The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 25-125

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 and Freedom Legal Group, attorneys for petitioners, by Peter Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund their daughter's individual nursing and special transportation costs related to her private placement at the International Academy for the Brain (iBrain) for the 2024-25 school year. The district cross-appeals those portions of the IHO's decision finding that the district failed to provide the student a free appropriate public education (FAPE) and that equitable considerations favored the parents. 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 has received special education programs and services as a student with a traumatic brain injury and her eligibility for special education is not in dispute (Parent Ex. C at pp. 1, 5; see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).[1] She has received diagnoses of a genetic

[1] The hearing record contains duplicate copies of the November 16, 2023 IEP (compare Parent Ex. C, with Dist.

disorder, hypotonia, chronic encephalopathy, global delays, sensorineural hearing loss, strabismus, myopia of both eyes, cortical visual impairment, and skull anomaly (Parent Ex. C at p. 5). The student has attended iBrain since April 2022 and, at the time of the impartial hearing in September 2024, she was in a 6:1+1 special class (Sept. 9, 2024 Tr. p. 127; Parent Ex. C at p. 5).[2, 3]

By way of further background, a CSE convened on November 16, 2023 and developed an IEP for the student with a projected implementation date of December 4, 2023 (Parent Ex. C). The November 2023 CSE recommended that for the 12-month extended school year, the student attend a 12:1+(3:1) special class in a district specialized school, with three periods per week of adapted physical education, four 60-minute sessions per week of individual occupational therapy (OT), one 60-minute session per week of group OT, five 60-minute sessions per week of physical therapy (PT), five 60-minute sessions per week of individual speech-language therapy, three 60-minute sessions per week of individual vision education services, and individual school nurse services as needed, and, for the parents, one 60-minute sessions per month of group parent counseling and training (id. at pp. 48-49). The November 2023 CSE additionally recommended a full-time individual paraprofessional for health, ambulation, safety, and feeding and two 60-minute sessions per week of individual assistive technology services (id. at p. 49). The November 2023 CSE recommended that the student receive special transportation services, including transportation from the closest safe curb location to school, 1:1 nursing services, a lift bus that could accommodate a regular size wheelchair, and a route with fewer students (id. at pp. 53-54).

The district conducted an OT evaluation of the student on January 8, 2024 and a PT evaluation of the student on January 26, 2024 (Dist. Exs. 6; 8).

By prior written notice to the parents dated February 16, 2024, the district summarized the recommendations of the November 2023 CSE; indicated that the CSE was not seeking a district assistive technology evaluation at that time; identified the evaluations used in the creation of the November 2023 IEP; identified the options considered and rejected and the reasons why; notified the parents of the procedural safeguards and where they could obtain a copy; and attached a school location letter and notification that the student would be alternatively assessed (Dist. Ex. 3).

The district requested permission from the parents to perform a psychoeducational assessment of the student via an assessment authorization and information packet dated March 4, 2024 (Dist. Ex. 7). A psychoeducational evaluation was performed on March 25, 2024 (Dist. Ex. 10).

Ex. 1) and also includes a copy of the November 2023 IEP in the parents' primary language (Dist. Ex. 2). This decision will cite to Parent Exhibit C when referring to the November 16, 2023 IEP.

[2] The transcripts for this hearing are not consecutively paginated with each other so for clarity this decision will cite to the transcripts by both the hearing date and page number.

[3] The testimony by affidavit of the deputy director and the student's mother both indicated that the student attended an 8:1+1 special class at iBrain, however during the impartial hearing, the deputy director testified that this was a "typo," and the student actually attended a 6:1+1 special class (compare Dist. Exs. J ¶ 13; K ¶ 5, with Sept. 9, 2024 Tr. p. 127).

In a prior written notice of recommendation dated April 29, 2024, the district notified the parents that it had received the parents' request for a reevaluation and agreed to perform the following assessments: assistive technology; classroom observation; functional vision; OT; PT; psychoeducational; speech and language; and social history update (Dist. Ex. 5 at pp. 1-2).

On June 16, 2024, the parent signed an annual service agreement with Sisters Travel and Transportation Services, LLC (Sisters Travel) for the provision of transportation for the time period of July 2, 2024 through June 27, 2025 at an annual rate of $191,111 (Parent Ex. A-F).[4] In a letter dated June 17, 2024, the parents, through their attorneys, provided the district with notice that the parents were rejecting the district's "most recent proposed" IEP and school placement for the 2024-25 extended school year and that they had "no choice other than to re-enroll the [s]tudent" at iBrain, which the parents contended was the student's last-agreed upon placement between the parents and district (Parent Ex. A-A). On June 18, 2024, the parent signed an enrollment contract with iBrain for the provision of special education services for the student for the extended 2024-25 school year (Parent Ex. A-E).[5] The parent also signed a nursing service agreement on June 18, 2024 with B&H Health Care Services, Inc. (B&H) for the provision of nursing services for the student for the time period of July 2, 2024 through June 27, 2025 at an annual rate of $333,608 (Parent Ex. A-G).

The district sent the parents a prior written notice dated June 20, 2024, again summarizing the considerations of and recommendations made by the November 2023 CSE, along with a new school location letter (Dist. Ex. 4). The district recommended a different assigned public school in its June 20, 2024 school location letter than in its February 16, 2024 school location letter (compare Dist. Ex. 3 at p. 7, with Dist. Ex. 4 at p. 8).

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 FAPE for the 2024-25 extended school year (Parent Ex. A). The parents invoked pendency and requested an interim order of pendency directing the district to fund the cost of the student's tuition and supplemental services pursuant to the parents' enrollment contract with iBrain, transportation services pursuant to the parents' agreement with Sisters Travel, and nursing services pursuant to the parents' agreement with B&H (id. at pp. 2, 13).

The parents argued a number of procedural violations that that they asserted impeded the student's right to a FAPE, significantly impeded the parents' opportunity to meaningfully

[4] Parent Exhibit A, which is the parents' due process complaint notice dated July 2, 2024, included the following attached documents: A-A which is a June 17, 2024 ten-day notice; A-B which is a July 2, 2024 pendency implementation form; A-E which is a June 24, 2024 iBrain enrollment contract; A-F which is a June 16, 2024 Sisters Travel annual service agreement; and A-G which is a June 18, 2024 nursing services agreement (Sept. 9, 2024 Tr. pp. 76-80; Parent Ex. A). Parent Exhibits A-C and A-D were withdrawn during the impartial hearing and accordingly were not included in the hearing record that was certified to the Office of State Review (Sept. 9, 2024 Tr. p. 78). For purposes of this decision, reference to the documents that were attached to the parents' due process complaint notice will be cited as marked (i.e., "Parent Ex. A-A").

[5] The iBrain annual enrollment contract indicated the base tuition was $213,000 and the supplemental tuition was $124,124.20 for a total "full tuition" of $337,124.20 (Parent Ex. A-E).

participate in the decision-making process regarding a FAPE to the student, and caused a deprivation of education benefits to the student (Parents Ex. A at pp. 8-9). The parents further listed many additional substantive violations of the IDEA and asserted that the district failed to offer the student a FAPE because it "failed to provide a placement uniquely tailored to meet [the student's] needs" for the 2024-25 extended school year (id. at p. 9).

More specifically, the parents asserted that the district failed to provide them with prior written notice or a school location letter for the 2024-25 school year, which constituted procedural violations that denied the student a FAPE (Parent Ex. A at pp. 7, 9). The parents also argued that the district failed to evaluate the student in all suspected areas of disability, failed to recommend appropriate related services, and predetermined the outcome of the November 2023 IEP (id. at pp. 10-11). With respect to the IEP, the parents alleged that the November 2023 CSE denied the student a FAPE by recommending a 12:1+(3:1) special class ratio and failing to recommend a full-time 1:1 nurse and music therapy with a licensed music therapist (id. at p. 7). The parents also alleged that the November 2023 CSE's failure to recommend special transportation services that included air-conditioning, limited travel time, and a 1:1 nurse constituted a denial of a FAPE (id. at p. 9). Finally, the parents asserted that the district's assigned public school could not provide the student with an extended school day and was inappropriate to meet the student's needs (id. at p. 10).

The parents asserted that iBrain was an appropriate unilateral placement for the student and that equitable considerations favored awarding the parents their requested relief (Parent Ex. A at p. 12). As relief, the parents requested an order directing the district to fund the full cost of iBrain tuition and supplemental tuition, transportation services provided to the student pursuant to the parents' contract with Sisters Travel, and nursing services pursuant to the parents' contract with B&H for the 2024-25 extended school year, as well as funding for independent evaluations of the student (id. at p. 13).

B. Events Post-Dating Due Process Complaint Notice

On July 10, 2024, a physician signed iBrain's physician's order for a 1:1 nurse (Parent Ex. H at pp. 1-2). By letter dated July 11, 2024, the district notified the parents that it had become aware that the parents intended to unilaterally enroll the student at iBrain for the 2024-25 extended school year and that the district was prepared to transport the student to and from iBrain, "immediately, starting July 1, 2024" (Dist. Ex. 12).

In a response to the parents' due process complaint notice dated July 15, 2024, the district generally denied the parents' allegations and provided notification of its intention to "pursue all applicable defenses during these proceedings" (Response to Due Process Compl. Not.).

C. Impartial Hearing Officer Decision

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). A prehearing conference was held on August 8, 2024 (Aug. 8, 2024 Tr. pp. 1-50). A pendency hearing was held on August 14, 2024, at which the district did not appear (Aug. 14, 2024 Tr. pp. 51-64). In an interim decision on pendency dated August 14, 2024, the IHO held that the student's pendency program was based on the decision in Application of a Student with a

Disability, Appeal No. 23-271 which awarded direct payment of the student's full tuition at iBrain pursuant to the parents' enrollment contract with iBrain, and special transportation services pursuant to the parents' contract with Sisters Travel (Interim IHO Decision). The hearing continued on September 9, 2024 and concluded on November 1, 2024, after four days of hearings devoted to the merits of the parents' complaint (Sept. 9, 2024 Tr. pp. 65-189; Oct. 3, 2024 Tr. pp. 190-264; Oct. 24, 2024 Tr. pp. 1-21; Nov. 1, 2024 Tr. pp. 22-119).

In a final decision dated January 15, 2025, the IHO found that the district failed to meet its burden to demonstrate that it provided the student with a FAPE for the 2024-25 school year because it failed to present any witness testimony (IHO Decision at pp. 10-11). Next, the IHO held that the parents met their burden of proving that iBrain was an appropriate unilateral placement for the student and that equitable considerations supported an award of direct funding to iBrain (id. at pp. 12, 14-16). However, with regard to the parents' request for funding for transportation and nursing services, the IHO noted the parents failed to provide a witness from either the transportation or nursing company and that there was insufficient evidence in the hearing record to determine whether the costs charged for transportation or nursing were reasonable (id. at pp. 18, 20). In discussing transportation, the IHO noted that the hearing record failed to establish that the transportation recommended by the district in the November 2023 IEP was insufficient to meet the student's needs or that the parents engaged with the district to determine if the district could have provided appropriate transportation to and from iBrain for the 2024-25 school year (id. at p. 18). The IHO found that there was no evidence in the hearing record that a school nurse could not have sufficiently addressed the student's medical needs in lieu of a 1:1 nurse (id. at p. 19). The IHO discussed inconsistencies in the testimony regarding the student's medical needs and concluded that there was no evidence before her to justify the need for a 1:1 nurse during the school day (id. at p. 20). For these reasons, the IHO denied the parents' requests for orders directing the district to fund the costs of the student's transportation and nursing services pursuant to the parents' contracts (id. at pp. 18, 20).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO's determinations regarding the district's denial of a FAPE for the 2024-25 school year and the award of iBrain tuition should be affirmed, but that the IHO erred in denying the parents' requests for transportation and nursing services pursuant to the contracts. Regarding transportation, the parents assert that the district's July 11, 2024 offer to transport the student to and from iBrain would have failed to provide the student with air-conditioning and limited travel time, thereby endangering the student, and that the parents' evidence addressed the provision to the student of private transportation services. The parents argue that with respect to 1:1 nursing services, the district inappropriately failed to recommend 1:1 nursing for the student in the November 2023 IEP and the parents' evidence established that the student received 1:1 nursing services at iBrain to ensure her safety.

In an answer and cross-appeal, the district asserts that it met its burden of proving that it offered the student a FAPE for the 2024-25 school year based on the documentary evidence it entered into the hearing record. The district argues that the parents failed to prove that iBrain was an appropriate unilateral placement for the student. According to the district, equitable considerations do not weigh in favor of the parents' requested relief and the parents should be denied iBrain tuition, 1:1 private nursing costs, and private transportation costs. The district

further argues that the parents failed to raise their request for independent evaluations in their appeal and therefore it should not be considered.

In the parents' reply and answer to the cross-appeal, the parents argue that the IHO correctly held that the district denied the student a FAPE for the 2024-25 school year and properly ordered the district to fund the student's tuition at iBrain for the 2024-25 school year.

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

[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).

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

Preliminarily, the district in its answer correctly notes that among the relief sought in the parents' due process complaint notice was funding for independent evaluations; however, the IHO did not specifically address this request in the decision and the parents have not appealed the IHO's failure to address this issue or the IHO's failure to award them such requested relief (compare Parent Ex. A at p. 13, with IHO Decision; see generally Req. for Rev.). Thus, the parents' request for funding for independent evaluations has been deemed abandoned by the parents and will not be further addressed (8 NYCRR 279.8[c][4]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]).

Next, I address the district's arguments relating to witness testimony. The IHO found that the district did not meet its burden to demonstrate that it offered the student a FAPE for the 2024-25 extended school year because it did not produce any witness testimony (IHO Decision at p. 11). The district cross-appeals the IHO's finding that it denied the student a FAPE, arguing in part that the IHO erred in requiring witness testimony and by failing to specify which of the parents' "several allegations" set forth in their due process complaint notice required more than just the production of documentary evidence. As noted above, the burden of production and persuasion has been shifted under State law to a district to show that it offered a student a FAPE (Educ. Law § 4404[1][c]).[7] In Endrew F., the Supreme Court held that the "reviewing court may fairly expect [school] authorities . . . to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances"(580 U.S. at 404). However, neither the IDEA, State Law, nor case law provides that a district fails to meet its burden of proof simply because the evidence produced does not consist of witness testimony and instead, each party has the right to "[p]resent evidence and confront, cross-examine, and compel the attendance of witnesses" (34 CFR 300.512 [a][2]). Thus, a district could prevail on some or all of the disputed issues related to a FAPE for a student by producing evidence consisting of documentary evidence. An IHO is required to conduct a fact-specific analysis in order to determine whether a district offered the student a FAPE and a district must ensure that the hearing record includes evidence addressing the particular issues raised by

[7] Ordinarily, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer v. Weast, 546 U.S. 49, 58 [2005]; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H., 685 F.3d at 225 n.3; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]).

the parents in their due process complaint notice. The sufficiency of the evidence presented should be determined after weighing the relative strengths and weakness of the parties' evidence in light of the allegations and the relevant legal standards. To be clear, there is no procedural requirement that a district call witnesses at the impartial hearing in order to address the parents' due process complaint notice, especially if the district submits the extensive documentation that is required under the procedures of the IDEA itself.[8]

While the parents seek affirmance of the IHO's finding that the district denied the student a FAPE, in their request for review they also request a finding that the district denied the student a FAPE for the 2024-25 school year on the specified grounds that the district "fail[ed] to recommend an appropriate class size, fail[ed] to evaluate [s]tudent in all areas of her suspected disability, den[ied] [p]arents meaningful participation in the IEP process and predetermin[ed] the outcome of [s]tudent's IEP" (Req. for Rev. ¶ 15). The parents further argue that the district failed to recommend appropriate special transportation and nursing services (Req. for Rev. ¶¶ 20-27, 28-37).[9] Thus, I will focus on the parties' arguments specified in their pleadings when reviewing whether the district's documentary evidence demonstrates that it offered the student a FAPE.

B. November 2023 CSE and IEP

1. CSE Process - Predetermination/Parent Participation

Concerning the issue of the predetermination of a student's program by a district, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2022]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of

[8] If the district intends to rest its case solely on documentary evidence, it is essential that the district offer into evidence all documentation pertaining to the evaluations of the student and the CSE's recommendations (see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [discussing the consequences of a CSE's failure to adequately document evaluative data, including that reviewing authorities might be left to speculate as to how the CSE formulated the student's IEP]).

[9] The district argues that the parents did not sufficiently raise on appeal claims related to the November 2023 CSE's recommendations for special transportation and nurse services, as the allegations in the request for review appear under headings pertaining to the unilateral placement and equitable considerations. However, the IHO's determinations related to equitable considerations, by which the parents were aggrieved, address whether or not the parent's unilaterally obtained services exceeded FAPE, thereby necessitating a discussion of what constituted a FAPE for the student—a discussion which the IHO did not undertake. As such, in this instance, I decline to find that the parent abandoned her claims pertaining to nurse or transportation services.

Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

A review of the November 2023 IEP shows that the following individuals attended the November 2023 CSE meeting: the district representative, a district related service provider/special education teacher, the student's mother, a language translator, the iBrain deputy director of special education (deputy director), a parent advocate, and "iBrain [a]dditional [s]taff/[p]arent [a]dvocates" (Parent Ex. C at p. 58).[10]

With respect to whether the CSE had the requisite open mindedness regarding the contents of the IEP, here, the November 2023 IEP and February 2024 prior written notice documented the mother's participation in the CSE meeting and reflected the parents' concerns, as well as concerns expressed by iBrain representatives (see Parent Ex. C at pp. 15-16, 25, 57; Dist. Ex. 3 at pp. 3-4). For example, the November 2023 IEP noted the mother's concern that, when overstimulated, the student would cry, overheat, and exhibit limited focus, and the mother's desire that PT focus on increasing the student's participation and engagement in academic and play activities by working on grasp and head control and increasing the student's independence with rolling, sitting balance, and weight bearing positions in a gait trainer and while standing (id. at pp. 15-16, 26-27). The IEP also reflected the mother's concern that music therapy would not be provided by a board-certified music therapist, concerns about the recommended class size and size of the larger school building, lack of staff with specialized training in traumatic brain injury, lack of 1:1 nursing, and lack of extended school day (id. at p. 57; see also Dist. Ex. 3 at p. 4).

Further, the February 2024 prior written notice reflected that, in addition to the 12:1+(3:1) special class ultimately recommended, the CSE considered a 6:1+1 special class in a specialized school, an 8:1+1 special class in a specialized school, and a 12:1+1 special class in a specialized school but these options did not meet the student's needs (Dist. Ex. 3 at p. 4).[11]

In her affidavit testimony, the student's mother acknowledged that she and representatives from iBrain "attended and participated" in the CSE meeting and that, during the meeting, the parent "greatly disagreed" with the CSE's recommendation for a 12:1+(3:1) special class in a district specialized school, as well as the lack of music therapy, vision education, and transportation accommodations of air-conditioning and limited travel time (Parent Ex. I ¶¶ 7-8).[12] However, the failure of the CSE to adopt the parents' preferred programming recommendations does not mean

[10] With regard to additional iBrain staff and parent advocates, the November 2023 IEP included a note to "[s]ee attachment for full list of participants," but no list is included in the hearing record (see Parent Ex. C at p. 58).

[11] As discussed below, the prior written notice did not explain the CSE's determination that the other options did not meet the student's needs (see Dist. Ex. 3 at p. 4). Nevertheless, given evidence that the parent participated in the November 2023 CSE meeting, along with the representatives from iBrain, the lack of detail regarding the CSE's rationale is not enough in this instance to undermine evidence that the district had an open mind regarding the student's placement.

[12] The IHO's exhibit list reflects that Parent Exhibit I is the student's mother's affidavit in English and Parent Exhibit K is the student's mother's affidavit in her primary language (IHO Decision at p. 25). However, a review of the submitted documents reflects that they are both in English (compare Parent Ex. I, with Parent Ex. K).

that the outcomes of the meeting were predetermined (B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014]).

Based on the foregoing evidence, the parents' arguments that the November 2023 IEP was predetermined and that they were precluded from meaningful participation is not supported by the hearing record.

2. Sufficiency of Evaluative Information

As noted above, while the issue of the sufficiency of evaluative information before the November 2023 CSE was not addressed by the IHO, on appeal, the parents allege that the district failed to evaluate the student in all areas of suspected disability, which they say contributed to the district's denial of a FAPE for the 2024-25 school year. In their July 2, 2024 due process complaint notice, the parents specifically allege that the district failed to complete a triennial psychological evaluation of the student or neuropsychological testing prior to the November 2023 CSE meeting and failed to conduct an updated psychoeducational evaluation, OT evaluation, PT evaluation, or speech-language evaluation prior to the start of the 2024-25 school year (Parent Ex. A at p. 10).

Federal and State regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F. v. New York City Dep't of Educ., 2011 WL 5419847 at *12 [S.D.N.Y. November 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The February 2024 prior written notice reflects that, when developing the student's November 2023 IEP, the CSE considered an October 2023 iBrain quarterly progress report, an October 2023 vision report, November 2023 medication administration forms, and a November 2023 iBrain report and education plan (Dist. Ex. 3 at p. 4).

A review of the hearing record shows that, of these evaluations, only the October 2023 iBrain quarterly progress report is included in the hearing record (see Parent Ex. D). The November 2023 IEP included information about the student's present levels of performance, which the IEP stated were, "[u]nless otherwise noted . . . taken from the draft IEP" provided by iBrain (Parent Ex. C at p. 5). While the hearing record does not contain the November 2023 iBrain draft report, it does contain a June 13, 2024 iBrain education plan for the 2024-25 school year (see Parent Ex. B). A comparison of the November 2023 IEP and the June 2024 iBrain education plan reveals that, with the exception of vision and music therapy needs, which were only discussed in the iBrain education plan, the student's present levels of performance identified in the November 2023 IEP were virtually identical to those reflected in the June 2024 iBrain education plan (compare Parent Ex. B at pp. 1-30, with Parent Ex. C at pp.1-29).

Regarding the student's academic needs, the November 2023 IEP described that the student was eager to learn, attentive to her surroundings, and persistent when completing tasks (Parent Ex. C at p. 5). She understood cause and effect relationships, answered some "wh" questions, and communicated using a head tracking device or by reaching for her choice from a field of two options (id.). According to the IEP, the student followed simple one-step directives when given minimal support (id. at pp. 5-6). She recognized the first letter of her name and was working on recognizing her printed name and spelling her first name using her head tracking device (id. at p. 6). The IEP noted the student matched and sequenced stories with moderate support and participated in 30-minute preferred and non-preferred academic sessions with minimal to moderate support (id.). She identified letters A to M with moderate support and was working on identifying letters N through Z and counting up to 10 objects (id.).

In terms of the student's communication needs, the November 2023 IEP related that the student understood spoken language and responded to her name (Parent Ex. C at p. 6). She had a speech generating device (SGD) and iPad Pro with head tracking access and TouchChat communication software (id. at pp. 6-7). The IEP indicated the student participated in classroom and therapies using her SGD with TouchChat and head tracking access and two single-level voice output switches (id. at p. 7). She used TouchChat with headtracking to greet peers and adults, respond to simple yes/no questions, select from preferred activities, and express simple wants and needs (id.). The student continued to use switches with prerecorded messages for certain tasks, however the physical challenge affected her stamina, so head tracking was the preferred communication method (id.). According to the IEP, during assistive technology sessions, the student needed moderate to maximal multimodal prompts and cues to access and activate her device with minimal to moderate processing time (id.). She required breaks every 15-20 minutes to remain on task, maintain stamina, reduce frustration, and prevent overstimulation (id.). In addition to her SGD, the student communicated using facial expression, body language, gestures, and behavior and required help from a communication partner to communicate successfully (id. at p. 8).

The November 2023 IEP noted that the student's receptive and expressive language skills were below average limits, and her physical challenges significantly impacted her ability to communicate in most contexts and settings (Parent Ex. C at pp. 12, 13). The student responded to common gestures by looking in the direction of the clinician and visually attending to the speaker (id.). The IEP noted the student followed simple directions within familiar routines and activities, and this skill was emerging in unfamiliar settings and tasks, and with unfamiliar communication

partners (id. at p. 13). In addition, the student benefited from pictures to increase comprehension of simple concepts and items (id.). The IEP also noted the student communicated most effectively using a combination of modalities, including her augmentative and alternative communication (AAC) device, facial expression, body language, and behavior (id. at pp. 13-14). She consistently activated picture symbols from a visual field of four on her AAC device, activated one picture at a time to communicate messages, and given a verbal field of two to four options, consistently raised her hands to comment, reject, and respond yes or no to a variety of questions (id. at p. 14). Given her AAC device or a verbal field of options, the student directed actions, made requests, commented on items, actions, and people, and assigned descriptors (i.e., adjectives and adverbs) to objects (id.).

Speaking to the student's social/emotional needs, the November 2023 IEP related that the student demonstrated clear preference for certain objects, activities, and people (Parent Ex. C at p. 14). She was interested in social interactions with familiar adults and her interest in peers was emerging (id.). The student gained the attention of peers and adults through vocalizations, cries, and gestures using her hands and legs (id.). According to the IEP, the student's social skills were still emerging, and she required moderate verbal support to participate in small group activities and maximal support to participate in large groups (id. at p. 16). She attended 1:1 academic sessions with minimal to no support and engaged in morning/afternoon meeting with minimal support (id.). The IEP stated the student greeted peers by waving or using her head tracking device, was aware of her peers, and enjoyed playing games such as hot potato, freeze dance, and Simon says with adult assistance (id.). When overstimulated, the student cried, overheated, and exhibited limited focus, and needed a break to self-regulate and return to participation (id. at p. 17).

With regard to the student's physical development, the November 2023 IEP reported that the student had received diagnoses of a genetic condition, hypotonia, chronic encephalopathy, global delays, sensorineural hearing loss, strabismus, myopia of both eyes, cortical visual impairment, and skull anomaly (Parent Ex. C at p. 5). She wore glasses and bilateral hearing aids (id.). As memorialized in the IEP, the student had mixed hypotonia and hypertonia, with a low tone base and fluctuating tone in her upper and lower extremities (id. at pp. 17, 20). She required the support of an individual paraprofessional throughout the day to support her physical, cognitive, and sensory needs (id. at p. 19). The student needed "total assistance transfers," total support for functional mobility and navigation of all environments, moderate to maximal assistance for completing all activities of daily living, support for safety throughout the day, and assistance with maintaining attention to tasks and using adaptive devices and equipment, donning/doffing orthotics, completing position/equipment changes, and managing overall safety (id.). The IEP indicated the student used a wheelchair as her primary form of mobility during school hours and transportation (id.). In addition, she used bilateral hand splints, bilateral ankle foot orthoses, and a flexible thoracic-lumbar-sacral orthosis (id.). The November 2023 IEP noted that the student required flexible and adaptive seating, daily stretching and passive range of motion, donning of splints, use of positioning devices, and physical repositioning (id.). She required adaptive equipment to aid in functional positioning and participating (id. at p. 22). She also required assistive devices for communication and participation in tasks, including head tracking, switches, high-contrast academic materials, Eazyholds, built-up and long handles, and tactile materials (id.). According to the IEP, the student needed environmental modifications including quiet spaces, available movement activities (e.g., swings and balls), positioning aids (e.g., wedges and benches), access to a changing table and elevator, extended time for processing and response, modified

materials, and modified activities (id.). She also used a fully supported gait trainer, chairs, benches, mats, bolsters, and therapy balls during PT sessions, and a prone stander for one hour daily in the classroom (id. at p. 23). The November 2023 IEP also noted that the student received all nutrition and hydration via gastrostomy tube (g-tube) (id. at p. 26).

A review of the hearing record shows that, in an April 2024 prior written notice, the district acknowledged a November 27, 2023 request for reevaluation made by the parents (Dist. Ex. 5 at p. 1).[13] The letter noted that, although the student had "already been reevaluated [that] school year" the district agreed to the requested reevaluation (id.). According to the April 2024 prior written notice, the district determined that the student needed an assistive technology assessment, a classroom observation, a functional vision assessment, an OT assessment, a PT assessment, a psychoeducational evaluation, a speech-language assessment, and a social history update (id. at pp. 1-2). The district subsequently obtained additional evaluations of the student which included a January 2024 PT evaluation, a January 2024 OT evaluation, a March 2024 speech-language evaluation, a March 2024 psychoeducational evaluation, and an April 2024 functional vision assessment (see Parent Exs. 6; 8; 9; 10; 11).[14, 15]

A review of the spring 2024 reevaluations shows that the student's needs were consistent with those identified in the November 2023 IEP. The March 2024 psychoeducational evaluation report indicated that the evaluator was unable to determine the student's full scale IQ or academic skills (Dist. Ex. 10 at p. 3). On the Vineland Adaptive Behavior Scales-Third Edition, the student's scores in communication skills, daily living skills, socialization, and motor skills were below the first percentile (id. at pp. 3-4).

The January 2024 PT evaluation report related the student's diagnoses of a genetic mutation, hypotonia, chronic encephalopathy, global delays, sensorineural hearing loss, strabismus, myopia of both eyes, cortical visual impairment and skull anomaly (Dist. Ex. 6 at p. 5). The PT evaluation report noted the student wore glasses and bilateral hearing aids (id.). The report further noted the student was unable to stand or walk independently, presented with significant postural weakness along with balance, coordination and motor planning deficits, had stiffness in her upper/lower extremities and diminished trunk and postural control (id.). According to the January 2024 OT evaluation report, the student demonstrated diminished proprioceptive awareness, motor planning, vestibular awareness, and fine motor skills and required "maximum assistance with all activities of daily living" (Dist. Ex. 8 at pp. 2-3).

[13] According to the district's events log for the student, evaluations were being pursued "as per [a findings of fact and decision]" (Parent Ex. 13 at pp. 9-10).

[14] The hearing record indicates that the PT, OT, speech-language, and psychoeducational evaluations were independent evaluations (Dist. Exs. 6 at p. 6; 8 at p. 5; 10 at p. 5; 11 at pp. 4-5; 13 at pp. 4-5, 9).

[15] While the district asserts that a March 2024 prior written notice to the parents requesting consent for further assessments was never signed by the parents, it nonetheless appears that the district completed the psychoeducational evaluation, functional vision assessment, OT evaluation, PT evaluation, and speech-language evaluation in 2024 (see Parent Exs. 6; 8; 9; 10; 11; Dist. Ex. 5).

The March 2024 speech-language evaluation found that the student exhibited a severe deficit in expressive and receptive language skills (Dist. Ex. 11 at p. 2). As detailed in the evaluation report, the student was unable to understand verbal language, gestures, some routine concepts, or follow directions and had difficulty comprehending academic tasks and did not always respond to questions (id.). The student's expressive language was extremely limited, as she only vocalized the /a/ vowel, which she used to communicate many of her needs; however, she also used gestures to express her needs or make choices (id.).

While the parents assert that the district did not complete psychoeducational, speech-language, OT and PT reevaluations prior to the start of the 2024-25 extended school year, the hearing record shows that these evaluations were completed by April 2024, well before the July 1, 2024 start of the 2024-25 school year. In addition, the student's needs revealed in these reevaluations were not dissimilar to the student's needs reflected in the November 2023 IEP, and the fact that the student's needs identified in the June 2024 iBrain education plan were almost identical to those in the November 2023 IEP shows that her needs had not changed so significantly as to render the November 2023 IEP inappropriate. Accordingly, the evidence in the hearing record supports that the November 2023 CSE had sufficient evaluative information before it to make appropriate recommendations for the student for the 2024-25 school year.

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

To meet the student's special education needs, the November 2023 CSE recommended the student attend a 12-month program in a 12:1+(3:1) special class in a district specialized school and receive related services set forth in further detail above (Parent Ex. C at pp. 47-49). The CSE also recommended that the student have an individual paraprofessional for "[h]ealth, [a]mbulation, [s]afety, [and] [f]eeding," and to allow the student to benefit from participation in an educational setting (id. at pp. 27; 49). The November 2023 IEP additionally identified management needs that included a "1:1 paraprofessional and 1:1 nurse for functional mobility and positioning," two-person transfers, skilled manual prompting for the facilitation of appropriate movement patterns, 1:1 instruction using direct instructional model, aided language stimulation, additional processing time, repetition of verbal cues and physical cues to increase comprehension, familiar communication partner to interpret signs and vocalizations, clear verbal instructions, a highly structured classroom or corner room with less stimulus from visual and auditory distractions, direct instruction, multisensory supports, sensory breaks during instruction, rest breaks, isolated therapy room to minimize distraction, a padded treatment floor, "(PriO) with language acquisitions through Motor Planning (LAMP)," access to AAC, an instructional laptop, access to adaptive equipment, group intervention with appropriate play partners, a wheelchair, various orthoses, a Rifton chair, a toilet chair, a prone stander, an adaptive tricycle, and a gait trainer (id. at pp. 27-28).

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]).[16] Further, State regulation provides that the maximum class size for those

[16] Management needs are defined by State regulations as "the nature of and degree to which environmental

students 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.). The Second Circuit has recently 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]).

The district argues that in the continuum of classroom options, the 12:1+(3:1) special class is the most supportive classroom available and has "a similar adult-to-student ratio as a 6:1+1 special class" (Answer & Cr.-App. ¶ 7). The adult-to-student ratio required in a 6:1+1 special class and a 12:1+(3:1) special class is similar; however, the 12:1+(3:1) special class ratio provides for variety in the category of school personnel working with the student and which may not be found in other special classes on the continuum designed to address the needs of a student with intensive management needs. Generally, while the student does exhibit highly intensive management needs and requires a high or significant degree of individualized attention and intervention (see 8 NYCRR 200.6[h][4][ii][a]-[b]), her needs also include those which require the highest level of support consisting of the type of habilitation and treatment contemplated by regulation to be available in a 12:1+(3:1) setting (see 8 NYCRR 200.6[h][4][iii]; see Navarro Carrillo, 2023 WL 3162127, at *3).

Where a student's needs could be deemed to fit within the definitions for both 6:1+1 and 12:1+(3:1) special classes as set forth in State regulation, the student's unique needs must dictate the analysis of whether the CSE recommended an appropriate class size. As noted above, the hearing record shows that the November 2023 CSE also considered a 6:1+1 special class in a specialized school, an 8:1+1 special class in a specialized school, and a 12:1+1 special class in a specialized school but determined that none of these programs would meet the student's needs (Parent Ex. C at pp. 57-58; Dist. Ex. 3 at p. 4). The November 2023 prior written notice reflected the concerns of the parents and the iBrain representatives that a 12:1+(3:1) special class would not meet the student's needs as the student required a classroom with no more than six students and "would be overstimulated in a larger class due to the unpredictability of others in the larger school/class" (Dist. Ex. 3 at p. 4). The parent's advocate also expressed that "the large class size would be detrimental to [the student's] health" (id.).[17] While the prior written notice documented

modifications and human or 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 achievement, functional performance and learning characteristics, and social and physical development (8 NYCRR 200.1[ww][3][i][d]).

[17] There is no further elaboration regarding the grounds for the parent advocate's statement that the class size would have an impact on the student's health. However, during the impartial hearing, iBrain's deputy director testified that the recommended class would "pose[] a safety concern" given that many students in 12:1+(3:1) special classes in district specialized schools "may be ambulatory" without "similar classifications" or "health diagnoses" as the student (Nov. 9, 2024 Tr. p. 181). The deputy director's assumptions about other students

the concerns of the parents and iBrain staff, beyond stating that the other options considered "would not meet [the student's] needs," the notice did not articulate the CSE's rationale for believing that to be the case (id.).

On the other hand, review of the November 2023 IEP reflects accommodations and supports to address the concerns raised by the parent and iBrain staff relating to the student's reactions to being overstimulated (see, e.g., Mason v. Carranza, 2023 WL 6201407, at *11 n.15 [E.D.N.Y. Sept. 22, 2023] [finding that supports such as noise-cancelling headphones could have supported the conclusion that the "noisier environment in the 12:1+4 setting could be appropriately mitigated"], reconsideration denied, 2024 WL 3624058 [E.D.N.Y. Aug. 1, 2024]). As noted above, the November 2023 IEP described the student's tendency to dysregulate when overstimulated (Parent Ex. C at p. 17). As supports for the student's management needs, the IEP included recommendations for a "[h]ighly structured classroom or corner room with less stimulus from visual and auditory distractions," provision of "sensory breaks during instruction," "[b]rief rest breaks as needed to sustain energy and attention," and use of an "[i]solated therapy room to minimize distraction" (Parent Ex. C at pp. 27-28).

Given the similarity in the ratios and the supports included in the IEP to address the student's needs that underlay the parents' concerns regarding the recommended class size, I am not convinced that the CSE's recommendation for a 12:1+(3:1) special class was inappropriate to meet the student's needs.

4. Nursing Services

In their July 2, 2024 due process complaint notice, the parents asserted that the student required a full-time 1:1 nurse to address her health and medical needs and argued that the district's failure to address the student's need for individual nursing denied the student a FAPE (Parent Ex. A at p. 11). On appeal, the parents argue that the IHO's finding that the hearing record fails "to show that a school nurse could not handle [s]tudent's medical needs" fails to address "the inadequacies in the [district's] recommendations" (Req. for Rev. ¶ 35; see IHO Decision at p. 19). The parents argue that the hearing record provides evidence that the student needed 1:1 nursing services to ensure her safety during school and during transportation (Req. for Rev. ¶ 35).

assigned to district 12:1+4 special classes are speculative and without support. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]). State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]).

Generally, a student who needs school health services[18] or school nurse services[19] 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 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"]).[20]

The November 2023 IEP indicated that the student had "recently received the service of a 1:1 nurse" (Parent Ex. C at p. 5). According to the IEP, the student received all nutrition and hydration via g-tube and needed an individual paraprofessional to "manage her G-Tube" (id. at p. 26). As a management need of the student, the IEP stated that the student required a "1:1 paraprofessional and 1:1 nurse for functional mobility and positioning" (id. at p. 27). The IEP included an annual goal for tolerating oral intake "with no overt signs or symptoms of aspiration, penetration, or sensory aversion," and an annual goal for the paraprofessional to "consistently consult with the school nurse regarding close monitoring of [the student]'s medical needs" and "ensur[ing] that [the student's] toileting, feeding, and ambulation needs are addressed" with a short-term objective that the student would "be free from aspiration" and the paraprofessional would "ensure that aspiration precautions are followed at all times" (id. at pp. 37, 46). To meet the student's needs in this regard, the November 2023 CSE recommended school nurse services "as needed" (id. at p. 48).

The February 2024 prior written notice reflected that the November 2023 CSE had before it a November 14, 2023 medication administration form with "[u]pdated information on medical levels/needs"; however, the district did not enter a November 2023 medication administration form into the hearing record (see Dist. Ex. 3 at p. 4).[21] The February 2024 prior written notice indicated that, during the November 2023 CSE meeting, the parent and iBrain representatives "expressed significant concern about the lack of provision of school nursing and specifically a 1:1 nurse" (id. at p. 3). According to the February 2024 prior written notice, the student's mother and iBrain representatives felt that the student's g-tube feeding, and other needs justified a full-time1:1 nurse

[18] "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]).

[19] "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]).

[20] However, a school district is not required to furnish medical services under the IDEA except for diagnostic and evaluation purposes (20 U.S.C. § 1401[26][A]; see 34 CFR 300.34[a], [c][5]; 8 NYCRR 200.1[ee], [qq]; Cedar Rapids, 526 US at 73; Irving Independent Sch. Dist. v. Tatro, 468 US 883, 889-90 [1984]).

[21] The hearing record contains a July 10, 2024 medication administration form for the 2024-25 school year which postdates the November 2023 CSE meeting and the parents' July 2, 2024 due process complaint notice (see Parent Ex. H).

(id.). The notice further indicated that "[f]ollowing the meeting the required medical documentation was received and school nursing was able to be initiated" (id. at p. 3).

While the district did not present testimonial evidence to explain the significance of entries on the district's events log for the student, it appears that certain logs entered around the time of the November 2023 CSE meeting pertained to the CSE's recommendation for nurse services for the student (Dist. Ex. 13 at pp. 11-12). In particular, on the same day as the November 16, 2023 CSE meeting, the district representative submitted an entry to the district's events log, indicating that the district received a nursing referral, which was "set for 1:1 skilled nurse service," but that the "the student c[ould] safely be managed by the school nurse," and, therefore, "[i]f in agreement," the referral should be changed to "non 1:1 skilled nurse service" (id. at p. 12). On November 28, 2023, the district "[f]inalized th[e] recommendation for non 1:1 skilled nurse service for [the] student in school evidenced by the attached [2023-24 medication administration forms]" (id. at p. 11). However, there is no other evidence in the hearing record regarding this shift in the referral, whether any "agreement" was reached or by whom, or the basis for the district's view that school nurse services as needed would meet the student's needs.

State guidance provides guidelines for determining whether a student requires 1:1 nursing services that 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 (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). State guidance further provides that:

> [i]n terms of providing school health services or school nurse services to a student as a part of his/her IEP, the term 'as needed' is not specific enough to provide a clear frequency and/or duration for this service and may result in inconsistent implementation. In consideration of a student's unique needs related to nursing services, the IEP may specify the timing conditions which would result in a need for this service (e.g., 'in the event that the student experiences __'). The same would apply to duration and may include an observable, measurable signal that warrants the end of the service (e.g., until the student's heart rate measures __ beats per minute'; or 'until the student's blood glucose level reaches __'). For students whose health conditions require a full-day (continuous) one-to-one nurse, the IEP must specify the frequency, duration, and location for this service

("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4).

In addition, while the student's need for a 1:1 nurse is determined by the CSE, there are certain services that may only be performed by registered professional nurses (RNs) or in some cases, licensed practical nurses (LPNs) under the direction of an RN or district medical director

(see "Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs," at p. 1 [Off. of Student Support Servs. Jan. 7, 2019], available at https://www.nysed.gov/sites/default/files/programs/student-support-services/nursing-one-to-one-nsgqa.pdf). State guidance provides that tasks such as "[f]eeding students with feeding risks (i.e. aspiration" and "initiation and cessation of gastronomy tube feeding by bolus or drip with or without pump" may only be performed by an RN or by an LPN under the direction of an RN, nurse practitioner, or physician assistant (see "Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs" at p. 14).

Given the statement of the student's needs in the IEP, including her need to receive all nutrition and hydration via g-tube (see Parent Ex. C at p. 26), the district did not establish that the CSE's recommendation for school nurse services "as needed" was sufficient to meet the student's needs.[22], [23] The district failed to include in the hearing record any information relied upon by the November 2023 CSE in making a determination regarding the student's need for nurse services and failed to provide any evidence or witness testimony to explain the CSE's rationale in recommending school nurse services as needed. Further, the district did not demonstrate that the November 2023 IEP recommendations pertaining to the student's g-tube feeding were consistent with State guidance. Nor, for that matter, did the CSE's recommendation for school nurse services "as needed" align with the management needs identified in the IEP which indicated that the student required a 1:1 nurse. Accordingly, on this ground, I will uphold the IHO's determination that the district failed to meet its burden to prove that it offered the student a FAPE for the 2024-25 school year.

5. Transportation

The parents next assert that the transportation recommendations made by the district failed to address the student's safety needs, including her need for air conditioning and limited travel time.

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Specialized forms of transportation must be provided to a student

[22] The district's reference to evidence that the parents cleaned the student's G-tube at home and did not have in-home nurse services is irrelevant in the context of determining appropriate in-school nurse services for the student consistent with State laws, regulations, and guidance documents.

[23] The iBrain deputy director also testified that the student needed a 1:1 nurse for administration of medicines and seizure monitoring (Sept. 9, 2024 Tr. p. 153); however, the parent testified that the student had not experienced a seizure in several years and that the student's medication was administrated after school (Nov. 1, 2024 Tr. pp. 36, 44-51, 55). Nevertheless, as discussed above, there are other reasons in the hearing record that support the student's need for a 1:1 nurse for at least portions of each school day.

with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891, 894 [1984]; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The transportation must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

For school aged children, according to State guidance, the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate," which may include special seating, vehicle and/or equipment needs, adult supervision, type of transportation, and other accommodations ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at https://www.nysed.gov/sites/default/files/programs/special-education/special-transportation-for-students-with-disabilities_0.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]).

A review of the November 2023 IEP shows that the CSE recommended that the student receive special transportation that included transportation from the safest curb location, adult supervision in the form of individual nursing services, a lift bus that could accommodate a regular size wheelchair, and a route with fewer students (Parent Ex. C at pp. 53-54). The IEP documented concerns expressed by iBrain representatives at the CSE meeting that the student required "smaller bussing" (id. at p. 57). Speaking to the CSE's transportation recommendations, the iBrain deputy director testified that, at the November 2023 CSE meeting, he disagreed with the recommendation for a lift bus because he assumed that there were other students on that bus, and disagreed with the student traveling with multiple students because it did not provide a "defined, limited travel time" (Sept. 9, 2024 Tr. pp. 176-77).

The deputy director testified that the June 2024 iBrain education plan recommended that the student have limited travel time and an air conditioned bus (Sept. 9, 2024 Tr. pp. 177-78; see Parent Ex. B at p. 60). It is unclear whether the November 2023 iBrain education plan that was purportedly before the CSE included a similar recommendation because the district did not offer that document or the November 2023 medical accommodation form as evidence during the impartial hearing (see Dist. Ex. 3 at p. 4).

Because the district did not offer documentary evidence or witness testimony to support its assertion that the transportation recommendations made in the November 2023 IEP met the

student's needs, it failed to meet its burden of proof on the issue. Accordingly, this serves as another basis to uphold the IHO's determination that the district failed to meet its burden to prove that it offered the student a FAPE for the 2024-25 school year.

C. Unilaterally Obtained Services

I next turn to the appropriateness of the parents' unilateral placement of the student at iBrain. 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).

The district appeals the IHO's determination that Brain was an appropriate placement for the student for the 2024-25 school year, alleging that the testimony of the iBrain deputy director did not provide specificity regarding the student's needs or performance. A review of the hearing record shows that the deputy director testified that the student's program was "geared towards improving functioning skills appropriate to [the student's] cognitive, physical, and developmental levels, through a collaborative and multidisciplinary approach" (Parent Ex. J ¶ 7). Instruction was provided using evidence-based practices, including direct instruction, cognitive strategies, behavior management strategies, physical rehabilitation, therapeutic intervention, social interaction, and transition services (id.). The deputy director testified that the student's goals were determined based on individual assessments, and every student had an "individual curriculum" (Sept. 9, 2024 Tr. p. 141). According to the deputy director, the student was working on identifying and sequencing numbers, letter identification, and using her AAC device to advocate for herself and identify her emotions (Sept. 9, 2024 Tr. p. 142-44).

As noted previously, the student's present levels of performance identified in the November 2023 IEP were virtually identical to those listed in the June 2024 iBrain education plan (compare Parent Ex. B at pp. 1-30, with Parent Ex. C at pp.1-29). The iBrain education plan included annual goals for the student related to identifying letters; using 1:1 correspondence to count up to 10 objects; expressing when she was overwhelmed and requesting a break; using visually guided reaching to choose, assemble and put away overlays during vision therapy; increasing independence when using her AAC device; increasing pragmatic language skills; increasing expressive language skills; improving receptive language skills; tolerating oral intake; maintaining a sitting position; walking 250 feet using a gait trainer; increasing participation in classroom activities; increasing participation in play activities; increasing participation in self-care activities; and increasing attention, interpersonal skills, and active participation during music therapy sessions (Parent Ex. B at pp. 43-55). These annual goals were consistent with the student's needs identified in the November 2023 IEP (compare Parent Ex. B at pp. 43, with Parent Ex. C at pp. 43-55).

The district further asserts that the hearing record did not include a schedule or attendance record, and without such, it was impossible to confirm how much of the student's day was dedicated to mathematics, reading, writing, or social skills. However, the deputy director testified that the student was working on sequencing numbers one to five with "minimal" support of one to three prompts and identifying the letters of the alphabet (Sept. 9, 2024 Tr. p. 143). According to the deputy director, every iBrain student received a minimum of two hours of academic instruction (Sept. 9, 2024 Tr. pp. 149-50).

The district also asserts that the iBrain progress reports from the 2023-24 school year showed only "some" progress, with no goals or benchmarks actually achieved, demonstrating that the unilateral placement was not appropriate for the 2024-25 school year (Answer & Cr.-App. ¶¶

10-11). However, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v Ne. Sch. Dist., 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Moreover, while the hearing record does not include progress reports for the 2024-25 school year, the iBrain deputy director testified that the student was making progress across academic and related services domains (see Sept. 9, 2024 Tr. pp. 142-44, 148-50). For example, the deputy director indicated that the student had "done an incredible job so far in both identifying and then also sequencing numbers 1 to 5" with minimal prompts (Sept. 9, 2024 Tr. pp. 142-43). In literacy, the deputy director indicated that the student was "able to identify half of the alphabet" and was working on the other half (Sept. 9, 2024 Tr. p. 143).[24] In the social realm, the deputy director highlighted the student's "ability to use her AAC device to self-advocate" and to recognize emotions (Sept. 9, 2024 Tr. pp. 143-44). The IHO relied on this testimony to determine that the student made progress during the school year at issue (IHO Decision at p. 14), and the district does not raise any persuasive arguments to refute this evidence.

Finally, the IHO separately addressed the parent's burden with respect to the appropriateness of the private transportation and 1:1 nurse services in an analysis that further examined the reasonableness of the costs of the services (IHO Decision at pp. 16-20). However, the IHO should have viewed the unilateral placement taking into account the totality of the circumstances (see Gagliardo, 489 F.3d at 112). When assessing a unilateral placement, a parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a '"private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). To the extent the

[24] The October 2023 iBrain progress report reflected that, at that time, iBrain had not yet introduced goals related to counting and letter identification (Parent Ex. D at pp. 1-2). The hearing record shows that by January 2024 the student was working on those goals (Parent Ex. E at pp. 1-2). A review of the student's July 2024 quarterly progress report shows that the student had achieved benchmark one toward the annual goal of identifying letters given a field of two choices and minimal support (one to five cues) and was making progress toward benchmark two of the same goal, demonstrating 62 percent accuracy identifying letters N-Z with moderate support (Parent Ex. G at p. 1). The student had also achieved benchmark one of her annual goal to use 1:1 correspondence to count up to 10 objects and was counting up to five objects with moderate support (six to eight tactile cues) (id. at p. 2). At that time, the student had not obtained any of the annual goals reflected in the July 2024 iBrain progress report, but had achieved at least one benchmark or demonstrated progress toward benchmarks for every identified goal (id. at pp. 1-22). The deputy director's testimony demonstrates that during the 2024-25 school year the student continued with similar goals and continued making progress.

IHO found the unilaterally obtained programming appropriate in part (i.e., iBrain) but identified some weaknesses in the evidence as it pertained to appropriateness of private nurse and special transportation services, this was error as the Second Circuit has explained, it is not appropriate for an IHO to "conduct[] reimbursement calculations in [the] appropriateness analysis"; rather, "[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" (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]).

Here, while the evidence of the delivery of the student's private transportation and nurse services is not robust, the hearing record includes the contracts with the private companies and some testimony from the parent regarding delivery of the services (see Nov. 1, 2024 Tr. pp. 60, 63-64; Parent Exs. A-F; A-G).

With respect to transportation, the contract stated that the provider would transport the student to and from school during a trip that would be no more than 90 minutes each way with an air-conditioned vehicle that could accommodate a regular-size wheelchair and space to accommodate a person to travel with the student (Parent Ex. A-F at pp. 1-2). The nursing contract provided that the company would arrange for a 1:1 nurse to travel with the student to and from her home and for during school hours (Parent Ex. A-G at p. 2). The parent indicated that, during the 2024-25 school year, the nurse would arrive at the student's home and then travel to school with her (Nov. 1, 2024 Tr. pp. 60, 63). She described that the transportation was "[n]ormally with the ambulance," which included another student and that student's nurse, but had, for the two weeks prior to her testimony on November 1, 2024, been "more like a van" (id.).[25] The mother further described that, at the end of the day, the nurse would return with the student to the student's home in the private transportation (Nov. 1, 2024 Tr. p. 64).

Accordingly, contrary to the district's assertion, the hearing record shows that the student's 6:1+1 program at iBrain along with the private transportation and 1:1 nurse services appropriately addressed her individual needs as identified in the November 2023 IEP and she was making progress toward her annual goals. As such, the IHO correctly determined that the program at iBrain was an appropriate placement for the student for the 2024-25 school year.

D. Equitable Considerations

The IHO held that equitable considerations favored the parents (IHO Decision at pp. 15-16). Specifically, the IHO found that the hearing record failed to demonstrate that the parents acted unreasonably or committed misconduct that would warrant a denial of the parents' requested relief on equitable grounds (id. at p. 15). The parents request that the IHO's holding be affirmed, but assert that they should also be awarded funding of their B&H and Sisters Travel contracts

[25] The mother indicated that, on approximately two occasions that school year, the student's nurse had been late and so the parent transported the student to school and the nurse met them there (Nov. 1, 2024 Tr. p. 61).

under a balancing of the equities. The district argues that the IHO's equitable consideration finding should be reversed, and that the equities favor the district.

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"]).

1. 10-Day Notice

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

Here, the parents provided the district with a ten-day notice on June 17, 2024, well before the start of the student's 2024-25 school year on July 2, 2024, of their concerns with the district's assigned public school and recommended program for the student's 2024-25 school year (Parent Ex. A-A). The district argues that the equities do not favor the parents because the parents signed an enrollment contract with iBrain on June 18, 2024, a day after sending the district their ten-day notice (Parent Ex. A-Eat p. 6). However, the district's focus on the timing of the parents' contract

with iBrain is misplaced. The Second Circuit Court of Appeals has explained that, so long as the parents cooperate with the district and do not impede the district's efforts to offer a FAPE, even if the parents had no intention of placing the student in the district's recommended program, their plan to unilaterally place a student, by itself, is not a basis to deny their request for tuition reimbursement (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014]; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]).[26]

Therefore, the IHO's finding that equitable considerations favor awarding the parents' their requested iBrain tuition funding should not be disturbed based on the argument advanced by the district pertaining to the timing of the parents' contract with iBrain.

2. Excessive Services

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

[26] Moreover, the terms of the iBrain educational contract allow the parents to terminate the contract prior to the first day of the school year, which was July 2, 2024 (Parent Ex. A-E at p. 3).

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 found that the parents did not demonstrate how the transportation and nursing companies arrived at the amounts charged for their services (IHO Decision at pp. 17, 19). 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.

There is no evidence in the hearing record regarding what a reasonable market rate for a 1:1 nurse would be. The district also argues that "[t]he IHO denied funding in-full for 1:1 nursing based upon a scarcity of support in the record for its need or appropriateness" (Answer & Cr.-App. ¶ 15). However, as set forth above, the district failed to meet its burden to prove that its recommendation for school nurse services as needed was appropriate for the student. Accordingly, the provision of a 1:1 nurse for the student cannot be deemed to have exceeded what the student required in order to receive a FAPE.

With respect to transportation, the district did not present any evidence of market rate or alternative transportation services other than its evidence that, by letter dated July 11, 2024, it offered to transport the student to and from iBrain "as per the special education transportation recommendations contained in your Child's [IEP]" (Dist. Ex. 12). The IHO relied on that letter to find that "[t]here was no evidence or testimony presented to show that the [d]istrict's transportation accommodations would be insufficient for [s]tudent's needs during the 2024-2025 school year" (IHO Decision at p. 18). To the contrary, however, as set forth above, the district failed in its burden to prove that the transportation accommodations recommended in the November 2023 IEP would have met the student's needs; therefore, the district's offer in this regard does not undermine the parents' request for funding for the private transportation services. Moreover, the district did not offer the student transportation services to and from iBrain until July 11, 2024, after the parents had already entered into a contract for transportation services with Sisters Travel and after the school year had started (compare Parent Ex. A-F, with Dist. Ex. 12).

Based on the foregoing, the IHO's decision will be modified to award funding for 1:1 nurse services from B&H and transportation from Sisters Travel consistent with the transportation contracts the parent entered.

VII. Conclusion

Based on the foregoing, the district failed to meet its burden to prove that it offered the student a FAPE for the 2024-25 school year; the parents met their burden to establish, taking into account the totality of the circumstances, that iBrain, along with provision of a 1:1 nurse by B&H and private transportation from Sisters Travel, is an appropriate unilateral placement for the student; and equitable considerations do not warrant a reduction or a denial of the relief sought.

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 January 15, 2025, is modified by reversing that portion which denied the parents' request for an order directing the district to fund the parents' contract for a full-time 1:1 nurse with B&H for the 2024-25 school year in the amount of $333,608.00; and

IT IS FURTHER ORDERED that that the IHO's decision, dated January 15, 2025, is modified by reversing that portion which denied the parents' request for an order directing the district to fund the parents' contract with Sisters Travel for the student's special transportation costs for the 2024-25 school year in the amount of $191,111.00.

Dated: **Albany, New York**
September 12, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER