the bus with the student were her nurse and the driver (Tr. pp. 131, 134-35). The iBrain deputy director testified that the student was transported to school every day by a third-party vendor (Tr. pp. 161, 176). He further testified that he believed the third-party vendor was Sisters Travel and that from his observation the student was transported in a van, but any other details regarding transportation was "not [his] purview" (Tr. p. 176).

In addition, the iBrain deputy director also testified that the student required limited travel time, stating the student was highly medically fragile, had unpredictable seizures throughout the day and that an extended transportation time or extended time during transport could trigger her seizures (Tr. p. 205). He also testified that the student depended on a nebulizer which needed to be monitored for oxygen saturation, and that she was hypoglycemic, all of which could be triggered while the student was in transport for an extended period of time (id.).

Review of the hearing record shows that appropriate special transportation services were being provided to the student and the hearing record does not support the IHO's determination that there was no evidence of how the student was provided services. Both parties agreed that the student required special transportation services to be safely transported to and from school and according to the contract with Sisters Travel. Accordingly, the hearing record supports a finding that the special transportation services provided to the student by Sisters Travel were appropriate during the 2024-25 school year.

**2. Nursing Services**

As described in detail above, the student required nursing services to receive a FAPE for the 12-month 2024-25 school year. In finding that the parent's privately obtained nursing services were not appropriate, the IHO noted that although the parent presented testimony regarding the student's nursing needs she did not provide information regarding any nursing services that had

[10] There is no evidence in the hearing record that Sisters Travel subcontracted with another agency to provide transportation services to the student during the 2024-25 school year (Parent Exs. A; A-B-A-G; B; Dist. Exs. 1-2; IHO Exs. I-II).

been or were being provided to the student (IHO Decision at p. 6; see Tr. p. 168-69). The IHO also noted that the iBrain deputy director provided generic testimony that the student was "provided with a one-to-one nurse to address all of [her] health needs" but that such testimony was not supported by the hearing record (IHO Decision at p. 6; see Tr. p. 198). The IHO determined there was no credible evidence regarding how the student's nursing services were being provided (IHO Decision at pp. 6-7).

The hearing record does not support the IHO's determination. The parent entered into a nursing service contract with B&H on June 24, 2024 to provide the student with a 1:1 private duty nurse and a 1:1 transportation nurse during the 2024-25 school year from July, 2, 2024 to June 27, 2025 at an annual rate of $333,608 (Parent Ex. A-G at p. 1). According to the contract, B&H agreed to provide the services in accordance with the terms of the contract and agreed to use properly trained and licensed nurses employed by or under contract with B&H (Parent Ex. A-G at p. 2).

According to the June 2024 iBrain education plan, the student was placed in a 6:1+1 special class at iBrain with a 1:1 paraprofessional and a 1:1 nurse (Parent Ex. B at p. 1). The June 2024 iBrain education plan included an individualized health plan (IHP) that required a 1:1 nurse in order for it to be implemented properly (id. at pp. 39-46; see Tr. pp. 168-69). According to the IHP included in the June 2024 iBrain education plan, the student required 1:1 nursing services to monitor and report any seizure activity, including the clinical presentation, onset, duration, and postdictal phase (Parent Ex. B at p. 42). The nurse would also be responsible for providing rescue medications for seizures and administer medications as ordered by the student's primary care physician (id. at pp. 42-43, 45). The IHP indicated that a nurse was necessary to monitor for signs and symptoms of skin breakdown, pulmonary infections, and bladder infections and included a goal to ensure the student remained in optimal health with all care needs met 100% of the time (id. at pp. 41-42). According to the IHP the nurse would also be tasked with monitoring the student's oxygenation level and providing supplementary oxygen to maintain an oxygen level of 98% or greater; the nurse would also educate family and staff about the student's aspirin allergy to prevent exposure (id. at p. 43). Further, because the student was hypoglycemic, the nurse would monitor and treat symptoms of hypoglycemia and hyperglycemia, ensuring the student's blood sugar remained at optimal levels as per the primary physician's guidelines (id. at pp. 43-44). Additionally, according to the IHP, the nurse was responsible for ensuring the student remained free of pain and injury, and that all health needs were met while promoting growth, development, safety, and well-being (id. at p. 44). Further, the 1:1 nurse was needed to be present during the student's related services to assist with her medical needs (id. at pp. 26, 45-46).

The iBrain deputy director testified that the student required a 1:1 nurse to monitor her glucose levels, oxygen levels, and seizures due to her medical conditions, which included a seizure disorder and diabetes (Tr. p. 155). He further testified that the nurse was needed to administer medication as needed, including glucose pills and nebulizer treatments; and to monitor the student's oxygenation level to ensure her airways are not restricted (Tr. p. 168). He also explained that because the student is a diabetic, the nurse was needed to monitor her hypoglycemia to ensure she had the right amount of glucose and did not become insulant resistant (id.). The iBrain deputy director also testified that because of the student's highly intensive needs the student needed a 1:1 nurse to implement her IHP and IEP (Tr. p. 168-69).

The parent testified at the hearing that the student required nursing services because she suffered from seizures and that she required a nurse that knew how to recognize them (Tr. p. 129). Further, as previously noted, the parent testified that during the 2023-24 school year, the student was absent a lot and out of school due to illness and was hospitalized three times due to pneumonia (Tr. pp. 126-27, 129).

Based on the foregoing, the parent presented sufficient evidence to demonstrate that the student received appropriate nursing services. As indicated above, it was error for the IHO to consider the parent's unilateral placement as separate components as opposed to viewing the placement in its totality. The parent's unilateral placement consisted of the student's attendance at iBrain, along with privately-obtained special transportation and nursing services. The evidence in the hearing record demonstrates that the parent's unilaterally-obtained special education program constituted specially designed instruction to address the student's needs when viewed in light of the totality of the circumstances. Thus, the IHO's determinations that the parent failed to meet her burden of demonstrating the appropriateness of her unilaterally-obtained special transportation and nursing services must be reversed.[11]

[11] The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the 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"]). In its opening statement the district argued that the parent would not present any testimony "to explain the exorbitant cost of transportation" and that the parent would "not be able to justify the cost of iBrain, the student's transportation or for the nursing services" (Tr. p. 44). The district further argued that "it w[ould] be established that the cost of all these services [we]re unreasonable" (Tr. p. 45). In its closing brief, the district asserted that the cost of the parent's program, which included tuition, supplemental tuition, nursing and transportation was excessive and unreasonable (IHO Ex. I at p. 11-13). The district also asserted that the parent's 10-day notice was insufficient (id. at pp. 13-14). As indicated above, the IHO found that the parent provided adequate 10-day notice of her intention to unilaterally enroll the student at iBrain and seek public funding for the 2024-25 school year and further determined that the parent was entitled to direct funding for the balance of unpaid tuition and that the cost of tuition was reasonable (id.). In its answer with cross-appeal, the district argues that the parent's arguments related to equitable considerations should be disregarded because the parent was not aggrieved (Answer with Cross-Appeal ¶ 22). Notably, the district did not reassert the claims described above, which relate to equitable considerations and did not challenge the IHO findings on equitable considerations in its answer with cross-appeal. State regulation provides that a request for review must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Further, an IHO's decision is final and binding

### C. Independent Educational Evaluations

In its cross-appeal, the district argues that the IHO improperly ordered the district to fund IEEs that had been awarded as relief in a proceeding concerning the 2023-24 school year in the unappealed March 3, 2024 IHO decision. The district alleges that the IHO engaged in an improper attempt to enforce the unappealed March 3, 2024 IHO decision.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).[12]

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

Although the IHO stated that the IEEs sought by the parent had been previously awarded in a prior proceeding, the IHO nevertheless determined that the parent was entitled to IEEs in this proceeding, based on the district's failure to initiate an impartial hearing to establish that its own

upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Thus, the IHO's determinations related to equitable considerations have not been challenged and will not be discussed further.

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

evaluations were appropriate (IHO Decision at p. 7). The hearing record reflects that the unappealed March 3, 2024 IHO decision awarded the parent funding for a neuropsychological evaluation, a speech-language evaluation, an OT evaluation, a PT evaluation, and an assistive technology evaluation to be conducted by the parent's chosen providers at their market rates (IHO Pendency Ex. III at p. 21). The IHO in this matter ordered the district to "provide any evaluations" that were ordered in the prior proceeding "that have not been provided to date" (IHO Decision at p. 7).

In her July 2, 2024 due process complaint notice, the parent restated her disagreement with the district's failure to evaluate the student and asserted that the IHO in the prior proceeding "ordered the [district] to conduct" the awarded IEEs, and that "[t]he [district] ha[d] not conducted those evaluations" (Parent Ex. A at pp. 7, 8). However, as noted above, the parent was awarded funding for the evaluations in the prior proceeding, and the district was not ordered to conduct any evaluations.

Recently, the District Court of the Southern District of New York found that a parent may commence an impartial hearing and request a district-funded IEE in a due process complaint notice in the first instance and need not communicate with the school district or the CSE prior to seeking an impartial hearing regarding their request for such an IEE (Moonsammy v. Banks, 2024 WL 4277521, at *15-*17 [S.D.N.Y. Sept. 23, 2024]).[13]

Notwithstanding the district court's view in Moonsammy, the hearing record indicates that the district did not conduct any evaluations and relied on evaluative data provided by iBrain and from the student's prior nonpublic school (Dist. Ex. 2 at p. 5). In addition, review of the hearing record reflects that the parent has not obtained the previously awarded IEEs, which would include the parent's current requests for IEEs. As indicated above and pursuant to the regulations, the parent is only entitled to one IEE at public expense each time the district conducts an evaluation with which the parent disagrees (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g]). Accordingly, as the parent has already received an award of an IEE for the district's failure to conduct a triennial evaluation of the student during the 2023-24 school year, it would be inappropriate to award additional funding for the parent's requested IEEs in this matter.[14]

[13] Under 34 CFR 300.502(b)(2), it would appear that the district has only one option to forestall litigation on the issue, and that is to grant the IEE at public expense before the presentation of evidence begins in the due process hearing that was commenced by the parent. This is of little consequence so long as the district is in agreement with the parent to grant the IEE. However, with the burden of production and persuasion placed on school districts under State law, there is little incentive for a parent to use the resolution meeting with a school district. Strategically, it would almost always be more effective from a parent's perspective to force a district into defending itself in an impartial hearing as soon as possible on this issue. The district's second option under the regulation—to commence its own due process hearing "without unnecessary delay"—is illusory in cases where the parent has already initiated the proceeding by making the initial request for an IEE in their own due process complaint notice.

[14] To the extent the IHO in this matter was attempting to enforce the unappealed March 3, 2024 IHO decision, it is well settled that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't,

## VII. Conclusion

In summary, the evidence in the hearing record supports a finding that the district denied the student a FAPE for the 12-month 2024-25 school year by failing to recommend appropriate nursing services. The IHO correctly found that iBrain was an appropriate unilateral placement for the student for the 12-month 2024-25 school year. However, the IHO erred in his analysis of the parent's unilaterally-obtained services and incorrectly determined that the parent's privately-obtained special transportation and nursing services were not appropriate. The IHO further erred in ordering the district to fund IEEs that were awarded to the parent in a prior proceeding.

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

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision dated November 12, 2024 is modified by reversing those portions, which found that the parent's private transportation services and private 1:1 nursing services were not appropriate, and which ordered the district to fund IEEs awarded to the parent in a prior proceeding; and

**IT IS FURTHER ORDERED** that the district is directed to fully fund the student's private transportation services provided by Sisters Travel during the 2024-25 school year as set forth in the relevant contract; and

**IT IS FURTHER ORDERED** that the district is directed to fully fund the student's private 1:1 nursing services, including the 1:1 travel nurse provided by B&H health during the 2024-25 school year as set forth in the relevant contract.

**Dated:** **Albany, New York**
**May 14, 2025**

**CAROL H. HAUGE**
**STATE REVIEW OFFICER**

1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]).