

No.
IN THE
**SUPREME COURT OF THE UNITED
STATES**

LEONARDA BAUTISTA, INDIVIDUALLY AND AS
PARENT AND NATURAL GUARDIAN OF A.B.,

PETITIONER,

V.

DAVID C. BANKS, IN HIS OFFICIAL CAPACITY AS
CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF
EDUCATION, AND NEW YORK CITY DEPARTMENT
OF EDUCATION

RESPONDENTS.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the
Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the Individuals with Disabilities Education Act, in order to determine whether the parent of a disabled child is entitled to reimbursement from the local school district for a unilateral placement, administrative officers and courts apply the *Burlington/Carter* analysis. If the parent prevails on the first two prongs of that test, is there a rebuttable presumption of full reimbursement, which the school district may rebut only by producing evidence showing that the equities do not favor full reimbursement?
2. At an impartial hearing seeking reimbursement for a private placement under the Individuals with Disabilities Education Act, does a Parent waive her right to seek transportation funding when her attorney makes a misstatement as to the relief sought, despite making a claim for transportation in the Due Process Complaint, presenting evidence to support the claim, and never abandoning the claim?
3. Under the *Burlington/Carter* test to determine a parent's entitlement to public funding of a private placement, is the parent held to a higher standard of proof under Prong II than the school district is held under Prong I, or a lower standard of proof?

PARTIES TO THE PROCEEDING

The Petitioner in this case is Leonarda Bautista, as Parent and Natural Guardian of A.B. and Individually.

The Respondents in this case are David C. Banks, in his official capacity as Chancellor of the New York City Department of Education, and the New York City Department of Education (collectively the “DOE”).

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

In the United States Court of Appeals for the Second Circuit: *Bautista v. Banks, et al.*, Case No. 25-945. Summary Order was entered on February 27, 2026. Petitioner’s Petition for Rehearing and Rehearing *En Banc* was denied on April 9, 2026.

In the United States District Court for the Southern District of New York: *Bautista v. Banks, et al.*, Case No. 1:23-cv-11161 (ALC) (RFT). Summary Judgment was entered on March 19, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Leonarda Bautista, as Parent and Natural Guardian of A.B. and Individually, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals denying the Petition for Rehearing and Rehearing En Banc (A-70) is unreported. The decision of the Court of Appeals (A-1) is not published but is available at 2026 U.S. App. LEXIS 5787, 2026 WL 554579. The decision of the United States District Court for the Southern District of New York (A-11) is not published but is available at 2025 U.S. Dist. LEXIS 50598, 2025 WL 861223.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered a Summary Order affirming the District Court on February 27, 2026, and denied Appellants' Petition for Rehearing/Rehearing En Banc on April 9, 2026. This Court has jurisdiction under 28 U.S.C. §1254(1).

**STATUTORY PROVISIONS AND RULES
INVOLVED**

The statutes/regulations involved are the following:

- 20 U.S.C. § 1400(d), which provides:

(d) Purposes

The purposes of this chapter are-

(1)

(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

- 20 U.S.C. § 1412(a)(10)(C)(i)-(iii), which provides:

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

STATEMENT OF THE CASE

A. Legal Background

This case involves the responsibility of the District Court and Circuit Court to review a case under the Individuals with Disabilities Education Act (“IDEA”), applying State statutes and regulations enacted under the authority of Congress.

The IDEA creates a substantive obligation by a school district to offer a free appropriate public education (“FAPE”) to all disabled students in the district. The FAPE is provided in connection with an individualized education program (“IEP”) created for each disabled student, along with any additional services, such as occupational therapy, physical therapy, transportation, and nursing, among others, that the child requires to be able to access that education. The education must, among other things, be provided under public supervision and direction, meet the standard of the State educational agency, and include an appropriate preschool, elementary school, or secondary school education in the State involved. 20 U.S.C. §1401. The instruction must, in addition, be provided at no cost to parents. *Id.*; *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007).

Congress, recognizing that the expense of special education and related services places a significant financial burden on school districts, “offers federal funds to States in exchange for a commitment” to provide a FAPE “to all children with certain

physical or intellectual disabilities.” *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 158 (2017).

Once a State accepts IDEA funds, it is bound to implement due process procedures for a parent to contest whether the education provided is appropriate for their child. The IEP serves as the primary vehicle for providing each child with the promised free appropriate public education. Crafted by a child’s IEP team, a group of school officials, teachers, and parents, the IEP spells out a personalized plan to meet all of the child’s educational needs. 20 U.S.C. §1414(d)(1)(A)(i)(II)(bb), (d)(1)(B). “Most notably, the IEP documents the child’s current ‘levels of academic achievement,’ specifies ‘measurable annual goals’ for how she can ‘make progress in the general education curriculum,’ and lists the ‘special education and related services’ to be provided so that she can ‘advance appropriately toward those goals.’” *Fry*, 580 U.S. at 158-59 (quoting 20 U.S.C. §1414(d)(1)(A)(i)(I), (II), (IV)(aa)). The IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399, 402 (2017).

Parents who feel their child is denied a FAPE are entitled to due process to challenge the school district. The IDEA establishes general principles for due process hearings but allows States to decide how to implement them.

The IDEA allows states to choose between a one-tiered system or a two-tiered system for administrative review

before claims arising under the IDEA may be pursued in state or federal court. In a one-tiered system the ‘State educational agency’ decides the case. 20 U.S.C. §1415(f)(1)(A). In a two-tiered system, where the ‘local educational agency’ initially decides the case, an appeal must be taken to the ‘State educational agency’ to conduct an impartial review before a civil action is brought in state court or the district court of the United States. 20 U.S.C. §1415(f)(1)(A), (g)(1).

K.I. v. Durham Pub. Sch. Bd. of Educ., 54 F. 4th 779, 788-89. (4th Cir. 2022).

New York has established a two-tiered system. *Mackey v. Bd. of Educ.*, 386 F.3d 158, 160 (2d Cir. 2004). The Impartial Hearing Officer (“IHO”) is appointed as the first level of review, and must comply with the requirements of both the IDEA and its regulations and all applicable New York statutes and regulations. An appeal from an IHO decision is to the State Review Officer (“SRO”). Only after the SRO has ruled may a litigant bring the case to federal court, where the District Court, subject to the same laws and regulations, addresses the case in a quasi-appellate role.

In reviewing an administrative decision, a District Court is expected to give the factual findings of the IHO and SRO “deference” because judges lack the specialized knowledge and experience required to resolve persistent and difficult questions of

educational policy. *Walczak v. Florida Union Free School Dist.*, 142 F. 3d 119, 129 (2d Cir. 2001). However, no deference is due when the administrative officer's ruling is based on a question of law, or when the decision is not well-reasoned. *Muller on Behalf of Muller v. Comm. on Special Educ. of E. Islip Union Free Sch. Dist.*, 145 F.3d 95, 101 (2d Cir. 1998); *see also Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114, 1122 (2d Cir. 1997) ("due weight" that ordinarily must be given to the state administrative proceedings is not implicated where the decision below concerns an issue of law).

Reimbursement of unilateral private school placement is determined by the *Burlington/Carter* test. *See Burlington School Committee v. Dept. of Education*, 471 U.S. 359 (1985); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). "A court may award tuition reimbursement 'if it appears (1) that the proposed IEP was inadequate to afford the child an appropriate public education, and (2) that the private education services obtained by the parents were appropriate to the child's needs.'" *M.S. v. Yonkers Bd. of Educ.*, 231 F.3d 96, 102 (2d Cir. 2000) (quoting *Walczak*, 142 F.3d at 129 (citing *Burlington*, 471 U.S. at 370))).

B. Factual and Procedural Background

A.B. was a four-year-old during the 2022-2023 school year. (ECF No. 33 at 2). A.B. is a boy with a brain injury and multiple disabilities. (*Id.*). He is non-verbal, non-ambulatory, and has a seizure disorder. (*Id.*). Additionally, A.B. suffers from global developmental delays, callosal agenesis, cortical

visual impairment, nystagmus, and intermittent left eye exotropia. (*Id.*). According to a letter from Chantel Mason, M.D., at Maimonides Medical Center, A.B. requires 1:1 individual nursing along with a paraprofessional while attending his program/placement. Dr. Mason details a plethora of medical diagnoses that necessitate a 1:1 nurse full time during school and travel. (Appellant's Initial Brief, Case No. 25-945, Doc. 23.1 ("Doc. 23.1") at 5).

A.B. is classified by the CSE as a student with a Learning Disability. (ECF No. 33 at 2). A.B.'s medical condition requires that he be monitored for seizure activity with 1:1 nursing services while in transit and throughout the school day for his safety. (ECF No. 33 at 3). A.B. receives specialized transportation services to and from school in accordance with his medical needs. (*Id.*).

The DOE never responded to the Parent's ten-day notice, sent on May 26, 2022, stating their intention to unilaterally place A.B. at the International Academy for the Brain ("iBRAIN") for the 2022-2023 school year. (*Id.*). Additionally, the DOE did not appear in the matter, resulting in the IHO finding that the DOE failed to conduct an appropriate review, relevant evaluations, an appropriate IEP, or placement for the 2022-2023 school year. (*Id.*).

After the conclusion of the administrative hearings, the IHO found that the DOE did not meet its burden of proof, whereas Plaintiff satisfied the *Burlington/Carter* test for complete tuition reimbursement. (*Id.*). Plaintiff submitted documentary evidence in support of her position that

iBRAIN was an appropriate placement. (*Id.*). Plaintiff provided documentation verifying the contractual obligation to pay tuition and transportation for A.B. (*Id.*). The IHO found that the testimony of the Parent and iBRAIN's Director of Special Education established that iBRAIN was appropriate and had been providing A.B. with instruction specifically designed to meet his unique special education needs, supported by services necessary to permit him to benefit from instruction. (ECF No. 33 at 3-4). The IHO found that iBRAIN created a program specifically tailored to A.B.'s unique needs. (ECF No. 33 at 4).

On May 26, 2023, the IHO determined that a 6:1:1 classroom with similar peers and a paraprofessional, with additional related services including five 60-minute sessions of individual OT weekly, five 60-minute sessions of individual PT weekly, five 60-minute sessions of individual speech-language therapy weekly, two 60-minute sessions of individual music therapy weekly, and one session of parent counseling and training per month were appropriate. (*Id.*). The IHO further concluded that the small class sizes allowed A.B. to receive more individualized services from the teachers, as well as numerous small and group sessions proven appropriate for him. (*Id.*).

The IHO thus found that the Parent was entitled to funding for the cost of A.B.'s 2022-23 unilateral placement. (*Id.*). Further, the IHO granted the Parent's request that tuition funding be in the form of direct funding. (*Id.*).

However, in his May 26, 2023, decision, the IHO erred by failing to order the DOE to fund 1:1 nursing for

A.B., provided during the 2022-2023 school year due to his fragile medical conditions, including his seizure disorder. (ECF No. 33 at 5). Additionally, he erred by failing to order the DOE to fund transportation services for A.B.'s special transportation needs for the 2022-2023 school year. (*Id.*). In order to rectify these issues, Plaintiff appealed to the office of state review. ("OSR"). (*Id.*).

After Plaintiff filed a Request for Review to the OSR to appeal the errors by the IHO, the SRO issued SRO decision No. 23-131 on August 22, 2023. (*Id.*). The SRO erred in finding that there was insufficient evidence showing that A.B. received individual nursing services during the 2022-2023 school year. (*Id.*). The SRO reasoned that the hearing record lacked any evidence of a contract or legal obligation binding the parent to pay for nursing services, thus reaffirming the IHO's decision. (ECF No. 33 at 6).

Further, the SRO improperly discounted Plaintiff's request for transportation in Plaintiff's Due Process Complaint ("DPC") based on Plaintiff's counsel's "concession" that Plaintiff would be pursuing nothing more than the \$267,097.60 in direct funding. (A-61). The SRO reasoned in relevant part:

In fact, on the final hearing date, counsel for the parent confirmed that the total amount of relief sought was \$267,097.60. The IHO then asked if there was 'anything else' two times. The second time, counsel for the parent responded, 'Nothing from the Parent, Your Honor.' Accordingly, any request for transportation fell out during the process of the hearing and there is no basis for finding that the IHO

erred in not combing through the hearing record to conduct transportation calculations and then award the parent relief for which the parent did not make an affirmative request when specifically asked what total amount was being requested.

(*Id.*) (citations omitted).

Plaintiff filed a complaint in the Southern District of New York on December 22, 2023, seeking de novo review of the SRO's August 22, 2023, decision, which found a lack of evidence for nursing and transportation services received during the 2022-2023 school year. (ECF No. 1; ECF No. 22 at 6). Additionally, Plaintiff sought funding for the costs of A.B.'s 1:1 nursing and transportation services for the same school year. (*Id.*).

Plaintiff filed a Motion for Summary Judgment on May 17, 2024, 2024 (ECF No. 19), and a Memorandum of Law in Support three days later (ECF No. 23). Defendants filed a Cross-Motion for Summary Judgment and a Memorandum of Law in Support on August 5, 2024 (ECF No. 34).

The District Court entered its Opinion and Order on March 19, 2025. (A-11). The District Court denied Plaintiff's motion and granted Defendants' cross-motion. (A-25). The District Court found, *inter alia*, that the SRO's decision to uphold the IHO's determination to deny Parent reimbursement for nursing and transportation services was well-reasoned and supported by the administrative record. (A-20). The District Court rejected Plaintiff's argument that the SRO's decision relied on Plaintiff's

counsel's waiver of any claim for transportation in an exchange at the final hearing before the IHO. (*Id.*). The District Court also upheld the SRO's determination that there was insufficient evidence in the record to support a claim for nursing services. (A-20-21).

On appeal, the Second Circuit affirmed (A-9-10), and denied Plaintiff's Petition for Rehearing/Rehearing En Banc (A-70-71).

REASONS FOR GRANTING THE WRIT

I. **The Second Circuit Erred in Failing to Recognize a Rebuttable Presumption of Full Reimbursement When a Parent Prevails on Prongs I and II of the *Burlington/Carter* Test**

Under the *Burlington/Carter* framework, if an administrative officer or court is weighing the equities under Prong III, that means that the parent already has prevailed under Prongs I and II. Under this test, the DOE must prove that it provided a FAPE under Prong I.¹ If it fails to carry this burden, the parent must prove that the unilateral placement was appropriate under Prong II. If the parent prevails under Prong II, **she is entitled to reimbursement.**

¹ In New York, the school district has the burden under Prong I. *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 184 (2d Cir. 2012). This is not true in all jurisdictions, but that fact does not change the analysis here.

Under Prong III, the administrative officer weighs the equities to determine whether the parent is entitled to full reimbursement or whether the amount should be reduced. In rare, extreme cases, reimbursement may be reduced to zero, effectively denying reimbursement.

Under Prong III, there is no separate inquiry into the equities; the case **itself** is the inquiry into the equities. It is the hearing officer's duty to exercise his equitable authority to find where the responsibility for the student's education for the year in question lies. *See FB v. New York City Dep't of Educ.*, 132 F. Supp. 3d 522, 556 (S.D.N.Y. 2015). The IHO weighs the equities to determine **how much** reimbursement the parent is entitled to. The entitlement to reimbursement has already been determined under the first two prongs.

In *A.P. v. New York City Dep't of Educ.*, the Second Circuit cited this Court's decision in *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 246–47 (2009): “The first two prongs of the 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.” No. 22-2636, 2024 WL 763386, at *2 (2d Cir. Feb. 26, 2024). The Second Circuit continued: “[O]nce parents pass the first two prongs of the *Burlington-Carter* test, the Supreme Court's language in *Forest Grove School Dist.*, 557 U.S. 230, stating that the Court retains discretion to ‘reduce the amount of a reimbursement award if the equities so warrant,’ **suggests a presumption of a full reimbursement award.**” *Id.* at 2 (emphasis added).

This Court's language in *Forest Grove* is consistent only with a presumption of full reimbursement. As the *A.P.* Court correctly observed, this Court held that a court has discretion to **reduce** a reimbursement award **if** required by a balancing of the equities. The standard is not that the Court has discretion to **determine**, in the first instance, the amount to be awarded. The Court determines whether a **reduction** is warranted meaning, absent a reduction being required by the equities, the full amount is awarded. Thus, a full reimbursement is presumed going into the Prong III analysis.

Because, drawing on this Court's reasoning in *Forest Grove*, full reimbursement is a presumption, that presumption must be rebutted in order for an administrative officer to award anything less than full reimbursement. Prong III then involves the analysis of whether the school district is able to "overcome" that presumption and obtain a reduction or denial of reimbursement.

Moreover, as the Second Circuit itself has noted, the underlying purpose of the IDEA is to protect the rights of disabled children to an education. In addressing Prong III, the Court noted that the relief awarded under the IDEA "must 'be appropriate in light of the purpose of the [IDEA],' *Burlington*, 471 U.S. at 369 (internal quotation marks omitted), which is 'to "ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs.'"*" Ferreira v. Aviles-Ramos*, 120 F.4th

323, 330 (2d Cir. 2024) (quoting *Forest Grove*, 557 U.S. at 244 (quoting 20 U.S.C. § 1400(d)(1)(A))).

Because the Prong III analysis involves a rebuttable presumption of full reimbursement, the burden of proof on this prong cannot be on the parent. Yet, despite this Court's ruling in *Forest Grove*, courts, including the Second Circuit, continue to issue decisions placing the Prong III burden on the parent. See, e.g., *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 184-85 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2802 (2013); *M.S. ex rel. S.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers*, 231 F.3d 96, 104 (2d Cir. 2000), *abrogated in part on other grounds*, *Schaffer v. Weast*, 546 U.S. 49 (2005); *M.T. & T. v. New York City Dep't of Educ.*, 2016 U.S. Dist. LEXIS 42426, *4 (S.D.N.Y. Mar. 29, 2016) (citing *M.W. ex rel. S.W. v. New York City Dep't of Educ.*, 725 F.3d 131, 135 (2d Cir. 2013)); *Melendez v. Porter*, 2023 U.S. Dist. LEXIS 85017, *4 (E.D.N.Y. May 15, 2023); *Mr. A. v. Greenwich Bd. of Educ.*, 2016 U.S. Dist. LEXIS 94431, *59 (D. Conn. July 21, 2016).

Without this Court's intervention, lower courts will continue to misapply this Court's decision in *Forest Grove*, and impose on parents of disabled students a bar to recovery based upon a single procedural error or, as here, one misstatement by counsel. Here, the Parent made a claim for transportation and nursing services, and provided evidence to support those claims. The IHO denied transportation because of a misstatement by counsel at the end of the administrative hearing and denied nursing services by ignoring substantial evidence. The result was that the Parent was awarded, not a

reduced amount of transportation and nursing reimbursement, but zero, despite the fact that she had prevailed on both Prongs I and II. This cannot be the state of the law, and unless this Court intervenes, the rights of disabled students to a free, appropriate public education, commensurate with that of their non-disabled peers, will continue to be violated.

The decision affirmed by the Second Circuit is wrong on multiple levels. Not only did administrative officers and the District Court ignore the presumption of full reimbursement when Plaintiff prevailed on the first two prongs of the *Burlington/Carter* test; they also reduced Plaintiff's award despite the fact she **also prevailed on Prong III.**

There is no dispute that Plaintiff prevailed on Prong III. The IHO found that the equities favored the Parent because the DOE did not provide any evidence to the contrary and the record supported that the Parent cooperated with the school district in developing an IEP. (A-38-41). The IHO concluded, in relevant part, "I therefore find that there are, in fact, no equitable considerations which would mitigate against full reimbursement." (A-41). The IHO conceded that "all of the Student's related services were received at IBRAIN." (A-31).

By affirming the denial of transportation and nursing reimbursement, despite undisputed victories on all three prongs of the *Burlington/Carter* test, the Second Circuit created a result irreconcilable with precedent. Once a parent prevails on the first two prongs, relief "is warranted" and the only remaining inquiry under Prong III is whether equitable factors

justify any reduction. *A.P.*, 2024 U.S. App. LEXIS 4302, at 4-5. This is consistent with the purpose of the reimbursement provision of the statute, which is to cover expenses that the DOE should have borne in the first instance. *Burlington*, 471 U.S. at 370-71 (holding that reimbursement of a private placement “merely requires [the school district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP”). No such equitable findings were made in this case: the IHO expressly found “no equitable considerations which would mitigate against full reimbursement,” and the SRO adopted that finding. (A-41).

Having ruled that the Parent had prevailed on all three prongs, the IHO then made findings inconsistent with its rulings on Prongs II and III by awarding no transportation and no nursing. As set forth above, any reduction of full reimbursement can only be made under Prong III; no such reduction was permissible here because the IHO had **already ruled** that the Parent prevailed on Prong III, and that there was no basis for a reduction of reimbursement. The erroneous and impermissible denial of transportation and nursing was affirmed by the SRO, District Court, and Second Circuit. Thus, the Second Circuit’s ruling transforms the “consideration of the equities” prong into a new evidentiary burden requiring parents to reprove that each related service was “appropriate” – a standard already satisfied under Prong II. That conflation directly conflicts with *Burlington*, *Carter*, *Ferreira*, and *A.P.*, which distinguished the Prong II inquiry of the appropriateness of placement from the Prong III equities analysis governing quantum of

relief. By denying the Parent nursing and transportation funding, notwithstanding that she prevailed on Prong I and Prong II, not to mention Prong III, the Second Circuit effectively nullified the presumption of full relief and undermined precedent.

II. The Second Circuit Erroneously Held That Plaintiff Waived Her Claim for Transportation Funding

The Second Circuit erroneously held that Plaintiff waived her right to seek funding for transportation by “failing to pursue it before the IHO” (A-9), and confirmed only the amount of the tuition costs in answering the IHO’s question. This holding dismissed Plaintiff’s request in her DPC and evidence offered at the hearing. Moreover, the finding of waiver under the circumstances has no basis in the procedural requirements of the IDEA and conflicts with the purpose of the IDEA and deference thresholds.

Plaintiff’s DPC expressly demanded funding for transportation. The SRO explicitly found that “the IHO’s findings regarding FAPE [Prong I] and the appropriateness of the awarded iBrain program [Prong II] have become final and binding on the parties.” (A-60) (internal citation omitted). The failure to make an argument at the hearing, at which the DOE did not even appear, is not sufficient to constitute abandonment of the claim. Moreover, Plaintiff’s counsel did not withdraw the transportation agreement from evidence, did not state on the record that Plaintiff was no longer seeking transportation reimbursement, and the IHO

did not find that the claim was waived or abandoned. There is no dispute that Plaintiff properly sought reimbursement for the entire unilateral placement/program in the DPC, which specifically included private transportation, that the IHO found the unilateral placement/program appropriate, and that Plaintiff offered into evidence the transportation contract. To hold that Plaintiff “waived” her claim for transportation reimbursement based on an error or misunderstanding by Plaintiff’s advocate is not consistent with the purpose of the IDEA and imposes procedural requirements not found in the IDEA or its implementing regulations.

Case law provides that a parent is entitled to the full suite of services requested in the parent’s DPC when the parent prevails on all three prongs of the *Burlington/Carter* test. *See, e.g., J.L. v. N.Y.C. Dep’t of Educ.*, No. 15-CV-1200 (CBA) (RER), 2016 U.S. Dist. LEXIS 162328, at *14-28 (E.D.N.Y. Nov. 22, 2016) (awarding direct funding of tuition expenses after finding that the plaintiff prevailed on Prongs I, II, and III of the *Burlington/Carter* test), *see also Brock v. N.Y.C. Dep’t of Educ.*, 2015 U.S. Dist. LEXIS 44254, at *24-25 (S.D.N.Y. Mar. 31, 2015) (“Where, as here, Plaintiffs have satisfied each of the *Burlington-Carter* factors, this Court’s broad discretion to grant such relief as . . . is appropriate under § 1415(i)(2)(C)(iii) includes the power, in a proper case, to award retroactive direct payment of private school tuition”) (cleaned up) (quoting *Mr. & Mrs. A ex rel. D.A. v. N.Y.C. Dep’t of Educ.*, 769 F. Supp. 2d 403, 427 (S.D.N.Y. 2011) (internal quotation marks omitted)).

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, New York 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). The heart of the issue is not whether the DOE failed to provide FAPE by failing to provide specialized transportation under Prong I, because the administrative officers, District Court, and Second Circuit agreed that the DOE failed to provide FAPE. The heart of the issue is not whether the contracted specialized transportation was appropriate to access the unilateral placement under Prong II, because the administrative officers, District Court, and Second Circuit held that the unilateral placement was appropriate. The heart of the issue is not whether equitable considerations supported some denial or reduction of the transportation costs, because the District Court and Second Circuit affirmed the finding of the SRO that “[t]he IHO then addressed equitable considerations and found that the parent cooperated with the district and **there was no reason not to grant the parent full relief.**” (A-50) (emphasis added). The heart of the issue is whether the denial of the transportation costs which were undisputedly required for A.B. to access his educational program is justified based on one

mistaken answer or misunderstanding. Such a result glorifies form over substance and has no basis in the IDEA. The very purpose of the reimbursement provision of the statute is to cover expenses that the DOE **should have borne** in the first instance. *Burlington*, 471 U.S. at 370-71.

Civil courts recognize exceptions to waiver rules. For example, the Second Circuit has recognized that “an appellate court has discretion to consider arguments not raised below to avoid a manifest injustice or where the argument presents a question of law and there is no need for additional fact-finding.” *Universal Church v. Geltzer*, 463 F.3d 218, 228 (2d Cir. 2006) (cleaned up). Furthermore, the District Court is empowered to provide a “just outcome for a disabled student.” *T.Y. v. New York City Dep’t of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009), *see also Doe v. Brookline Sch. Comm.*, 722 F.2d 910, 917-18 (1st Cir. 1983) (“Section 1415(e)(2) [of the IDEA] is an express grant of authority to district courts to fashion all appropriate equitable relief”). By treating a single offhand statement, when Plaintiff prevailed on all three prongs of the *Burlington/Carter* test, as binding waiver, the Second Circuit imposed a procedural trap which is absent from the IDEA or its implementing regulations, and which stands in stark contrast to the purpose of the IDEA.

III. In Denying Reimbursement for Nursing, The Second Circuit Improperly Held the Parent To A Higher Burden Of Proof Under Prong II Than School Districts Are Held Under Prong I

To the extent that the Second Circuit reviewed the denial of the reimbursement of nursing services as a Prong II consideration, despite the administrative officers and District Court finding that Plaintiff met her burden of proof as to Prong II, the Second Circuit applied an improper heightened burden of proof and improperly deferred to the SRO. The Second Circuit agreed with the SRO that the evidence of A.B.'s medical need for 1:1 nursing services was "too vague," despite record proof including A.B.'s IEP, physician letter, and testimony from iBRAIN's Director of Special Education confirming that A.B. was "mandated to receive the services of a 1:1 nurse all day, every day." (A-6, DktEntry: 54.1 at 12, A-65). The Second Circuit's affirmance of that finding conflicts with the Court's holdings in *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012), and *M.H. v. N.Y.C. Dep't of Educ.*, 685 F.3d 217 (2d Cir. 2012), which limit deference to administrative findings that are "well-reasoned and supported by the record."

The "same criteria and considerations" under Prong I also govern the reasonableness of the parent's unilateral placement under Prong II. *Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 364 (2d Cir. 2006); *see also Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 113 (2d Cir. 2007) ("[W]e recently noted that the district court is required to employ the same

objective evidence standard when ascertaining the appropriateness of a parent's private placement"). Indeed, this Court has further suggested that parents carry a lighter burden under Prong II than what the DOE carries under Prong I, because parents "will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." *Bd. of Educ. v. Rowley*, 458 U.S. 176, 209 (1982). This is particularly cogent where, as here, the DOE did not even appear at the due process hearing to defend its actions.

As this Court has determined, the reasonableness of the parent's choice "turns on whether a placement . . . is 'reasonably calculated to enable the child to receive educational benefits.'" *Frank G.*, 459 F.3d at 364 (quoting *Rowley*, 458 U.S. at 207). A parent is not held to the same legal standard as a school district in demonstrating the appropriateness of a unilateral placement when proving it offered a student a FAPE. *See, e.g., C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 836-37 (2d Cir. 2014) ("The test for the Parent's private placement is that it is appropriate, and not that it is perfect"). A parent need only show that, at the time of the placement, the placement was likely to produce progress, not regression. *Gagliardo*, 489 F.3d at 112 (quoting *Walczak*, 142 F.3d at 130 (internal quotation marks omitted in *Gagliardo*)). The necessary inquiry about the appropriateness of a unilateral placement is whether the program reasonably could have been expected to offer a student meaningful educational benefit at the time of placement. *See, e.g., B.R. v. New York City Dep't of Educ.*, 910 F. Supp. 2d 670, 677 (S.D.N.Y. Dec. 26, 2012). Prong II focuses on the

appropriateness of the private placement at the time the parent enrolled the student in the private placement.

The “preponderance of the evidence” standard is all that Plaintiff is required to satisfy. Plaintiff must only establish that it is “more likely than not” that A.B. required 1:1 nursing services. The Second Circuit disregarded the ample evidence that A.B. needed 1:1 nursing services at the time Plaintiff made the decision to place A.B. at the private placement. iBRAIN’s IEP mandated that A.B. receive 1:1 nursing services in order to access his education. (A-65). iBRAIN’s director of special education testified at the hearing that A.B. required 1:1 nursing services, and A.B.’s physician provided a letter stating that, in his professional opinion, A.B. required 1:1 nursing services. (DktEntry: 54.1 at 12). Moreover, the SRO found that a “February 2023 iBrain progress report noted the student received the support of 1:1 nursing services in several locations,” and noted the numerous instances documented in iBRAIN’s IEP requiring both a 1:1 nurse and 1:1 paraprofessional throughout the school day. (A-65).

At the time Plaintiff made the decision to unilaterally place A.B. at iBRAIN with the recommended nursing services, Plaintiff was provided with information from iBRAIN’s IEP assessment and a physician’s opinion that a 1:1 nurse was reasonably calculated to enable A.B. to receive educational benefits. In denying the reimbursement for nursing services based on the SRO’s retroactive finding that “there was little evidence that A.B. actually received 1:1 nursing services” (A-7), the

Second Circuit improperly evaluated the appropriateness of the services retrospectively rather than prospectively, as required by the IDEA and precedent.

By endorsing the SRO's improper reasoning that the evidence for the need for nursing services was vague and that there was little evidence the nursing services were actually used, the Second Circuit reduced the IDEA's "more probable than not" evidentiary threshold to near-certainty, undermining the established principle that "the child is entitled to a program reasonably calculated to enable the child to receive educational benefits," not proof beyond doubt that the program could and did deliver the required benefits. *Frank G.*, 459 F.3d 356. The Second Circuit effectively created a new burden of proof for parents to require a program that, looking back after the fact, reasonably offered benefits over the entire school year. It would be further inequitable to hold the parent to this standard because a parent will, obviously, not be able to prove that a program actually implemented the IEP throughout the school year until after the completion of the school year. Thus, a parent will never be entitled to reimbursement under the IDEA until after the student has completed the entire school year, with the concomitant financial obligations on the parent. The result holds parents to a higher and impossible burden of proof under Prong II than is placed on the school district under Prong I, contrary to the IDEA and precedent.

IV. This Case Involves an Issue of Imperative Public Importance

This case implicates the scope of parental reimbursement rights under the IDEA, a recurring question generating inconsistent results in the Southern District of New York and administrative tribunals. This decision addresses two heavily litigated issues: the presumption of full reimbursement once Prongs I and II have been met by parents, and the comparative burdens of proof required under Prongs I and II. Numerous recent orders (*A.P.*, 2025 U.S. Dist. LEXIS 98097; *Archibald v. Banks*, 2025 U.S. Dist. LEXIS 174824 (S.D.N.Y. Sept. 8, 2025); *Diaz v. Aviles-Ramos*, 2025 U.S. Dist. LEXIS 147580 (S.D.N.Y. July 31, 2025)) have applied the clarified *A.P.* presumption to require full reimbursement once Prongs I and II are satisfied, subject to equitable reduction. The Second Circuit's contrary holding will invite inconsistent application among district courts and confusion for families and school districts alike.

As set forth above, the ultimate outcome in this case will have a significant impact on parents' ability to obtain for their disabled students the right to a free, appropriate public education guaranteed by the IDEA. This is particularly true in New York.

The DOE, which is responsible for administering the largest school district in the United States and which involves, exponentially, the most IDEA cases, is notorious for failing to provide the funding it owes to disabled students. The DOE has been called out by the federal courts, as demonstrated

by the over two-decades-long litigation in *LV v. N.Y.C. DOE*, No. 03-CV-09917 (LAP), a class action case that has been pending since 2003. There, the court held:

In December 2007, AFC and Milbank, on behalf of Lead Plaintiffs and the Class, entered into a settlement agreement with the DOE that provides injunctive and compensatory relief to class members. The Honorable Richard J. Holwell approved the Settlement at the Settlement Fairness Hearing held on April 10, 2008. Under the settlement, the DOE is required to implement all impartial hearing orders within the timeframe stated in the order or 35 calendar days from the date of the order, if no timeframe is specified. Orders that require immediate action must be implemented within 7 business days.

See <https://advocatesforchildren.org/case/l-v-v-nyc-department-of-education/>.

After the DOE continued, for years, to fail to fulfill its side of the agreement, Judge Loretta A. Preska issued an order in the *LV* class action: “DOE’s only lawful course of action is to implement those Orders, full stop.” No. 03-CV-09917-(LAP), ECF #258 (February 18, 2021).

Despite this clear directive, the DOE continues its chronic delay and/or withholding of funding for disabled students. As evidenced here, even when the DOE concedes it failed a disabled student, it persists

in opposing appropriate private placements to avoid funding that student's education, despite the earmarking of federal funds for such students.

As recognized by New York's federal courts, disabled students and their parents already face an uphill battle securing the funding that is rightfully theirs under the IDEA from a recalcitrant school district. The Second Circuit's decision offers the DOE more ammunition to withhold funding from its most vulnerable students by playing a game of "gotcha" with parents, many of whom, less fortunate than the Parent here, are not represented by legal counsel. One misstatement at a hearing and a student's entire funding for the school year may be withheld, irrespective of whether the DOE was negatively affected. The result is not just that parents will not receive funding; it may cause the student to lose their placement altogether. And again, Prong III is not even discussed until it has been shown that the DOE failed to provide the student with a FAPE, which is a statutory requirement in the first instance.

This Court's intervention is necessary in order to secure and protect the rights of disabled students and their families.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Dated: July 7, 2026

Respectfully submitted,

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APPENDIX

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ORDER OF THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT
FEBRUARY 27, 2026

25-945-cv
Bautista v. Banks

UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of February, two thousand twenty-six.

Present:

AMALYA L. KEARSE,
WILLIAM J. NARDINI,
EUNICE C. LEE, *Circuit Judges.*

LEONARDA BAUTISTA,
INDIVIDUALLY AND AS PARENT
AND NATURAL GUARDIAN OF A.B.,
Plaintiff-Appellant,

v.

25-945-cv

DAVID C. BANKS, IN HIS OFFICIAL
CAPACITY AS THE CHANCELLOR
OF THE NEW YORK CITY
DEPARTMENT OF EDUCATION,
NEW YORK CITY DEPARTMENT OF
EDUCATION,
Defendants-Appellees.

For Plaintiff-Appellant:

RORY JUDE BELLANTONI
(Kenneth Willard, Nicole Lancia,
on the brief), Liberty & Freedom
Legal Group, Ltd., New York, NY

For Defendants-Appellees:

SHANE MAGNETTI (Richard
Dearing, Deborah A. Brenner, *on
the brief*), for Muriel Goode-
Trufant, Corporation Counsel of
the City of New York, New York,
NY

Appeal from a judgment of the United States
District Court for the Southern District of New York
(Andrew L. Carter, Jr., *District Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED in part and VACATED in part and REMANDED.

Plaintiff-Appellant Leonarda Bautista, individually and as parent and natural guardian of A.B., appeals from a judgment of the United States District Court for the Southern District of New York entered on March 19, 2025. Bautista sued David C. Banks (in his official capacity as the Chancellor of the New York City Department Of Education) and the New York City Department of Education (together, “DOE”) under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.*, on the ground that her child A.B.’s right to a free appropriate public education (“FAPE”) was violated when the DOE refused to reimburse her for the costs of 1:1 nursing services or transportation for the 2022–23 school year. The district court denied Bautista’s motion for summary judgment and granted the DOE’s cross-motion for summary judgment. Bautista now appeals. We assume the parties’ familiarity with the case.

I. Background

Bautista is the mother of A.B., a minor child who has significant disabilities. Pursuant to the IDEA, a Committee on Special Education (“CSE”) convened on May 26, 2021, and created an individualized education program (“IEP”) for A.B., pursuant to which A.B. would receive public special education and services beginning on September 1,

2021. At the conclusion of the 2021–22 school year, however, Bautista unilaterally placed A.B. at a private school called the International Institute for the Brain (“iBrain”). In accord with state regulations, Bautista filed a due process complaint (“DPC”) seeking, *inter alia*, (a) an order declaring that the DOE failed to provide A.B. with a FAPE during the 2022–23 school year¹; (b) a determination that iBrain was an appropriate placement for A.B.; (c) an order directing that the DOE pay iBrain 2022–23 tuition expenses, as well as the costs of related services, 1:1 nursing services, and a 1:1 paraprofessional; and (d) direct payment/prospective funding of special education transportation. Under what is known as the *Burlington/Carter* test, a guardian may receive reimbursement for a child’s private education if (1) the DOE failed to offer the student a FAPE, (2) the guardian’s chosen school was appropriate, and (3) the equities favor the guardian’s claim. *See Sch. Comm. of Town of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369–70 (1985); *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 12–13 (1993); *Ferreira v. Aviles-Ramos*, 120 F.4th 323, 329 (2d Cir. 2024).²

The DOE did not appear at any of the hearings on the DPC before the state Impartial Hearing Officer (“IHO”). The IHO held that, in the absence of any defense of the IEP approved by the DOE for A.B., or an explanation of why the DOE’s proposed placement

¹ Bautista also brought but subsequently dropped a claim premised on the 2021–22 school year.

² Unless otherwise indicated, when quoting cases, all internal quotation marks, alteration marks, emphases, footnotes, and citations are omitted

was appropriate, A.B. had been denied a FAPE for the 2022–23 school year. The IHO next analyzed whether the private placement was appropriate to A.B.’s needs. Because the DOE again “did not contest the appropriateness of the unilateral placement” and the record clearly demonstrated that the unilateral placement was appropriate, the IHO concluded that this prong was also satisfied. App’x at 32–33. As relevant to the subsequent proceedings under review here, at the final hearing before the IHO, Bautista’s counsel confirmed that the “total amount” Bautista was seeking was \$267,097.60. \$175,000 of the \$267,097.60 figure was for iBrain tuition, including the cost of an individual paraprofessional and school nurse, and the remainder was for related services, identified as various types of individual and group therapy sessions per week and one session of parent counseling and training per month. Armed with that verbal confirmation, the IHO directed the DOE to fund the cost of A.B.’s 2022–23 placement at iBrain in the amount of \$267,097.60. That sum did not include reimbursement for any transportation or 1:1 nursing costs.

Bautista appealed the IHO decision to a State Review Officer (“SRO”) insofar as the award did not include funding for 1:1 nursing services or special transportation, as requested in her initial DPC. The DOE cross-appealed to the extent that the IHO’s decision could be read as finding that 1:1 nursing services and special transportation were appropriate services to meet A.B.’s special education needs. The SRO held that the IHO did not err by declining to award transportation costs: Although Bautista’s initial DPC requested funding for transportation costs, and a contract with a transportation service

was included in the administrative record, Bautista's counsel did not pursue transportation costs during the IHO hearings and confirmed, in the final hearing, that the total amount of relief sought was \$267,097.60, which did not include transportation costs. As the SRO explained, the IHO did not err by failing to comb through the hearing record *sua sponte* to determine what transportation costs Bautista was owed based on the daily rate set forth in the transportation contract, particularly in light of counsel's representation at the final hearing that the total amount sought was \$267,097.60. The SRO also noted that other forms of relief requested in the DPC (albeit of a different, non-remunerative nature) were not pursued by Bautista at any point in the hearings or pursued on appeal.

As to 1:1 nursing costs, the SRO held that although the appropriateness of 1:1 nursing services for A.B. was discussed at multiple hearings before the IHO, the IHO did not err by declining to find that Bautista was entitled to the cost of 1:1 nursing services for A.B. The SRO concluded that Bautista never demonstrated why A.B. needed 1:1 nursing services while at iBrain on top of his dedicated paraprofessional and an iBrain school nurse, despite multiple opportunities (and invitations) to do so. The IHO hearing transcripts reveal that the IHO repeatedly explained to Bautista's counsel why the documents submitted in support of A.B.'s need for both 1:1 paraprofessional and 1:1 nursing services failed to provide adequate evidence that both services were needed. Thus, reviewing the record afresh, the SRO concluded that evidence submitted to substantiate A.B.'s need for the services of both a 1:1 paraprofessional and a 1:1 nurse was, on balance, too

vague “to support a finding that appropriate programming for the student included all of the individual services the student was receiving.” App’x at 54. Moreover, regardless of whether such services were appropriate, the SRO stated there was little evidence that A.B. actually received 1:1 nursing services for the 2022–23 school year, and even some evidence to the contrary: a February 2023 iBrain progress report that listed a school nurse as one of A.B.’s providers, but did not list an individual nurse.

Bautista brought this action against the DOE in district court asking for reversal of the SRO’s decision and an award of “direct funding for tuition, transportation, nursing, and related services under the IDEA for A.B.’s placement at [iBrain] for the 2022–2023 extended school year.” App’x at 17. Bautista also sought reimbursement for attorneys’ fees and costs under the IDEA, which allows a district court, in its discretion, to “award reasonable attorneys’ fees as part of the costs . . . to a prevailing party who is the parent of a child with a disability,” including fees incurred in relation to state administrative hearings. 20 U.S.C. § 1415(i)(3)(B)(i)(I); *A.R. ex rel. R.V. v. New York City Dep’t of Educ.*, 407 F.3d 65, 84 (2d Cir. 2005). The parties filed cross-motions for summary judgment, which in IDEA cases is “in substance an appeal from an administrative determination, not a summary judgment motion.” *Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S.*, 990 F.3d 152, 165 (2d Cir. 2021). On review of such motions, a district court conducts “an independent review of the administrative record and makes a determination based on a preponderance of the evidence.” *Id.* “In conducting such an independent review, courts must give due weight to the state administrative

proceedings, mindful that the judiciary generally lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.” *Id.*

The district court upheld the SRO’s decision, agreeing with the SRO’s conclusion that Bautista failed to adequately support the claim that appropriate programming for A.B. included 1:1 nursing services and that there was insufficient evidence that such services had actually been rendered. The district court also affirmed the SRO’s refusal to award transportation costs because Bautista failed to pursue those costs in the hearings before the IHO. The district court noted on page 2 of its decision that Bautista had requested attorneys’ fees in her initial complaint, but it did not later address that claim.

II. The SRO Did Not Erroneously Deny Reimbursement for 1:1 Nursing and Transportation Services

We review the district court’s grant of summary judgment *de novo*. *A.C. ex rel. M.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist.*, 553 F.3d 165, 171 (2d Cir. 2009). Upon our independent review of the record, we too uphold the SRO’s decision. Bautista failed to present the state hearing officers with any competent medical evidence supporting her claim for 1:1 nursing services for A.B. despite the IHO’s clear articulation of the sort of evidence that would satisfy this burden. Although Bautista attempted to introduce additional evidence before the district court, the district court declined to permit the admission of this new evidence, and Bautista has

failed to challenge this portion of the district court's ruling here. Accordingly, based on the record before the SRO, we see no basis to disturb the SRO's conclusion that Bautista failed to demonstrate that 1:1 nursing services were needed to fulfill the DOE's obligations under the IDEA or had in fact been provided. And, as to transportation services, we agree that Bautista forfeited this claim by failing to pursue it before the IHO (and by affirmatively representing that she was not seeking any costs in excess of the \$267,097.60 to be paid to iBrain), rendering it unexhausted under the IDEA. *See J.M. v. New York City Dep't of Educ.*, 161 F.4th 149, 154 (2d Cir. 2025). Accordingly, we affirm the district court's decision on Bautista's IDEA claims for reimbursement for 1:1 nursing services and transportation.

III. The Case is Remanded to Permit the District Court to Analyze Bautista's Claim for Attorneys' Fees

The IDEA authorizes a court to award reasonable attorneys' fees to a prevailing party in any action or proceeding brought under the statute, including administrative proceedings. 20 U.S.C. § 1415(i)(3)(B)(i)(I); *A.R.*, 407 F.3d at 75. Bautista moved for summary judgment on her claim for attorneys' fees in connection with her state administrative appeal, but the district court failed to rule on this aspect of her motion. We therefore remand this case to the district court to permit it to determine whether and to what extent Bautista was the "prevailing party" in the state administrative proceedings and to calculate an appropriate award, if applicable, under the lodestar method. *See id.* at 79.

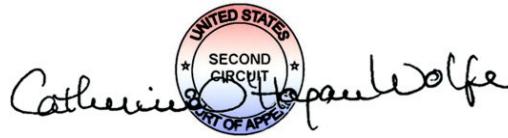
A-10

* * *

For the foregoing reasons, the judgment of the district court is **AFFIRMED** in part and **VACATED** in part and **REMANDED** for further proceedings consistent with this order.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal. The seal is divided into two horizontal halves: the top half is red and the bottom half is blue. The text "UNITED STATES" is written in white along the top arc of the seal, and "SECOND CIRCUIT" is written in white along the bottom arc. Two small white stars are positioned on the left and right sides of the seal, separating the top and bottom text.

DISTRICT COURT ORDER DATED
MARCH 19, 2025

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LEONARDA BAUTISTA,
as Parent and Natural Guardian
Of A.B., and LEONARDA BAUTISTA,
Individually,

Plaintiffs,

-against-

23-cv-11161

DAVID C. BANKS, in his official capacity
as Chancellor of the New York City
Department of Education, and THE NEW
YORK CITY DEPARTMENT OF EDUCATION,
Defendants.

OPINION AND ORDER

**ANDREW L. CARTER, JR., United States
District Judge:**

Plaintiff Leonarda Bautista (“Plaintiff” or “Parent”), individually and as parent and natural guardian of A.B. (“Student”), filed a complaint pursuant to the Individuals with Disabilities Act (“IDEA”), 20 U.S.C. § 1400, *et seq.* and New York State law against Defendants David C. Banks, in his official capacity as Chancellor of the New York City Department of Education, and the New York City Department of Education (“DOE”) (Collectively “Defendants”) to appeal the August 22, 2023

Decision of State Review Officer Justyn P. Bates (“SRO”), designated SRO Decision No. 23-131, relative to the May 26, 2023 Findings of Fact and Decision (“FOFD”) of Impartial Hearing Officer Steven P. Forbes (“IHO”), which concerned the Student’s attendance at the International Institute for the Brain (“iBRAIN” or “School”). ECF No. 1.

In the complaint, Plaintiff alleges that A.B.’s right to a free appropriate public education (“FAPE”) was violated when they were denied funding for 1:1 nursing services and special transportation. *Id.* at ¶ 16. Plaintiff requests the Court conduct an independent review, reverse the SRO’s decision, declare that the DOE did not provide A.B. a FAPE, and award direct funding for A.B.’s 1:1 nursing services and special transportation during the 2022-2023 extended school year. *Id.* at ¶¶ 77-89. Additionally, Plaintiff seeks reimbursement for litigation expenses, including attorneys’ fees, and any other just and equitable relief. *Id.* at ¶¶ 84-89.

Defendants request that the Court grant their cross-motion for summary judgment and deny Plaintiff’s request for summary judgment. ECF No. 34-1. They argue the SRO’s detailed analysis and Plaintiff’s alleged failure to provide sufficient evidence for additional services should result in the Court upholding the decision to award \$267,097.60 for tuition only. *Id.* Defendants further argue that new evidence presented by Plaintiff should not be considered, as it was not introduced during the administrative process. *Id.* The Plaintiff, however, claims that the IHO and SRO erroneously found that funding 1:1 nursing and special transportation for A.B. is not required, based on a failure to perform due diligence, inadequate review of the

administrative record, and a mistake from an inexperienced attorney who failed to enter a nursing contract into evidence and did not correct the IHO when discussing the relief requested. ECF No. 35 at 6. For the reasons set forth below, Plaintiff's request for summary judgment is **DENIED** and Defendants' cross-motion for summary judgment is **GRANTED**.

STATEMENT OF FACTS

Plaintiff Leonarda Bautista is the parent and natural guardian of A.B., a child with multiple disabilities who is non-verbal, non-ambulatory with a seizure disorder, global development delays, callosal agenesis, Cortical Visual Impairment, and nystagmus. ECF No. 1 at

¶¶ 30, 52-54. Plaintiff alleges that the DOE violated IDEA when it failed to provide funding for A.B.'s nursing services and transportation during the 2022-2023 extended school year. *Id.* at ¶¶ 41, 48, 49. On October 31, 2022, Plaintiff filed a Due Process Complaint ("DPC") alleging, *inter alia*, that the DOE failed to offer A.B. a FAPE for the 2022-2023 extended school year, that iBRAIN was an appropriate unilateral educational placement, and that the equities favored the Plaintiff's claims for relief in the form of direct funding for tuition, related services, nursing, and transportation costs for the 2022-2023 extended school year. *Id.* at ¶ 61.

On May 26, 2023, IHO Forbes found that by failing to appear at the hearing, the DOE conceded that it failed to provide A.B. with a FAPE and that iBRAIN was an appropriate unilateral placement. *Id.* at ¶ 64. However, IHO Forbes did not order the DOE to cover the costs of 1:1 nursing services and

special transportation. *Id.* at ¶ 65. On August 22, 2023, SRO Bates found there was insufficient evidence in the hearing record to show that A.B. received the disputed nursing services for the 2022-2023 extended school year. *Id.* at ¶ 69. In the complaint, Plaintiff argues that SRO Bates erred by failing to order the DOE to fund A.B.'s 1:1 nursing services for the 2022-2023 extended school year and by failing to address the issue of DOE funding the full award cost of special transportation services pursuant to the Parent's transportation agreement with the transportation provider. *Id.* at ¶¶ 70-72. Plaintiff asserts that the decision violates IDEA, federal regulations, and New York State Education Law. *Id.* at ¶ 76. Plaintiff seeks correction of these errors and appropriate relief under IDEA, including direct funding for A.B.'s full educational program at iBRAIN. *Id.* at ¶ 82.

PROCEDURAL HISTORY

On December 22, 2023, Plaintiff filed a complaint against the Defendantsa alleging violation of A.B.'s rights under the IDEA, 20 U.S.C. § 1400, *et seq.* and New York State law. ECF No. 1. In the complaint, Plaintiff asks the Court for *de novo* review, and to reverse the SRO's decision, declare that the DOE did not provide A.B. a FAPE, and award direct funding for all necessary educational services. ECF No. 1. Additionally, Plaintiff seeks reimbursement for litigation expenses, including attorneys' fees, and any other just and equitable relief. *Id.*

On May 17, 2024, the Plaintiff filed a motion for summary judgment pursuant to Fed. R. Civ. P. 56, as well as their memorandum of law in support and Rule 56.1 statement . ECF Nos. 20-22. On August 5, 2024, Defendants filed a notice of cross-motion for summary judgment, memorandum of law in support of their cross-motion for summary judgment and in opposition to Plaintiff's motion for summary judgment, and a response to Plaintiff's Rule 56.1 Statement. ECF Nos. 34, 34-1, 34-2. On August 19, 2024, Plaintiff filed a memorandum of law in opposition to Defendants' cross-motion for summary judgment and in further support of Plaintiff's motion for summary judgment and a response to Defendants' 56.1 statement. ECF Nos. 35, 36. On September 5, 2024, Defendants filed a reply memorandum of law in further support of their cross-motion for summary judgment and in opposition to Plaintiff's motion for summary judgment. ECF No. 37. The Court considers these motions fully briefed.

STATUTORY FRAMEWORK

The IDEA mandates that states receiving certain federal funds provide a FAPE to children with disabilities. See 20 U.S.C. § 1401(8). A FAPE should “emphasize[] special education and related services designed to meet the unique needs” of a child with a disability and “prepare” the child “for further education, employment, and independent living,” 20 U.S.C. § 1400(d)(1)(A). “Related services” are “the support services required to assist a child to benefit from” [educational] instruction” tailored to

the unique needs of a child with a disability, including school nursing services. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 390–91 (internal quotation marks omitted); *see W.A. v. Hendrick Hudson Cent. Sch. Dist.*, 927 F.3d 126, 149 (2d Cir. 2019); *see also* 20 U.S.C. § 1401(26)(A) (listing nursing services). To meet this statutory standard, such an education must be administered in accordance with the Individualized Education Program (“IEP”). *Id.* The IEP is a written statement that “sets out the child’s present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.” *L.O. v. N.Y.C. Dep’t of Educ.*, 822 F.3d 95, 102–03 (2d Cir. 2016) (quoting *R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167, 175 (2d Cir. 2012)). “The IDEA requires that an IEP be ‘reasonably calculated to enable the child to receive educational benefits.’” *R.E.*, 694 F.3d at 175 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982)).

When a parent believes that the State has failed to offer her child a FAPE, the parent may file a due process complaint and attend a hearing before an IHO. *See* 20 U.S.C. § 1415(b)(6); N.Y. Educ. Law § 4404(1). Such a complaint initiates an “administrative challenge unrelated to the concept of constitutional due process.” *R.E.*, 694 F.3d at 175. If the parent’s concerns are not resolved at a “[p]reliminary meeting,” 20 U.S.C. § 1415(f)(1)(B)(i), the matter proceeds to a hearing before the IHO, *id.* § 1415(f)(1)(A); *see also id.* § 1415(f)(3)(A)(i), who must “determin[e]... whether the child received a [FAPE],” *id.* § 1415(f)(3)(E)(i); *see also* N.Y. Educ.

Law § 4404(1)(a). The IHO's decision is appealable by either party to an SRO, who must "conduct an impartial review" of the IHO's "findings and decision." 20 U.S.C. § 1415(g); N.Y. Educ. Law § 4404(2). "Any party aggrieved by" the SRO's decision "ha[s] the right" to seek judicial review by filing a civil action in state or federal court. 20 U.S.C. § 1415(i)(2)(A); *see also* N.Y. Educ. Law § 4404(3)(a). "Though the parties in an IDEA action may call the procedure a motion for summary judgment, the procedure is in substance an appeal from an administrative determination, not a summary judgment." *Lillbask ex rel. Maucclair v. Conn. Dep't of Educ.*, 397 F.3d 77, 83 n.3 (2d Cir. 2005) (alterations and internal quotation marks omitted).

LEGAL STANDARD

"Although the parties have styled their submissions as motions for summary judgment, 'the procedure is in substance an appeal from an administrative determination, not a summary judgment.'" *C.U. v. New York City Dep't of Educ.*, 23 F.Supp.3d 210, 222 (S.D.N.Y.2014) (quoting *Lillbask*, 397 F.3d at 83 n. 3). While an IDEA appeal is in the form of a summary judgment motion, the existence of a genuine issue of material fact will not result in a denial. *J.R. ex rel S.R. v. Bd. of Educ.*, 345 F.Supp.2d 386, 394 (S.D.N.Y.2004). Instead, a federal court reviewing an administrative decision under IDEA bases its decision on an independent review of the record using a "preponderance of the evidence" standard. *Bd. of Ed. v. Rowley*, 458 U.S. 176, 205 (1982). In reviewing an IDEA action, the

Second Circuit has held that “[w]hile federal courts do not simply rubber stamp administrative decisions, they are expected to give due weight to these proceedings, mindful that the judiciary generally lack[s] the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy.” *Sherman v. Mamaroneck Union Free Sch. Dist.*, 340 F.3d 87, 93 (2d Cir.2003) (quoting *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 129 (2d Cir.1998)).

A district court must conduct an independent review of the record and exercise its own judgment in deciding whether to grant tuition reimbursement, but it also must give due deference to the decisions of the experts below. *Bettinger v. New York City Bd. of Educ.*, No. 06 CV 6889 (PAC), 2007 WL 4208560, at *4 (S.D.N.Y. Nov. 20, 2007). “[C]ourts may not ‘substitute their own notions of sound educational policy for those of the school authorities which they review.’ ” *T.Y. ex rel. T.Y. v. N.Y.C. Dep’t of Educ.*, 584 F.3d 412, 417 (2d Cir. 2009) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982)). Nor may the courts make subjective credibility assessments or weigh the testimony of educational experts when the state authorities have already performed these functions. *M.H v. New York City Dep’t of Educ* , 685 F.3d 217, 240 (2d Cir. 2012). In this way, “the role of federal courts in reviewing state educational decisions under the IDEA is ‘circumscribed.’ ” *Id.* (quoting *Gagliardo v. Arlington Cent. Sch. Dist.*, 489 F.3d 105, 112 (2d Cir. 2007)). Generally, either “party aggrieved” by the findings of the SRO “shall have the right to bring a civil action” in either state or federal court. 20 U.S.C. § 1415(i)(2)(A).

When such an action is brought in federal district

court, the court reviews the records of all of the prior administrative hearings and must hear additional evidence if so requested by either of the parties. *Id.* at § 1415(i)(2)(c). The court typically considers the propriety of the IEP on the parties' cross motions for summary judgment. *M.H.*, 685 F.3d at 225.

DISCUSSION

I. IHO and SRO's Decision

The Court upholds the SRO's decision affirming the IHO Forbes' finding that there was insufficient evidence in the hearing record to find that the Student received individual nursing services during the 2022-2023 extended school year and limiting Plaintiff's funding award to \$267,097.60 in tuition for their unilateral placement at iBRAIN. "[W]here the SRO and IHO agree, deference to the conclusions of the administrators ... is particularly appropriate." *C.W. v. City Sch. Dist. of the City of N.Y.*, 171 F. Supp. 3d 126, 131 (S.D.N.Y. 2016) (quotation omitted). "The IHO's, and even more so, the SRO's, evaluation of [] evidence is entitled to deference." *M.M. v. N.Y. City Dep't of Educ.*, No. 15-CV-5846, 2017 WL 1194685, at *7 (S.D.N.Y. Mar. 30, 2017) (affirming the IHO and SRO's refusal to consider submitted evidence). Most importantly, deference "is particularly appropriate when ... the [SRO's] review has been thorough and careful." *Walczak v. Fla. Union Free Sch. Dist.*, 142 F.3d 119, 129 (2d Cir. 1998). In particular, deference is warranted where, as here, the SRO "conducted a thorough review of the entire record ... and clearly explained the bases for [the] conclusions." *See M.W. v. Bd. of Educ.*, No. 12-cv-1476 (ER), 2013 WL

2631068, at *23 (S.D.N.Y. June 12, 2013), *aff'd sub nom. Ward v. Bd. of Educ.*, 568 F. App'x 18 (2d Cir. 2014).

Upon review of the SRO's decision and an independent review of the certified administrative record, the Court finds that the SRO's decision was thoroughly reasoned and based on a careful consideration of the case law and applicable facts, as well as supported by the administrative record. Where an SRO decision "is reasoned and supported by the record," the district court should not disturb it. *Schreiber v. E. Ramapo Cent. Sch. Dist.*, 700 F. Supp. 2d 529, 547 (S.D.N.Y. 2010) (internal citations omitted). In the instant motion for summary judgment, Plaintiff argues that the IHO and SRO unjustly focused their denial of Plaintiff's requests for reimbursement for both transportation and nursing services based on a mistake from an "inexperienced attorney." ECF No. 32 at 2. More specifically, the Plaintiff argues that the IHO's decision was based on a "single statement" made by the Plaintiff's counsel during the final hearing when asked whether the total amount that the Parent is seeking is \$267,097.60 and Plaintiff's counsel responded, "That is correct." DOE000317-318. Here, the Plaintiff's reliance on this brief exchange between IHO Forbes and Plaintiff's counsel to suggest that both the IHO and SRO's determinations were not based on a thorough review of the evidence that was presented during the hearing is misleading.

As for the nursing services, this Court maintains that there was no documentary evidence nor proof of any agreement in the record establishing that the parent was responsible for the costs of 1:1 nursing services allegedly provided to A.B. The

Defendants assert that during the administrative proceedings, IHO Forbes requested additional evidence to justify the need for 1:1 nursing services, which Defendants claim was not satisfactorily provided by the Plaintiff. ECF No. 34-2 at ¶ 47. The evidence submitted by Plaintiff, including medical records purporting to support the provision of 1:1 nursing services and a letter from the Student's physician, was deemed insufficient to support the need for both a paraprofessional and 1:1 nursing services at school. *Id.* at ¶¶ 48, 50. Indeed, the Plaintiff neither submitted a contract for nursing services into evidence nor indicated that such an agreement existed. Therefore, the SRO correctly held that:

[T]he evidence of the student's need for individual nursing services is insufficiently vague to support a finding that appropriate programming for the student included all of the individual services the student was receiving. As a final matter, regardless of whether the student required 1:1 nursing services, there is also little evidence in the hearing record that the student actually received nursing services during the 2022-23 school year... Additionally, there is no evidence as to how or by whom such services were provided to the student and there is no indication in the hearing record that the parent has a financial obligation to pay for such services.

ECF No. 34-1 at 13-14; *see also* DOE0000011-12.

Turning to the reasonableness of the denial of

transportation services, this Court finds that it was reasonable for the IHO and SRO to deny funding for the Student's special transportation. Plaintiff maintains that they entered a transportation contract into evidence to substantiate their claims for transportation services. ECF No. 32 at 17. However, Defendants point to the fact that Plaintiff's counsel never mentioned transportation during the administrative proceeding before the IHO. ECF No. 34-1 at 17; *see also* ECF No. 1-2 ("The hearing record shows that although nursing services were brought up as an issue during the hearing, in multiple instances where counsel for the parent discussed what relief was being sought, counsel for the parent did not mention transportation.") When the Plaintiff appealed the IHO's decision, the Parent asserted that the IHO erred in failing to award a flat rate of \$233 per school day regardless of whether they used the services or not. ECF No. 1-2 at 6. The SRO found that the IHO did not err in not "combing through the hearing record to conduct transportation calculations and then award the parent relief for which the parent did not make an affirmative request when specifically asked what total amount was being requested." *Id.* at 10. Therefore, it was reasonable for the IHO to rely on Plaintiff's counsel's statement that the Parent was not seeking anything more than \$267,097.60 in iBRAIN tuition funding. ECF No. 34-1 at 13-14; *see also* DOE000012.

II. Plaintiff's Request to Admit Additional Evidence

Plaintiff's request for this Court to consider additional evidence outside of the administrative

record is denied. As an initial matter, Section 1415(i)(2)(C) of the IDEA provides that “the [district] court (i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C). Although the statute is worded broadly and provides that courts “shall hear additional evidence at the request of a party,” 20 U.S.C. § 1415(i)(2)(C)(ii), courts have been unwilling to admit additional evidence when fairness and other equitable considerations cut against doing so. *See, e.g., M.B. v. N.Y. City Dep’t of Educ.*, No. 14-CV-3455, 2015 WL 6472824, at *2 (S.D.N.Y. Oct. 27, 2015) (“A lenient standard for additional evidence would have the consequence of making the whole IDEA process more time consuming, as parties scrambled to use the federal court proceeding to patch up holes in their administrative case.” (quotation omitted)). The Second Circuit has not yet addressed the standard for admitting additional evidence on appeal from the SRO. In the absence of controlling precedent from the Second Circuit, many district courts within this Circuit have adopted the approach established by the First Circuit. *See L.V. v. Rye City Sch. Dist.*, No. 22-CV-4255, 2023 WL 5744421, at *2 (S.D.N.Y. Sept. 6, 2023) (explaining that the First Circuit approach has been used by district courts within the Second Circuit and other circuits).

Here, the Plaintiff seeks to present additional evidence in support of nursing services, which includes a copy of the Nursing Affidavit and Nursing Services Contract for Plaintiff A.B. for the 2022-2023

school year. ECF No. 24. Neither Plaintiff nor Plaintiff's counsel, however, has provided this Court with a justification for their failure to present the evidence of nursing services in the first instance during the administrative hearing. The First and Fourth Circuits held that "a lax interpretation of 'additional evidence' would 'reduce the proceedings before the state agency to a mere dress rehearsal by allowing appellants to transform the Act's judicial review mechanism into an unrestricted trial *de novo*.'" *Springer by Springer v. Fairfax County Schoolboard*, 134 F.3d 659, 667 (4th Cir. 1998) (quoting *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 997 (1st Cir. 1990)). Therefore the exclusion of "testimony from all who did, or could have, testified before the administrative hearing" would be "an appropriate limit in many cases." *Burlington v. Dep't of Edu.*, 736 F.2d 773, 790 (1st Cir. 1984). Along with other circuits, we adopt the *Burlington* approach. See, e.g., *Monticello Sch. Dist. No. 25 v. George L.*, 102 F.3d 895, 901 (7th Cir.1996); *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1472–73 (9th Cir.1993), *cert. denied*, 513 U.S. 825 (1994). The Court also notes that Plaintiff's counsel was recently denied the opportunity to submit new evidence during an appeal from an SRO decision in this district. See *Landsman v. Banks*, No. 23-CV-6404, 2024 U.S. Dist. LEXIS 135370, at *9-11 (S.D.N.Y. July 31, 2024) (denying request to submit additional evidence on SRO appeal where IHO and SRO both found insufficient evidence to show that services were appropriate for student's needs and where "[p]laintiff had every opportunity" to submit evidence below). Therefore, in light of this authority, this Court will adopt this approach and deny the

consideration of additional evidence.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment is hereby **DENIED** and Defendants' cross-motion for summary judgment is otherwise **GRANTED**. The Clerk of Court is directed to terminate all pending motions and close this case.

SO ORDERED.

Dated: March 19, 2025
New York, NY

A handwritten signature in cursive script, reading "Andrew L. Carter, Jr.", written in black ink.

ANDREW L. CARTER, JR.
United States District Judge

INDEPENDENT HEARING OFFICER'S FINDINGS
OF FACT AND DECISION DATED MAY 26, 2026

STATE EDUCATION DEPARTMENT
OF NEW YORK

_____^x
In the Matter of a Complaint Pursuant
to Part 200 of the Regulations of the
Commissioner of Education Regarding,
STUDENT, a minor, by and through
his/her Parent(s),

-against-

Case # 214228

NEW YORK CITY DEPARTMENT OF
EDUCATION,

Respondent

_____^x

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND DECISION

INTRODUCTION AND PROCEDURAL
BACKGROUND

This matter came before the hearing officer by way of a due process complaint filed by the Parent on October 31, 2022. No written response was provided by the Respondent, the New York City Department of Education (hereinafter "DOE", "District" or "Respondent"). A hearing was held regarding this matter on April 3, 2023, April 21, 2023, and May 26, 2023. It was a closed hearing and the Petitioners were represented by Angelo Lagman, Esq. of the Brain Injury Rights Group, LTD.

Respondent did not appear. The record was closed on May 26, 2023.

In the due process complaint, the Parent requested tuition reimbursement for a unilateral placement at the iBrain International Academy for the Brain (“IBRAIN”) covering the 2022-2023 school year.

JURISDICTION

The due process hearing was held, and a decision in this matter is being rendered pursuant to the Individuals with Disabilities Education Act (hereinafter “IDEA”), 20 U.S.C. § 1400 *et seq.*, and the New York State Education Law, Educ. Law Art. 89 § 4404 *et seq.*, and its implementing regulations, 8 N.Y.C.R.R. § Part 200.

BACKGROUND

Student is a four-old child mandated for a 12-month school year who is classified as a Preschool Student with a Disability. The circumstances which gave rise to the current due process complaint involved the alleged failure of the CSE to review the Student’s current IEP, the CSE’s failure to request any updated evaluations for the Student and the CSE’s failure to recommend an appropriate program for the Student for the 2022-2023 school year.

ISSUES

- 1) Whether Student was denied a FAPE for the 2022-2023 school years by the failure of the CSE to request updated evaluations for the Student,

by failing to develop an appropriate IEP for the Student for the 2022-2023 school year and/or by failing to recommend or provide Student an appropriate placement.

- 2) Whether the Parent's unilateral placement(s) of the Student for the 2022-2023 school year was appropriate to the Student's needs.
- 3) Whether the equities favor reimbursement.

Petitioner requests relief in the form of an order directing the District to fund the tuition at IBRAIN for the 2022-2023 school year.

EVIDENCE SUBMITTED AT HEARINGS

DISTRICT'S CASE

The District introduced no exhibits into evidence.

PARENT'S CASE

The Parent introduced thirteen (13) exhibits into evidence which included the following:

- P-A: DPC
- P-B IEP
- P-C TDN
- P-D: Enrollment Contract
- P-E: TDN
- P-F: Determination Letter
- P-G: Transportation Agreement
- P-H: iBrain IEP
- P-I: Affidavit – School Representative
- P-J: Affidavit - Parent
- P-K: Affidavit – Parent (Spanish)
- P-L: Medical Records

P-M: Physician's Letter

WITNESSES

The District presented no witnesses.

The Parent presented two witnesses, Tiffany Semm, Director at IBRAIN, and the Parent. In lieu of direct examination, the Parent produced affidavits of the witnesses.¹ The District waived its right to cross-examine the witnesses.

FINDINGS OF FACT

After considering all of the evidence, as well as arguments of both sides, this Hearing Officers Findings of Fact are as follows:

- 1) The Student was a four-year-old child entering the 2022-2023 school year.² The Student is classified as a student with Multiple Disabilities.³
- 2) The District never appeared in this matter. As a result, I am constrained to find that the District has conceded that it did not conduct an appropriate review, that it failed to conduct relevant evaluations, failed to develop an appropriate IEP, and/or did not offer the Student an appropriate placement for the 2022-2023 school year. As a result, there is no question that the Student was denied a FAPE for the 2022-2023 school year.
- 3) On May 26, 2022, the Parent sent the District a ten-day notice stating their intention to

¹ P-I; P-J.

² P-B

³ Id.

unilaterally place the Student at IBRAIN for the 2022-2023 school Year.⁴ There is no evidence in the record that the District ever responded to this notice.

- 4) During the 2022-2023 school year, Student attended IBRAIN.⁵
- 5) For the 2022-2023 school year, the Parent submitted documentation to demonstrate that the Student made progress at IBRAIN.⁶ Specifically, the testimony of the school representative and the Parent detailed the Student's progress, both academically and otherwise, and reflected that the Student did well at IBRAIN.⁷
- 6) For the 2022-2023 school year, the Parent submitted documentation which amply demonstrated that IBRAIN was an appropriate placement for the Student.⁸ Specifically, the testimony of the school representative set forth the various ways in which IBRAIN had created a program which was specifically tailored to address the Student's unique needs.⁹ The District did not challenge any of this evidence.
- 7) For the 2022-2023 school year, the Parent provided documentation that verified that the Parent was contractually obligated to pay the tuition, inclusive of related services, at IBRAIN which totaled two hundred sixty-seven thousand ninety seven dollars and sixty cents

⁴ P-C

⁵ P-J

⁶ P-H; P-I, P-J

⁷ P-1;P-J

⁸ P-I

⁹ Id.

(\$267,097.60).¹⁰

- 8) IBRAIN was an appropriate placement for Student for the 2022-2023 school years. The small class sizes allowed the Student to get more individualized attention and support from the Student's teachers.¹¹ In addition, all of the Student's related services were received at IBRAIN.¹² In addition, Student had access to numerous individual and small group sessions where the Student received additional support from teachers within the school.¹³

CONCLUSIONS OF LAW AND DISCUSSION

Denial of FAPE

The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." Bd. Of Educ. V. Rowley, 458 U.S. 176, 179-91 (1982). Implicit in the congressional purpose of providing access to a free and appropriate public education (hereinafter "FAPE") is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicap child. (Id.)

Pursuant to 20 U.S.C. §1401(9) and 34 C.F.R.

¹⁰ P-d

¹¹ P-I

¹² P-D

¹³ Id.

§300.17 FAPE is defined as follows:

Special Education and related services that are provided at public expense under public supervision and direction and without charge; meet the standards of the SEA... include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with the individualized education program (IEP).

In deciding whether the Respondent provided a student with a FAPE, the inquiry is typically: (1) whether the Respondent complied with the procedures set forth in IDEA; and (2) whether the student's IEP is reasonably calculated to enable the student to receive educational benefit (Rowley, supra.). Under the second prong, a school district need not maximize the potential of child but must open the door of public education in a meaningful way, and the IEP must provide the opportunity for more than only a "trivial advancement" P.v. Newington Bd. Of Educ., 546 F.3d. 111 (2nd Cir. 2008).

The IEP is "the centerpiece of the statute's education delivery system for disabled children" Honig v. Doe, 484 U.S. 305, 311 (1988). An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs, establishes annual goals related to those needs, and provides appropriate specialized instruction and related services. See 34 C.F.R. §300.320 (a). For an IEP to be "reasonably

calculated to enable the child to receive educational benefits,” it must be “likely to produce progress, not regression” Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 (2d Cir. 1998).

Additionally, each public agency must ensure that, as soon as possible following the development of an IEP, special education and related services are made available to the child in accordance with the child’s IEP. In order to implement the IEP, a team that includes the child’s parents determines where the child should be placed based on the child’s IEP. Thus, the placement should not dictate the IEP but rather the IEP determines whether a placement is appropriate. Rourke v. District of Columbia, 460 F.Supp.2d 32, 44 (D.D.C. 2006).

The DOE must ensure that the IEP team reviews a student’s IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved. Moreover, the DOE must ensure that the IEP team revises the IEP, as appropriate, to address any lack of expected progress toward the annual goals; and the results of any reevaluation or information about the child provided to, or by, the parents. Additionally, if the parent obtains an independent educational evaluation (“IEE”) at public expense, or shares with the public agency an evaluation obtained at private expense, the school district must consider the results of the evaluation, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child. The IDEA mandates that an IEP be based on the results of the most recent evaluation of a student.

In determining the appropriate placement for

a child, preference is given to the least restrictive environment and the appropriate schools nearest the child's home (Id.). The IDEA requires that unless the IEP of a child with a disability requires some other arrangement, the child is to be educated in the school that he or she would attend if the student was otherwise not disabled. In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of the services that he or she needs. A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. See 34 C.F.R. § 300.116.

When developing the IEP, the District will have evaluations of the child, as a procedural safeguard the parents are entitled, as a matter of Law, an independent education evaluation (IEE) at public expense. 34 CFR § 300.502

Where a school system fails to provide special education or related services to a student with a disability, the student is entitled to compensatory education, “i.e., replacement of educational services the child should have received in the first place.” Reid v. District of Columbia, 401 F.3d 516 (D.C. Cir. 2005). An award of compensatory education “should aim to place the disabled children in the same position they would have occupied but for the school district’s violations of IDEA” (Id.). Compensatory education is a remedy for “past deficiencies” therefore a finding as to whether a student was “denied a FAPE in the relevant time period is a necessary prerequisite to a compensatory education award.” Peak v. District of Columbia, 526 F. Supp. 2d 32 (D.C. Cir. 2007).

Pursuant to New York Education LAW § 4401(c)(1) the DOE shall have the burden of proof, the burden of persuasion, and the burden of production in impartial hearings except for instances where the parent is seeking tuition reimbursement for a unilateral parental placement and in those cases the parent shall have the burden of persuasion and the burden of production as to the appropriateness of the placement. The burden of proof in matters such as this shall only be met upon a fair preponderance of the evidence. The preponderance of the evidence standard requires that the trier of fact find that the existence of a fact is more probable than its nonexistence. Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993).

Unlike other standards of proof, the preponderance-of-evidence standard allows both parties to share the risk of error in a roughly equal fashion, except that when the evidence is evenly balanced, the party with the burden of persuasion must lose. Director, Office of Worker's Compensation Programs v. Greenwich Collieries, 512 U.S. 267, 281 (1994).

In the instant matter, the Respondent presented neither documentary evidence nor witnesses. In the absence of a witness who could defend the IEPs developed for the Student, and, more importantly, explain how the proposed placement was appropriate for the Student, there is insufficient information in this record to conclude that the District provided the Student with a FAPE for the 2022-2023 school year. As a result, there can

be little question that the Student was denied a FAPE for the 2022-2023 school year.

Moreover, in assessing the propriety of the family's effort to rectify the district's failing, the decision-maker must take into account the limited range of options available to the family, the degree to which they possessed technical/professional educational expertise, the urgency of the placement timetable, and their natural desire to maximize the student's potential. The family is under no obligation to seek out a program that skirts just barely above the Endrew minimum, and the district that comes to the table with unclean hands is not in a strong position to argue that, notwithstanding its own derogation of duty, the family should be barred from seeking to remedy the deprivation of FAPE because the program they initiated

was *too* good. One of the fundamental tenets of equity jurisdiction is that ‘he that hath committed iniquity shall not have equity.’

Reimbursement for Unilateral Placement

A court or a hearing officer may order a district to reimburse the parents of a student with a disability for the student’s unilateral private placement if the district failed to make a FAPE available in a timely manner and the unilateral private placement is appropriate, 34 CFR 300, 148 (c); Florence County Sch. Dist. Four v. Carter, 20 IDELR 532 (US 1993). Parents seeking tuition reimbursement as a remedy cannot simply speculate that the assigned school will fail to provide one or more services the student needs to receive FAPE; they must show that the school is not capable of implementing the student’s IEP, M.O. and G.O. v. New York City Department of Education, 65 IDELR 283 (2nd Cir. 2015); Y.F. v. New York City Dept. of Educ., 68 IDELR 92 (2d Cir. 2016, unpublished).

It is true that a unilateral private placement does not need to meet state standards for public education programs to be “appropriate” for reimbursement services, 34 CFR 200.148(c). However, a unilateral private placement is appropriate for reimbursement purposes if it offers instruction that is specially designed to meet the student’s unique needs as well as the support services the student requires to benefit from that instruction, M.N. v. State of Hawaii, Dept. of Educ., 60 IDELR 181 (9th Cir. 2013, unpublished); Ward v. Board of Education of the Enlarged City Sch. Dist. Of Middletown, NY, 63 IDELR 121 (2d Cir. 2014,

unpublished).

In the instant matter, the District did not contest the appropriateness of the unilateral placement. Moreover, there was a clear demonstration that the unilateral placement chosen by the Parent was appropriate. Specifically, the evidence demonstrated that IBRAIN engaged the Student in classes, programs and related services which were specifically tailored to address Student's needs and challenges. The Student was provided with numerous accommodations and afforded the opportunity to engage in both individual and small group instruction, and related services providers that collaborated with the Student's classroom teacher. Over the course of the 2022-2023 school years, Student demonstrated consistent progress across a broad array of subjects and areas of disability and continued to show marked personal growth.

It is for this reason that I find that the District is directed to fund the cost of the Student's 2022-2023 placement at IBRAIN in the amount of \$267,097.60.

Equities

Pursuant to 20 U.S.C.A. § 1412(a)(10)(C)(iii), the cost of reimbursement described in clause (ii) may be reduced or denied if:

(I)(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP

Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

As a general rule, a school district may not argue that the “equities are in its favor once it has failed to provide a FAPE or concedes that it has not.” N.R. v. Department of Education of the City of New York, 2009 WL 874061 (S.D.N.Y. 2009). However, where the

record demonstrates that the Parent failed to cooperate with the CSE or actively took steps to thwart the District’s ability to develop an appropriate IEP for the Student, it is appropriate for the impartial hearing officer to either reduce or deny the Parent’s request for tuition reimbursement. Neske v. Porter, 2022 WL 3290561 (S.D.N.Y. 2022). In Neske, the Court held,

In determining whether parents have acted unreasonably, courts consider factors including: whether the parents cooperated with the CSE (e.g., providing reports, attending the meeting, participating in the meeting); whether the parents timely notified the school district of their intent to place their child in a private school; whether the parents visited the DOE's proposed placement; whether the parents intended to genuinely consider a proposed public placement, or whether they would have

kept their child in private school regardless of the proposed public placement; whether the parents or the DOE unreasonably delayed anything; and the appropriateness of the DOE's conduct.

Id., at 3-4 (citing G.B. v. New York City Dept. of Educ., 145 F.Supp.3d 230, 257 (S.D.N.Y. 2015)). In addition, even where the District fails to present a Prong I case, and even when it does not contest the appropriateness of the unilateral placement, the courts have held that it remains Parent's burden to demonstrate that the equities are in their favor. R.E. v. New York City Dept. of Educ., 694 F.3d 167, 185 (2nd Cir. 2012); see also Donohue v. New York City Dept. of Educ., 2021 WL 4481344 (S.D.N.Y. 2021).

In the instant matter, the District offered no evidence on the subject of the equities. Moreover, the evidence is clear that the Parent cooperated with all of the District's efforts to develop an IEP for the Student. I therefore find that there are, in fact, no equitable considerations which would mitigate against full reimbursement. In addition, a review of the evidence in the record reveals that no such equitable considerations exist.

ORDER:

Based on the Findings of Fact and Conclusions of Law and all evidence before the IHO, it is hereby ORDERED that:

1. That the New York City Department of Education is directed to reimburse

and/or fund the cost of the Student's
2022-2023 placement at IBRAIN in
the amount of
\$267,097.60;

2. As to the tuition reimbursement/funding,
pdfall payments shall be made directly to
the non-public, unilateral placement(s)
upon a showing by the Parent that tuition
has not been paid out-of-pocket by the
Parent. If the Parent can show that out-
of-pocket payment to the placement(s)
was made by the Parent, then the Parent
shall be reimbursed by the District;
3. The district must immediately upon
receipt, enter this order on a system that is
used to keep track of such orders.

SO ORDERED:

Dated: May 26, 2023

Steven P. Forbes

Steven P. Forbes

Impartial Hearing Officer

STATE REVIEW OFFICE DECISION
DATED AUGUST 22, 2023

STATE OF NEW YORK
The State Education Department
State Review Officer
www.sro.nysed.gov

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

Appearances:

Brain Injury Rights Group, Ltd., attorneys for
petitioner, by Angelo A. Lagman,

Esq. Liz Vladeck, General Counsel, attorneys for
respondent, by Ezra Zonana, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals
with Disabilities Education Act (IDEA) (20 U.S.C. §§
1400-1482) and Article 89 of the New York State
Education Law. Petitioner (the parent) appeals from
those portions of a decision of an impartial hearing
officer (IHO) which declined to grant her direct
funding for 1:1 nursing services or transportation for
the 2022-23 school year. Respondent (the district)
cross-appeals from the that portion of the IHO's
determination finding that the 1:1 nursing services
and transportation services obtained by the parent

were appropriate for the student. The appeal must be dismissed. 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 200.5U[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 200.5Li[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

A CPSE convened on May 26, 2021 for the student's initial eligibility determination and found the student eligible for special education as a preschool student with a disability (Parent Ex. B at p. 1). The hearing record reflects that the student is non ambulatory and nonverbal, he is dependent on a gastronomy tube for feeding needs, and he has received diagnoses of including, among other things, a seizure disorder, cerebral palsy, cortical visual impairment, and global developmental delays (Parent Exs. Hat p. 1; I at ,r10; J at i112-3; Lat p. 5; Mat p. 1). The CPSE recommended that beginning September 1, 2021, the student should be placed in a 12:1+2 special class for a full day, five days per week, and receive related services, including three 30-minute sessions of 1:1 speech-language therapy per week, three 30-minute sessions of 1:1 physical therapy (PT) per week, and three 30-minute sessions of 1:1

occupational therapy (OT) per week (id. at p.9).¹

On May 24, 2022, the parent sent a letter to the district informing it that the parent was rejecting the district's program and placement for the 2021-22 extended school year, that the parent had concerns regarding the student's regression and lack of progress and the district's failure to implement aspects of the CPSE's May 2021 IEP, that the parent disagreed with the recommendations made in the May 2021 CPSE IEP including the lack of recommendation for special transportation, and that the parent was placing the student at iBrain (Parent Ex. C).

On June 14, 2022, the parent entered into an agreement with the International Academy for the Brain (iBrain) for the student's enrollment starting on July 6, 2022 and ending on June 23, 2023 (Parent Ex. D at pp. 8-13).²

On June 17, 2022, the parent notified the district that she had not received a program and placement for the student for the 2022-23 school year and that, at that time, she had "no choice other than

¹ The May 2021 IEP indicated that the student would receive the same recommended program over a 12-month school year, noting that the "student's disabilities [we]re so severe that they require[d] a structured learning environment of twelve months duration to prevent substantial regression" (Parent Ex. Bat p. 10)

² The parent submitted two versions of the iBrain enrollment contract for the 2022-23 school year, one in Spanish and one in English (Parent Ex. D). The English version of the contract is the one cited to in this decision and the documents indicate in the footer that the Spanish translation is a courtesy copy and that the English version of the document is binding (Parent Ex. D at pp. 8-13)

to enroll [the student] at iBrain" (Parent Ex. E). The district responded to the parent's letter on July 21, 2022 indicating that the parent's request was "not appropriate for settlement" (Parent Ex. F).

On September 19, 2022, the parent entered into an agreement with Sisters Travel and Transportation Services, LLC (Sisters Travel) for the provision of school transportation services for the student to attend iBrain (Parent Ex. G).

A. Due Process Complaint Notice

In a due process complaint notice dated October 31, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 extended school years (see Parent Ex. A).

Initially, the parent requested a pendency determination asserting that in the absence of the district showing the student's last agreed upon placement was available, the student's placement for pendency should consist of direct payment of tuition and transportation at iBrain as the student's "operative placement" for the 2022-23 school year (Parent Ex. A at p. 2).

With respect to the 2021-22 school year, the parent asserted that the student was not provided with services and was unable to attend school as a result (Parent Ex. A at p. 3). According to the parent, she enrolled the student at iBrain in June 2022 for the remainder of the 2021-22 school year (!fl). Turning to the 2022-23 school year, the parent asserted that the district failed to hold a CSE meeting or develop an IEP for the student or offer the student a school placement (id. at pp. 3-4). According to the

parent, she re-enrolled the student at iBrain at the start of the 2022-23 school year (id. at p. 4).

More specifically, the parents asserted that the district failed to conduct appropriate and timely evaluations of the student, that the district denied the parent meaningful participation in the CSE process and predetermined the student's programming, that the class size recommendation was not sufficient for the 2021-22 school year, that the related services recommendations were not sufficient for the 2021-22 school year, that the district failed to hold a CSE meeting or develop an IEP for the student for the 2022-23 school year, and that the district failed to identify a school placement for the 2022-23 school year (Parent Ex A at pp. 4-5).

As relief, the parent requested a declaratory finding that the district denied the student a FAPE for the 2021-22 and 2022-23 school years and a determination that iBrain was an appropriate placement for the student (Parent Ex. A at p. 6). The parent sought an order requiring the district to directly fund the costs of the student's tuition at iBrain for the 2021-22 and 2022-23 school years including the costs for related services, 1:1 nursing services, and 1:1 paraprofessional services, as needed (ill). The parent also requested "funding of special education transportation with limited time travel, a 1:1 nurse and/or paraprofessional, air conditioning, a lift bus, and a regular-sized wheelchair" (igj. Finally, the parent requested an order directing that the CSE reconvene to develop a new IEP, an order directing the district to conduct any necessary evaluations, and an order for the district to fund an independent neuropsychological evaluation (id.).

B. Impartial Hearing Officer Decisions

Following a prehearing conference held on January 9, 2023, an impartial hearing was conducted on April 3, 2023, continuing on April 21, 2023, and concluding on May 26, 2023 (Tr. pp. 1-56).³ The district did not appear on any of the scheduled hearing dates (*id.*). During the hearing, counsel for the parent explained that the student did not begin attending iBrain until the 2022-23 school year and limited their request to the 2022-23 school year; the parent withdrew her claims regarding the 2021-22 school year (Tr. pp. 24-28, 38-39).

In a decision dated May 26, 2023, the IHO determined that by failing to appear at the hearing, the district conceded that it denied the student a FAPE for the 2022-23 school year (IHO Decision at pp. 5, 11). The IHO further found that the parent submitted documentation showing iBrain was an appropriate placement for the student for the 2022-23 school year (*id.* at p. 6-7, 12-13). The IHO then addressed equitable considerations and found that the parent cooperated with the district and there was no reason not to grant the parent full relief (*id.* at pp. 14-15). The IHO directed the district to reimburse the parent or fund the costs for the student's placement

³ At the January 9, 2023 prehearing conference, counsel for the parent requested that the IHO schedule a pendency hearing; however, when the IHO asked what the basis for pendency was at the time, counsel for the parent did not offer a response that the IHO found warranted a pendency hearing; however, the IHO gave the parent the opportunity to submit a written legal brief to argue their position (Tr. pp. 5-10). There is no indication in the hearing record that the parent submitted such a brief in this matter (Tr. pp. 1-56; Parent Exs. A-M).

at iBrain for the 2022-23 school year in the amount of \$267,097.60 (id. at p. 15).

IV. Appeal for State-Level Review

The parent appeals the IHO's decision to the extent that the amount ordered as relief did not include funding for 1:1 nursing services or special transportation. As for 1:1 nursing services, the parent argues that the student requires 1:1 nursing services "to closely monitor his needs, monitor seizures, and administer anticonvulsive medication while in transit and throughout the school day." According to the parent, the IHO inquired as to why the student needed 1:1 nursing services as well as 1:1 paraprofessional services and that it was addressed by an explanation as to the student's seizure history and that a home-based nurse accompanied the student at school and at home. In addition, the parent indicated the hearing record included a statement from the student's physician that the student required 1:1 nursing services. Overall, the parent asserts that the IHO overlooked evidence showing the student's need for 1:1 nursing services and erred in failing to order payment for those services. With respect to transportation, the parent asserts that the IHO erred in failing to award a flat rate of \$233 per school day whether the student used the services or not. The parent asserts that the IHO did not address the issue of transportation at all and should have awarded the parent "the full benefit of her valid contract with the transportation provider." The parent requests an order affirming the IHO's determinations that the district denied the student a FAPE for the 2022-23 school year, that iBrain was an

appropriate placement for the student, and that equitable considerations favor the parent's claims. The parent further requests an order directing the district to "fully and directly fund [the student's] placement at iBrain, including base tuition, supplemental tuition (related services), special transportation, and 1:1 nursing services."¹¹

The district answers the parent's request for review and cross-appeals from the IHO's determinations to the extent the decision could be read as finding 1:1 nursing services and special transportation were appropriate services to meet the student's special education needs. With respect to 1:1 nursing services, the district asserts that the IHO inquired of counsel for the parent's as to the total amount the parent was seeking and parent's counsel confirmed the parent was seeking a total of \$267,097.60, that there was no contract for nursing services entered into evidence and little evidence of by whom or if the service was provided to the student during the 2022-23 school year, and that the hearing record did not include sufficient information regarding the 1:1 nursing services to support a finding it was an appropriate or necessary service for the student. With respect to transportation, the district asserts that the parent waived it by explicitly stating the total amount requested was \$267,097.60, which is the total amount that was ordered by the IHO.

The parent submits a verified reply and answer to the district's cross-appeal responding to the district's assertions regarding 1:1 nursing and transportation.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP"¹¹ (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. ___, 137 S. Ct. 988, 999 [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 Chappagua 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., 137 S. Ct. at 1001). 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.Jd 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.Jd 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [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 300.14[a][2][i], 300.16[a][2]; 8 NYCRR 200.1[cc],

200.6[a][l]; 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][l]; 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][2J[i], (2)[iJ[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]).⁴

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

⁴ 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., 137 S. Ct. at 1000).

252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

Turning to the analysis used regarding the parent's unilateral placement, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of

Yonkers, 231 FJd 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

No one factor is necessarily dispositive

in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

VI. Discussion - Relief

The parties have not appealed from the IHO's determination that the district failed to meet its burden to prove that it offered the student a FAPE for the 2022-23 school year. In addition, the parties do not argue as to whether the base program and related

services provided to the student by iBrain was appropriate to meet the student's special education needs. Therefore, the IHO's findings regarding FAPE and the appropriateness of the awarded iBrain program have become final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.50)[5][v]).

The sole issues in this matter relate to the relief granted by the IHO and whether the IHO erred in the relief granted under the circumstances.

The IHO awarded the parent the total sum of \$267,097.60 for the student's program provided at iBrain during the 2022-23 school year (IHO Decision at p. 15). Review of the iBrain contract shows that for the 2022-23 school year, the parent agreed to pay iBrain the sum of \$175,000.00 in base tuition, which included the cost for an individual paraprofessional, and school nurse" (Parent Ex. D at p. 8). In addition, the parent agreed to pay for related services, identified as five 60-minute sessions of individual OT per week, five 60-minute sessions of individual PT per week, five 60-minute sessions of individual speech-language therapy per week, one 60-minute session of individual assistive technology services per week, two 60-minute sessions of individual music therapy per week, and one session of parent counseling and training per month (id. at pp. 8-9). iBrain charged the parent \$112 per hour for individual services and \$56 per hour for services in a group (kl) The total cost of related services for the 2022-23 school year was identified as \$92,097.60, indicating that the total cost of the student's programming at iBrain for the 2022-23 school year was \$267,097.60 as awarded by the IHO.

The parent asserts that the IHO erred in failing to award the parent the cost of individual

nursing services and transportation during the 2022-23 school year. Initially, the parent did request funding for individual nursing services and special transportation in the due process complaint notice (Parent Ex. A at p. 6). However, the hearing record shows that although nursing services were brought up as an issue during the hearing, in the multiple instances where counsel for the parent discussed what relief was being sought, counsel for the parent did not mention transportation (Tr. pp. 24-33, 54). In fact, on the final hearing date, counsel for the parent confirmed that the total amount of relief the parent sought was \$267,097.60 (Tr. p. 54). The IHO then asked if there was "anything else" two times (Tr. p. 54). The second time, counsel for the parent responded, "Nothing from the Parent, Your Honor." (Tr. p. 55). Accordingly, any request for transportation fell out during the process of the hearing and there is no basis for finding that the IHO erred in not combing through the hearing record to conduct transportation calculations and then award the parent relief for which the parent did not make an affirmative request when specifically asked what total amount was being requested.⁵

Turning to the request for individual nursing services, this issue was addressed during the hearing. At the April 3, 2023 hearing date, counsel for the parent indicated that the stated tuition amount of \$267,097.60 did not include costs for individual

⁵ The parent's due process complaint notice included additional requests for relief, such as requests for the district to conduct evaluations and convene a CSE and for an independent neuropsychological evaluation (Parent Ex. A at p. 6); however, none of those requests were raised during the hearing and the parent has not raised them on appeal.

nursing services (Tr. pp. 30-31). When asked what the purpose of the individual nursing services was, counsel for the parent responded that the "nurse [wa]s needed primarily to monitor seizure activity" (Tr. p. 32). The hearing then adjourned for the parent to obtain more information to support the request for individual nursing services (Tr. pp. 32-33).

When the hearing resumed on April 21, 2023, the parent submitted the student's medical records into the hearing record, which counsel for the parent argued supported a need for individual nursing services (Tr. pp. 39-40; Parent Ex. L). In reviewing the medical records, the IHO questioned why the student required a full-time 1:1 nurse as well as a paraprofessional at the same time; the IHO indicated he expected "an affidavit from a doctor indicating that it [wa]s imperative for the student to have, for health reasons ... a nurse present" (Tr. pp. 41-42). Counsel for the parent then indicated that the medical records were submitted to show that, at the age of four, prior to the student attending school, the student received round the clock nursing services at home; however, counsel for the parent offered to obtain a letter from the student's doctor (Tr. pp. 42-43).

Consistent with the IHO's assessment during the hearing, the student's medical records contain only a passing reference to the student having a home nurse (Tr. pp. 43-44; Parent Ex. L at p. 12). The documentation, from a hospital visit in March 2023, indicates only that the student's home nurse stated the student had increasing instability in his left shoulder during the past month (Parent Ex. L at p. 12). There is no indication in the document that the student had round the clock nursing services at home, although it is at least possible that the student did

receive such services considering his diagnoses (see Parent Ex. L).

During the hearing, the IHO explained that he wanted more documentation because even if the student had a nurse at home, the student did not have a paraprofessional at home; the IHO was clear that he expected an explanation from an expert as to why both services were necessary (Tr. pp. 44-45). The IHO further clarified that he was not seeking a letter from a doctor, he "need[ed] some form of affidavit from a doctor who's going to testify. Not just a letter - or some sworn statement" (Tr. pp. 47-48). The hearing was then adjourned so counsel for the parent could obtain the requested information (Tr. p. 48).

The hearing resumed on May 26, 2023, at which time the parent submitted a letter from the student's physician into the hearing record (Tr. p. 54; Parent Ex. M). The IHO then asked counsel for the parent "[s]o the total amount that the [p]arent is seeking is \$267,097.60" (igj. Counsel for the parent then responded "[t]hat is correct" (llh). The IHO issued his decision the same day as the final date of the hearing (see IHO Decision). As discussed above, in his decision, the IHO awarded the parent a total of \$267,097.60 that the parent requested for the costs of the student's tuition at iBrain for the 2022-23 school year.

Upon review of the physician's letter offered by the parent into evidence, the letter did not comply with the directives the IHO clearly stated at the April 21, 2023 hearing date (Tr. pp. 44-45, 47-48). The submitted letter, dated May 9, 2023, noted the student's complex medical history including a list of the student's diagnoses and indicated that it was "medically necessary for a 1:1 nurse to be attending

to [the student] full time during school and travel"; the letter specifically noted that the student could have seizures at any time and that the student was g-tube dependent for feeds throughout the day (Parent Ex. M). However, the letter does not clearly state why the student required both 1:1 nursing services and 1:1 paraprofessional services at school, or why the student required those services in addition to his school program, which consisted of placement in a 6:1+1 special class with approximately 18 hours per week of individual related services (see Parent Exs. M). The letter failed to meet the clear expectations set by the IHO in that it was not in the form of an affidavit, the doctor was not available for questioning, and the document itself offers no explanation as to why both services were simultaneously necessary for the student to attend school. Accordingly, without further documentation, the letter itself does not provide sufficient information to overturn the IHO's decision not to award funding for 1:1 nursing services.

In review of the rest of the hearing record, there is testimony and documentary evidence indicating the student required the services of both a 1:1 paraprofessional and a 1:1 school nurse; however, the information included is vague and does not fully address the IHO's question as to why the student required the services of both providers at the same time, especially considering the student was placed in a class with a 6:1+1 ratio and received approximately 18 hours of 1:1 related services per week.

The iBrain director of special education testified that the student attended a 6:1+1 special class with related services including five 60-minute sessions of individual OT per week; five 60-minute sessions of individual PT per week; five 60-minute

sessions of individual speech-language therapy per week; three 60-minute sessions of individual vision education services per week; and three 60-minute sessions of individual music therapy per week (Parent Ex. I at 1 12; Parent Ex. H at p. 67).⁶ The director also testified that the student received 1:1 paraprofessional services "all day, every day, to support his needs" (Parent Ex. I at 1 14). In addition, she testified that the student was "mandated to receive the services of a 1:1 nurse all day, every day, to monitor his condition and to support his medical needs" (id. at 1 15).

A February 2023 iBrain progress report noted the student received the support of 1:1 nursing services in several locations (Parent Ex. H at pp. 15-16, 18, 20, 39, 60-62, 65-67). In noting the equipment and supports the student required, the iBrain IEP indicated that the student "require[d] a 1:1 bilingual paraprofessional and /or nurse ... to assist with mobility and navigation throughout the school, changing and dressing, feeding, transfers, and setting up/cleaning up equipment for therapy sessions" (id. at pp. 15-16). It also stated the student required a 1:1 paraprofessional for navigating his environment, activities of daily living skills, assistance with assistive technology, transfers, and overall safety and also "required[d] his 1:1 nurse throughout the school day to monitor his health and safety including g-tube management" (id. at p. 18). At another point, without further explanation, the iBrain IEP noted the student

⁶ The February 2023 iBrain IEP did not note music therapy as a related service for the student (Parent Ex. H at p. 67). However, it does indicate a recommendation for two weekly sessions of music therapy, then later a recommendation for three weekly sessions, two individual and one group (id. at pp. 28-29, 59).

required "a 1:1 paraprofessional and 1:1 private nurse throughout the school day" (id. at p. 20). At another point, the IEP noted the student required "a 1:1 paraprofessional to assist with set-up of classroom activities, access to and use of assistive technology devices and technology, assistance with attention to tasks, and to provide frequent repositioning" and "also need[ed] a nurse to assist his medical condition" (id. at p. 39). The iBrain IEP included annual goals regarding the services a **1:1** paraprofessional provided for the student and in those goals it indicated the paraprofessional would consistently consult with the 1:1 nurse; however, those annual goals contained a different student's name and, without an explanation as to why, they do not appear to be reliable evidence of the student's programming (id. at pp. 60-62). At the end, iBrain recommended that the student receive a 12-month program in a 6:1+1 class, with related services, as well as a 1:1 paraprofessional, and a 1:1 nurse (id. at pp. 65-67).

Based on the above, the evidence of the student's need for individual nursing services is insufficiently vague to support a finding that appropriate programming for the student included all of the individual services the student was receiving.

As a final matter, regardless of whether the student required **1:1** nursing services, there is also little evidence in the hearing record that the student actually received nursing services during the 2022-23 school year (Parent Ex. H at pp. 18, 31, 69).⁷ Additionally, there is no evidence as to how or by

⁷ The February 2023 iBrain report lists a school nurse as one of the student's providers but does not identify an individual nurse for the student (Parent Ex. H at p. 69)

whom such services were provided to the student and there is no indication in the hearing record that the parent has a financial obligation to pay for such services.

The Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington- Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442,453 [2d Cir. 2014]; see also Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403,430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]).

Unlike the E.M. case, there is no proof of any agreement, either written or oral, between the parent and whoever delivered individual nursing services to the student to show that the parent was responsible for the costs of the nursing services for the 2022-23 school year. As noted by the district, the parent's contract with iBrain does not include individual nursing services, in fact, as the parent repeatedly notes the contract with iBrain explicitly excludes individual nursing services from the base tuition (Parent Ex. D at p. 8). Additionally, the only other mention of nursing services in the contract is that the base tuition includes the services of a school nurse (id.). Accordingly, there is no evidence that iBrain provided individual nursing services to the student or

the cost of such services (id. at pp. 8-13).

Accordingly, under the circumstances of this matter, the parent's request for a determination that the district pay for privately obtained nursing services must be denied. The hearing record lacks any evidence of a contract or legal obligation binding the parent to pay for nursing services and, therefore, there is no reason to disturb the outcome reached by the IHO, namely that the parent is not entitled to anything in excess of the amount of \$267,097.60 as stated in the iBrain contract.

VII. Conclusion

Based on the above, there is insufficient evidence in the hearing record to find that the student received individual nursing services during the 2022-23 school year, who may have provided the student with such services, what such a service provided for the student that could not have been provided through the support of a 1:1 paraprofessional and a school nurse, or that the parent incurred a financial obligation to pay for individual nursing services or what the cost of such services would have been. Additionally, as counsel for the parent was asked during the hearing what relief was being sought and responded that the only relief sought was the student's tuition at iBrain in the amount of \$267,097.60, the IHO did not err in granting the parent the requested relief.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
August 22, 2023

s: Justyn P. Bates
Justyn P. Bates
State Review Officer

ORDER OF THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT DATED
APRIL 9, 2026

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of April, two thousand twenty-six.

Leonarda Bautista, Individually and
as Parent and Natural Guardian of A.B.,

Plaintiff - Appellant,

v,

ORDER

Docket No: 25-945

David C. Banks, in his Official Capacity
as the Chancellor of the New York City
Department of Education, New York City
Department of Education,

Defendants - Appellees.

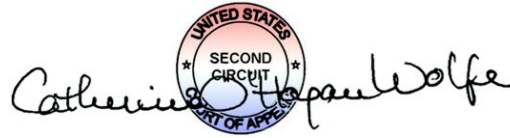
Appellant, Leonarda Bautista, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the

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appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

The image shows a handwritten signature in black ink that reads "Catherine O'Hagan Wolfe". The signature is written over a circular official seal. The seal has a red outer ring with the words "UNITED STATES" at the top and "COURT OF APPEALS" at the bottom. Inside the ring, the words "SECOND CIRCUIT" are written in black, flanked by two small stars on either side.