The University of the State of New York

The State Education Department
State Review Officer
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No. 21-159

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 Peter G. Albert, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Brian J. Reimels, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed by respondent (the district) for her son's tuition and related services costs at the International Institute for the Brain (iBrain), and for transportation for the 2020-21 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student had been unilaterally placed in a private school the International Academy of Hope (iHope) prior to the 2018-19 school year, which was the subject of previous a due process hearing (Tr. p. 9). Since then the parties have been regular participants in due process proceedings and federal litigation. The student has been the subject of several prior State-level administrative appeals (Application of a Student with a Disability, Appeal No. 20-169; Application of the Dep't of Educ., Appeal No. 20-157; Application of the Dep't of Educ., Appeal No. 20-044; Application of the Dep't of Educ., Appeal No. 20-033; see also M. v. New York City Dep't of Educ., 2020 WL 5117948 [S.D.N.Y. Aug. 31, 2020]; M. v. New York City Dep't of Educ., 420 F. Supp. 3d 107 [S.D.N.Y. 2019]) and, as a result, the parties' familiarity with his educational history and the prior due process proceedings is presumed, however, some discussion of procedural history is required.

The student in this matter has been diagnosed with multiple medical conditions which include cerebral palsy, epileptic seizures and a cortical vision impairment (Parent Ex. C at p. 1). At the time of the hearing he was unable to ambulate independently and was minimally verbal (Parent Ex. C at. pp. 1, 3, 7-8). The student was 11 years old and had attended iBrain since July 2018 (Parent Ex. L at p. 1; see Parent Ex. C at p. 1).

On March 23, 2020, iBrain developed a privately drafted "Individualized Education Plan" (iBrain IEP) for the student for the 2020-21 school year with similar components to an IEP that a public school would develop, the details of which will be discussed below (Parent Ex. C).

The CSE convened on May 13, 2020, to formulate the student's proposed public school IEP for the 2020-21 school year (see generally Dist. Exs. 1-2).[1] In a letter dated June 26, 2020, the parent asserted that the program and placement offered by the district could not appropriately address the student's educational needs for the extended school year 2020-21 and notified the district of her intent to unilaterally place the student at iBrain and seek public funding for the costs thereof (Parent Ex. I). In a due process complaint notice dated July 6, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Parent Ex. A).

On July 7, 2020, the parent executed an enrollment contract with iBrain along with a transportation contract (Parent Exs. E at p. 7; F at p. 6). According to the terms of the enrollment contract (written in English), the student's enrollment at iBrain was effective from July 6, 2020 through June 25, 2021 (Parent Ex. E at p. 1). The bus contract (written in Spanish) anticipated that the student would receive transportation through a private transportation company between the student's home and the school between July 1, 2020 and June 30, 2021 (Parent Ex. F at p. 1).

An impartial hearing on the merits convened on January 13, 2021 and concluded on April 23, 2021 after four days of proceedings (Tr. pp. 45-191).[2] In a decision dated June 10, 2021, the IHO determined that as the district conceded it had not met its burden to show provision of a FAPE, based on its acknowledgment that it did not send out a timely school location letter to the parent, the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (IHO Decision at p. 7). However, the IHO also found that the parent had failed to demonstrate the appropriateness of the student's unilateral placement, based primarily on the lack of evidence that any remote instruction that the student may have received during the 2020-21 school year met his needs (id. at pp. 8-15). The IHO indicated that accordingly, it was not necessary for her to make a determination with regard to equitable considerations (id. at p. 16). The IHO denied the parent's request for relief in its entirety (id.).

[1] The May 13, 2020 IEP contained information about the student consistent with the iBrain IEP which was created earlier, in March 2020 (compare generally Parent Ex. C and Dist. Ex. 1).

[2] The hearing record reflects that the appeal was initially assigned to another IHO who convened on October 6, 2020 and concluded on October 22, 2020, after two days of proceedings for purposes of conducting a pendency hearing (Tr. pp. 1-44). That IHO issued an interim decision addressing pendency dated October 29, 2020 (see Tr. pp. 50-51; Oct. 29, 2020 Interim Decision). The district has not appealed from the October 29, 2020 interim decision which found that iBrain was the student's pendency placement for the 2020-21 school year and ordered direct payment by the district of tuition to iBrain including related services and transportation (Tr. p. 51; see Oct. 29, 2020 Interim Decision).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parent's answer thereto is also presumed and will not be recited here. The gravamen of the parties' dispute on appeal focuses on the parent's contentions that the IHO erred in determining that the student's program at iBrain was not appropriate to address his needs during the 2020-21 school year. In an answer, the district alleges that the appeal should be dismissed as moot as the 2020-21 school year has ended as of July 1, 2021, the district has substantially complied with pendency,[3] and there is no further relief that can be granted as the parent does not seek relief that is in excess of pendency, or in the alternative, the SRO should sustain the IHO's decision, and dismiss the parent's appeal with prejudice (see Ans. pp. 2-3, 9). In a reply, the parent asserts arguments why the district's mootness defense should be rejected by the undersigned, but otherwise impermissibly reiterates arguments were or should have been set in her request for review.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 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 Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck

[3] According to the district, the parent filed another court action seeking enforcement of the student's pendency placement in the United States District Court for the Southern District of New York.

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.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 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 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[4]

[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).

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

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

VI. Discussion

A. Preliminary Matters

1. Mootness

I will first address the threshold issue raised by the district, namely that this case seeking reimbursement relief related to the student's unilateral placement at iBrain for the 2020-21 school year should be dismissed as moot because the parent has received all of the relief that she requested in this proceeding by virtue of the stay-put requirement and that the student has been unilaterally placed in iHope for the 2021-22 school year (see SRO-Ex. 1). A dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

However, a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Toth, 720 Fed. App'x at 51; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88). Many IEP disputes escape a finding of mootness due to the short duration of the school year facing the comparatively long litigation process (see Lillbask, 397 F.3d at 85). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; Toth, 720 Fed. App'x at 51; see Hearst Corp., 50 N.Y.2d at 714-15). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet, 260 F.3d 114, 120 [2d Cir. 2001]). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; but see A.A., 2017 WL 2591906, at *7-*9 [finding that the controversy as to "whether and to what extent the [s]tudent can be mainstreamed" constituted a "recurring controversy [that] will evade review during the effective period of each IEP for the [s]tudent"]; see also Toth, 720 Fed. App'x at 51 [finding that a new IEP that did not include the service requested by the parent established that the parent's concern that the prior IEP would be repeated was not speculative and the "capable of repetition, yet evading review" exception to the mootness doctrine applied]). However, generally, courts have taken a dim view of dismissing a Burlington/Carter reimbursement case as moot because all of the relief has been obtained through pendency (see, e.g., New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2-*3 [S.D.N.Y. Dec. 4, 2012]).

The student's placement for the pendency of this proceeding was described in the IHO's October 2020 interim decision ruling that "it is hereby ordered that [the district] shall pay for the student's program and placement at iBrain for the 2020-2021 school year in the form of direct payment of tuition to iBrain including related services and transportation that the student was receiving at iBrain during the 2018-2019 school year" (Oct. 29, 2020 Interim Decision at p. 5). That order was issued essentially because the district agreed that iBrain was the student's pendency placement due litigation. Thus, pursuant to the district's agreement and the IHO's unappealed interim decision regarding the student's stay put placement, the district is responsible for paying the student's tuition at iBrain for the entirety of his enrollment there for the 2020-21 school years because the parent initiated a due process proceeding on the first day of his enrollment, July 6, 2020, and the due process hearing continued for the duration of the entire school year. Accordingly, the case has been rendered moot.

However, there are limited circumstances in which cases that have been mooted by the passage of time must nevertheless be decided if certain exceptions apply. Turning to the possible application of the "capable of repetition yet evading review" exception to mootness, the parent's arguments related to the appropriateness of the unilateral placement of the student at iBrain are not likely to repeat, especially since the student has been placed at iHope, a point that the parent fails to address in the reply. At the same time these two parties have a history of litigating the similar types of claims over and over and the student seems has now returned to iHope, which the parent

has previously asserted was very similar to iBrain. I am very familiar with cases such as this in which parties come to due process year after year in tuition reimbursement disputes. It is a routine occurrence in special education due process cases in this district. It has consistently been viewpoint of the undersigned that the factual findings for each CSE meeting, IEP, unilateral placement, and equitable considerations, must by necessity, be made for each school year as the parties must hold new meetings, examine the student's progress, establish new present levels of performance and engage in the educational planning process anew at least annually. In my experience, when a case has been rendered moot due to all of the relief being awarded, yet the disagreements continue, it is better for all involved to clear the dockets, and move on to address the live disputes about a student's more recent performance and programming rather than to continue lingering on the old disputes of years past.

But then, a number of years ago, the district challenged such a dismissal on mootness grounds and opened the proverbial "Pandora's box" in New York City Dep't of Educ. v. V.S. (2011 WL 3273922, at *9 [E.D.N.Y. July 29, 2011]), which noted that the parties had returned to due process again and were continuing to filed new claims seeking tuition reimbursement relief and ruled that pendency going forward (i.e. beyond the current proceedings) was a sufficient reason to apply the "capable of repetition" branch of the exception. The court reasoned that a ruling on a proposed but unimplemented IEP for a school year that had already elapsed could shift pendency on going forward basis and, therefore, a ruling on claims would be of value. But the Second Circuit courts have never otherwise held that programs that were merely proposed could become a student's pendency placement and instead has crafted rules indicating that implemented programing is the one of the defining characteristics of a valid pendency placement, explaining that "[t]o determine a child's 'then-current educational placement, Second Circuit courts consider: (1) 'the placement described in the child's most recently implemented IEP; (2) the operative placement actually functioning at the time when the stay put provision of the IDEA was invoked; or (3) the placement at the time of the previously implemented IEP'" M. v. New York City Dep't of Educ., 2020 WL 4273907, at *2 [S.D.N.Y. July 24, 2020], reconsideration denied, 2020 WL 5117948 [S.D.N.Y. Aug. 31, 2020] [emphasis added] quoting Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015]; Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 536 [2d Cir. 2020], cert. denied, 141 S. Ct. 1075 [2021], reh'g denied, 141 S. Ct. 1530 [2021] [determining in the unilateral placement context that the student's previous private school where the student's programing had been implemented, iHope, provided the status quo rather than the newly selected school chosen by the parents, iBrain]). Thus, the broad application of the "capable of repetition exception" to prior school year disputes does not seem to have resulted in resolving "future pendency" disputes in the manner that the V.S. Court contemplated. It seems to have only fueled continued litigation of aging due process claims in which no further meaningful relief can be granted while adding to the caseloads of an already flooded administrative hearing system in the district.[5] With respect to this student in particular, an SRO has already ruled on the merits that the district offered the student a FAPE the for the 2019-20 school year (the school year immediately preceding the dispute in this case), and it demonstrates that even the district does not

[5] The district is currently swamped with an unprecedented number of due process hearing requests and is facing corrective action and proposed class litigation over long delays in that process (see New York City Department of Education Compliance Assurance Plan" [May 2019], available at https://www.regents.nysed.gov/common/regents/files/120p12d3.pdf; J.S.M. et al v. New York City Department of Education et al, 1:20-CV-00705 [filed 2/7/2020, EDNY]).

actually believe that such a favorable decision regarding an unimplemented IEP as any future effect whatsoever on pendency when the litigation continues (see Application of the Dep't of Educ., Appeal No. 20-157). Thus, respectfully, I cannot in good conscience agree with the V.S. reasoning or the parent's arguments regarding the exception to mootness in this case, and would dismiss as moot, but I nevertheless find myself compelled of offer alternative findings due to the risk of remand from some courts that broadly apply the "capable of repetition" exception in IDEA disputes in which all of the relief has been obtained by virtue of the stay-put provision.[6] Accordingly, the district's now 10-year-old desire to reduce dismissals based upon the mootness doctrine in cases of this type has come full circle, but ironically, it now finds itself trying to advance a very similar theory for dismissal on mootness grounds to the one it successfully opposed in V.S. That bell is difficult to unring.

2. Scope of Review

B. 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 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. 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

[6] New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2 [S.D.N.Y. Dec. 4, 2012] involved another similar challenge to mootness brought by the district that contained equally broad reasoning under the capable of repletion exception—stating that [i]ndeed, the Parents have already initiated proceedings challenging the DOE's proposed IEP for N.A. in the 2011–2012 school year "[t]here can be no question that the "reasonable expectation" of repetition necessary to bring this action within the mootness exception is satisfied." It but such reasoning that the parties continue to have disputes does not take into account the detailed procedural and substantive fact findings must be made in each disputed IEP, school year or unilateral placement and that administrative hearing officers cannot rely on facts from one school year to make determinations about different school year (see J.R. v. New York City Dep't of Educ., 748 F. App'x 382, 386 [2d Cir. 2018] [stating that "the DOE's funding of J.R.'s schooling in other years is irrelevant: 'the adequacy vel non of an IEP ... is to be judged on its own terms.' M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000]. Whether the DOE offered J.R. an appropriate placement in other years 'makes no difference' to the question of whether the IEP provided a FAPE in 2013–14]).

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).

1. The Student's Needs

Although not in dispute in this case, a brief discussion of the student's special education needs will provide the background to evaluate the appropriateness of the parent's unilateral placement of the student at iBrain for the 2020-21 school year.

The parent provided pre-filed testimony by affidavit in both Spanish and an English translation, which was entered into evidence without objection, and indicated that, the student was 11 years old and had an acquired brain injury (Tr. pp. 137, 159, 161; Parent Ex. L at p. 1; see Parent Ex. M).[7] She testified that the student was friendly, smiled a lot, liked to listen to music, and was becoming more sociable with classmates (Parent Ex. L at p. 1). The student had attended iBrain since July 2018 (id.).

According to the parent's written testimony, the student had limited communication abilities (Parent Ex. L at p. 1). He could communicate using facial expressions, head turning (to activate switches), limited vocalizations, and assistive technology (id.). The parent reported that

[7] During the April 20, 2021 proceedings, the parent's attorney clarified that the date the parent's affidavit testimony was contained a typographical error in the year and was completed was January 25, 2021 (Tr. p. 142). As the documents were not notarized, it was not an affidavit in the true sense, but IHO appropriately had the witness swear to the veracity of the document as her direct testimony (Tr. p. 140).

the student also had physical problems but was able to sit and stand upright with support and he could pedal his tricycle with rest breaks (id.). He also used a wheelchair (id.). According to the parent, the student needed constant adult care and supervision for academic activities in class and for activities of daily living (id.). He had highly intensive management needs which required a high degree of individualized attention and intervention and required individual attention and a small class (id.). The parent's affidavit indicated that during the 2020-2021 school year, the student attended a 6:1+1 class and received occupational therapy (OT), physical therapy (PT), speech-language therapy, vision education services, and a 1:1 paraprofessional (id. at p. 2).

The parent further testified that she had always given her consent for the district to conduct observations, evaluations, and testing for the student (Parent Ex. L at p. 2). In addition, the parent reported that she had always attended scheduled IEP meetings, including the student's IEP meeting on May 13, 2020 (id.). The parent indicated that at the May 13, 2020 CSE meeting, the CSE recommended the student be classified as a student with a traumatic brain injury (TBI), and attend a 6: 1+1 class, with related services, in a District 75 school (id.). The parent testified that she disagreed with the student going to a District 75 school because she did not believe that it could accommodate the student and his IEP (id.). She indicated that she sent a 10-day letter to the district (Parent Ex. L at p. 2; see Parent Ex. I). The parent reported that the student attended iBrain for the 2020-21 school year and was making progress there (Parent Ex. L at p. 2).

The hearing record also contained a March 23, 2020 IEP drafted by iBrain (Parent Ex. C). The March 2020 iBrain IEP indicated in part that the student displayed a global developmental delay, neuromuscular scoliosis of thoracolumbar region, cranial asymmetry, hip migration, dysphagia and bilateral optic atrophy (Parent Ex. C at p.1). He had highly significant management needs which required a high degree of individualized attention and support, including a 1:1 paraprofessional throughout the school day and class size of no more than six students (Parent Ex. C at p.1).

According to the iBrain IEP, academically, the student was working on identifying letters and numbers and could understand simple commands (Parent Ex. C at pp. 1-2). In terms of social development, the student could activate a voice output speech to appropriately greet a peer and turn his head to indicate who he was speaking to (id. at p. 2). The student was also able to request an activity and a preferred peer (id.). The iBrain IEP characterized the student student's receptive and expressive language skills as "emergent" (id. at pp. 3-4). With respect to augmentative and alternative communication (AAC), the iBrain IEP indicated that the student predominantly used low-tech to mid-tech AAC including pre-recorded voice output switches and low-tech picture symbol cards (id. at p. 4). The IBrain IEP stated that the student was dependent for all feeding tasks (id. at p. 7). He demonstrated decreased postural and head control for oral motor functioning and was not able to imitate oral motor actions (id. at pp. 4-5). The student was on a puree diet with nectar thick liquids and was at risk for swallow dysfunction and aspiration (id. at p. 5). According to the iBrain IEP, the student had limited fine motor skills and required minimal to moderate physical assistance with dressing and moderate to maximum physical assistance with grooming (id. at pp. 6-7). The iBrain IEP indicated that the student could ring sit in an upright posture for 45 seconds with minimal assistance before needing a brief break (id. at p. 7). The student was able to sit in a fully supported chair for one minute to engage in a game of catch but needed hand over hand upper extremity assistance due to poor motor control and visual acuity (id.). The iBrain IEP noted that in order to perform sit to stand transitions the student required

moderate assistance and the student could ambulate in a Rifton gait trainer for 75 feet with moderate assistance at the upper trunk (id.). The iBrain IEP indicated that the student had a cortical visual impairment and continued to make progress using his right peripheral field of vision to explore (id. at p. 9). The student did not use his left eye to explore his environment (id.). The iBrain IEP indicated that the student was highly distractable and did his best academic work when shielded from visual distractions in modified environments with reduced noise (id. at p. 2).

The March 2020 iBrain IEP recommended that the student receive instruction in a 6:1+1 special class with four 60-minute sessions of individual occupational therapy (OT) per week, five 60-minute sessions of individual physical therapy (PT) per week, five 60-minute sessions of individual speech-language therapy per week, and three 60-minute sessions of individual vision education services per week (Parent Ex. C at pp. 33-34). Additionally, the March 2020 iBrain IEP provided for a 12-month program, assistive technology services, one 60-minute session of parent counseling and training per month, a school nurse daily as needed, 1:1 paraprofessional services, multiple supports for school personnel on behalf of the student, and transportation with a 1:1 paraprofessional, a vehicle with air conditioning, a lift bus/wheelchair ramp, limited travel time, and a regular size wheelchair (Parent Ex. C at pp. 33-36).

2. Specially Designed Instruction

Turning to the disputed issues in this case, as noted by the IHO and as further discussed below, the evidence of iBrain's implementation of the student's March 2020 iBrain IEP shows that it was conducted primarily via remote instruction.

The director of special education provided general testimonial evidence about iBrain. In direct testimony by affidavit, the director of special education at iBrain dated January 2021 indicated that she was responsible for overseeing the educational components of the program including staff training and development, development and implementation of students' IEPs and oversight of the intake of new students (Parent Ex. K at pp. 1, 3). The director reported that she was dually State "licensed" for students with disabilities grades 1-6 and in early childhood education (id. at p. 1).[8]

Consistent with a brochure about iBrain included in the hearing record, the iBrain director of special education testified that iBrain is a private, not-for-profit, and highly specialized special education program created for children who suffer from acquired brain injuries or brain-based disabilities (Parent Ex. K at pp. 1-2; see generally Parent Ex. H). iBrain had a 12-month extended school year calendar and offered all services during its extended school day, which ran from 8:30 AM to 5:00 PM (Parent Ex. K at p. 2). The director of special education reported that iBrain was an interdisciplinary program comprised mostly of students who were non-verbal and non-ambulatory (id.). according to the special education director, every student at iBrain required a 1:1 paraprofessional to assist with activities of daily living and to access and benefit from the educational program (id.). In addition, many of the students at iBrain required a 1:1 nurse to attend to their medical needs (id.). At the time of her direct testimony, the director of special education

[8] A brochure about iBrain that was included in the hearing record provided similar information as the special education directors direct testimony by affidavit (compare Parent Ex. K with Parent Ex. H).

reported that the school had five 6:1+1 classes and one 8:1+1 class (id.).[9] The director of special education stated that iBrain provided its students with IEPs geared toward improving functioning skills appropriate to their cognitive, physical, and developmental levels, through a collaborative and multi-disciplinary approach that incorporated the best practices from the medical, clinical, and educational fields (id.). She noted that through this collaboration, students were instructed using the most effective strategies with evidence-based practices (id.). According to the director of special education, these practices included but were not limited to direct instruction, cognitive strategies, and compensatory education (using diagnostic-prescriptive approaches), behavior management, physical rehabilitation, therapeutic intervention, social interaction, and effective transition services (id.). In addition to a daily period of direct instruction, academic instruction was incorporated throughout the school day (id.).

With regard to related services, the director of special education indicated that the school offered it students a wide variety of related therapy services, including OT, PT, speech(-language) therapy, vision education, hearing education, assistive technology services, music therapy, and parent counseling and training (Parent Ex. K at p. 2). All therapy services were designed to support the education of iBrain students and were provided to the students as needed, usually in 60-minute intervals (id.). The director of special education indicated that related services were provided using a push-in and pull-out model, which ensured that each student's therapeutic goals were addressed in multiple locations (id.). She reported that doing so was critical for students with brain injuries as they had a severe deficit in their ability to generalize skills (id.). She further explained that students at iBrain generally required 60-minute related services sessions because of transferring

[9] The iBrain director of special education testified that the school's 6:1+1 classes were for its students who had the most highly intensive management needs (Tr. p. 82). The director of special education indicated that although all the students at iBrain were non-verbal and non-ambulatory, the students in the 6:1+1 classes had a higher level of distractibility and required a smaller class size (Tr. p. 82). The director of special education stated that typically, the students in the 6:1+1 classes had more significant visual impairments and had a more significant need for the paraprofessional's assistance in communication, specifically assistance with positioning the assistive technology communication device, programming the device, prompting, and accessing the device (Tr. p. 83; see Tr. p.86). The director of special education indicated that the more contained the environment, the better it helped students pay attention to tasks, even with slight distractors (Tr. pp.83- 84). The director of special education described iBrain's approach to class placement, indicating that as "a student builds on their ability to pay attention and attend to tasks, even with slight distractors, and as they become more independent and more interested in socializing with peers and more independent in using their devices to communicate, then we start considering them for the 8:1:1 classroom" (Tr. p. 84). The director of special education testified that the students in the 8:1+1 class had a similar level of physical impairment (compared to those enrolled in the 6:1+1 class), but they were more social and on a "higher" cognitive level, had a longer attention span, were more interested in communicating with peers in groups, and could access their devices to communicate independently (Tr. pp. 84-85). The 8:1+1 class offered opportunity for peer models working on similar communication skills (see Tr. p. 85).

and re-positioning needs, additional transition time and rest, and repetition needs to foster neuroplasticity (id.).[10, 11]

Specific to the student in this case, the iBrain director of special education indicated that the student was non-ambulatory and non-verbal (Parent Ex. K at p. 2). The student used assistive technology for communication, as well as facial expressions, limited vocalization, and assistive technology devices (id.). The student had several physical conditions including quadriplegic cerebral palsy, epilepsy, and cortical visual impairment (id.). According to the director of special education, these conditions resulted in the student having severe impairments in his cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem-solving, fine and gross motor skills, information processing, and speech (id.). The director indicated that at the time of her direct testimony by affidavit, the student was enrolled in the iBrain extended school day, 12-month program for the 2020-21 school year (id.). She described the student as presenting with highly intensive management needs which required a high degree of individualized attention and intervention and that the student required adult support for all activities of daily living due to his brain injury (id.). The iBrain director of special education indicated that the student had a disability classification of TBI in his then-current iBrain IEP (id. at p. 3). She noted that the disability classification was important because it warranted the use of a direct instruction model and informed the clinical approach taken throughout the inter-disciplinary program (related services) (id.).[12] The iBrain director of special education indicated that the student required individual and small group instruction in a modified environment that reduced visual and auditory distractions (id.).

In her direct testimony by affidavit, the iBrain director of special education indicated that during the 2020-21 school year, the student attended a 6:1+1 special class (Parent Ex. K at p. 3).

[10] In the IHO's Decision, the IHO indicated there was no evidence in the hearing record that the teachers or related service providers were licensed or certified (see Dec. p. 9). I disagree. As previously noted, the district's May 2020 IEP contained information about the student consistent with the iBrain IEP which was created earlier, in March 2020 (compare generally Parent Ex. C and Dist. Ex. 1). The iBrain IEP included a list of participants who were involved in developing the student's iBrain IEP (Parent Ex. C at p. 36). Except for the social worker, the other professionals' names included their professional credentials (i.e., Master of Education (M.Ed.), Teacher of the Visually Impaired (TVI), Certificate in Clinical Competence in Speech-Language Pathology (CCC-SLP)/Teaching Students with Speech-Language Learning Disabilities (TSSLD), Physical Therapist/Doctor of Physical Therapy (PT/DPT), Conductive Education (CE), Licensed Registered Occupational Therapist (OTR/L), and Registered Nurse RN). Also, the March 2020 IEP contained highly detailed information about the student's classroom and functional present levels of performance, specific to his educational and related services. Those education and related services professionals appeared to be qualified when speaking regarding their areas of expertise.

[11] During her questioning the iBrain director of special education about her affidavit, the IHO stated, "I know there are a lot of exhibits here, and the answer to these questions may be somewhere in the exhibits if one were to look for them" (Tr. p. 80). I agree with the IHO's statement here—the answer is in the documentary evidence.

[12] The director of special education's overreliance on the TBI "classification" are unconvincing to me for the reasons about disability category "labels" that were recently discussed in Navarro Carrillo and Garzon, v. Carranza, et al., (2021 WL 4137663, at *15 [S.D.N.Y. Sept. 10, 2021]), but it such statements do not require a finding that iBrain is inappropriate because the other evidence discussed herein tends to support the parent's case. However, I remind the parties that a student's classification should not dictate the special education services.

The student received individual related services of individual PT five times per week for 60 minutes, individual OT four times per week for 60 minutes, individual vision education services three times per week for 60 minutes, and individual speech-language therapy five times per week for 60 minutes (id.). The student also received assistive technology services and had daily use of assistive technology devices and a 1:1 paraprofessional all day to support his needs (Parent Ex. K at p. 3). The director of special education also noted that the parent received parent counseling and training one time per month for 60 minutes (id.). The student had special transportation which consisted of a transportation paraprofessional, travel time limited to 60 minutes, air conditioning, a lift bus, and a wheelchair (id.). According to the director of special education, the student's classmates in the 6:1+1 class were similar to the student as they were on a pre-kindergarten academic functioning levels for math and English language arts (ELA), dependent on assistive technology, had a 1:1 paraprofessionals, and received similar related services (id.). The iBrain director of special education testified that for the 2020-21 school year, the student was placed in a 6:1+1 special class with other students who were between eight and 11 years of age (Tr. pp. 86-87). The 6:1+1 classroom served as the students' primary physical location and therapists pushed-in to the classroom to make sure the students generalized their skills as the teacher conducted academic activities (Tr. p. 87).

The iBrain director of special education noted that the student had impairments with his language, executive function skills, attention, and memory and that the impairments were severe, and he needed an approach to education that did not rely on those strengths (Tr. p. 89). The director of special education described the direct instruction model as a student working 1:1 with a teacher on an exact skill (Tr. p.89). She indicated, for example, that if the student was working on a vocabulary word, the teacher would probably be using a three-dimensional object or a colored photograph to present the object to meet the student's visual needs (Tr. pp. 89-90). The director of special education explained that although the student's instructor would provide him with multisensory support, they would also be careful not to provide him with information that was that he would have difficulty filtering out or that was unimportant, due to his executive functioning challenges (Tr. p. 90). She noted that the student's difficulties with recognizing the salient factors understanding abstraction needed to be taken into account when choosing materials to present to him (Tr. pp. 90-91). The director of special education indicated that the instructor also needed to minimize the student's ability to make errors because once an inaccurate connection was made between two pieces of information it would be hard to undo (Tr. pp. 91-92). In addition to trying to reduce distractions by choosing appropriate materials, the director of special education reported that the school used accommodations in the student's classroom, such as temporary wall dividers as a "visual block," to address the student's distractibility (Tr. pp. 92-93). The special education director explained that iBrain also had pullout spaces in the school building where teachers and therapists could take students to work 1:1 (Tr. p. 93).

The iBrain director of special education testified that, with regard to assistive technology devices, the student used switches that contained a prerecorded message (i.e., press the button to say good morning during morning meeting) or to make choices via partner-assisted scanning (Tr. pp. 94-95). Due to the student's quadriplegic cerebral palsy and the muscle memory challenges involved, the student required a lot of practice controlling his motor movement (Tr. p. 96). The staff helped figure out where the button switch could be put on the student's wheelchair tray or mounted elsewhere to make it easier for the student to motor plan and access the switch (Tr. p. 96). Further, the staff worked with the student to foster the understanding that the switch was a

means to communicate and build the student's ability to use more than one switch device and more complicated ones, as appropriate (Tr. pp. 96- 97).

According to the director of special education, the student did not have the ability to interact with any school materials, such as using fingerpaints or turning the pages of a book, independently (Tr. pp. 97-98). She noted that the paraprofessionals played a critical function, and in the student's case helped move a book so that it was in the student's visual field and provided him with a multisensory object to help him understand the pictures that were being presented (Tr. pp. 97-98). The director reported that the paraprofessionals attended all therapy sessions where they received training from the therapists in specific skills to work on with the student throughout the day (Tr. pp. 97-98). The paraprofessional was the person who knew what the student was working on all day and used techniques key to building motor memory, as students generalized and understood that a skill they learned in one area with one person could be used throughout the day (Tr. p. 99).

With regard to vision education services, the iBrain director of special education indicated that the student's cortical vision impairment meant that his eyes took in information, but his brain did not know how to process that information (Tr. p. 100). She described how the teachers of the visually impaired used specific techniques (i.e., using various types of lighting and colors and shiny or reflective surfaces) to build up certain skills and make it easier for student's to visually process what was in front of them (Tr. pp. 100-02). In addition, she described how the teachers of the visually impaired worked on students' ability to shift their gaze and indicated that this was a very important skill as students in the program were often presented with choices on the left and the right and needed to be able to shift their gaze to look at both (Tr. pp. 102-03). Further, the director of special education noted that a teacher of the visually impaired might push into the classroom and help the classroom teacher visually modify materials and their presentation so the student could fully process and understand what was going on in class (Tr. pp. 102-03).

Upon further examination and clarification during the impartial hearing by the IHO, the iBrain director of special education indicated that during the 2020-21 school year the student was in a 6:1+1 remote class, although he might have physically returned to class for a few days (Tr. p. 109). She explained that during the time the student attended remote instruction, the school offered all its families the option of paraprofessionals to come to the home and based on medical needs and concerns of the household, families made those decisions (Tr. p. 110). According to the director of special education, the parent declined the 1:1 paraprofessional and the student received telehealth services conducted with the therapist and the teacher, as well as the support of the family that was at home with the student (Tr. pp. 110-11). The therapist and teacher directed the family in terms of what supports to provide (Tr. pp. 111-12).[13] The director of special education indicated in general terms that iBrain provided parents with any equipment requested for use at home (i.e., gait trainers, mats, augmentative and alternative communication (AAC) switch devices at the

[13] The director of special education also testified that the student had spinal fusion surgery during this time period and regardless of the pandemic, he would not have been able to be fully in school participating in person, due to his recovery from surgery (Tr. p. 112). Some services continued with modifications based on the student's physical condition and recovery, and clearance from his doctors (Tr. p. 113). Although she could not recall the specific number of days the student did not receive any services from iBrain because he was recovering from surgery, the director of special education indicated it was likely only a few days immediately following the surgery (Tr. pp. 113-14; see Tr. pp. 121-125).

beginning of remote instruction, but she could not remember what specific equipment or devices had been provided to the student because 10 months had elapse since that time (Tr. p. 111).

Although the director of special education did not have documented information available during her impartial hearing testimony, she estimated that the student received remote services rather than in-person services from March 2020 until "just recently," indicating that "he started to come in for some in-person services, if I recall correctly" in late December 2020 or early January 2021 (Tr. p. 115). In response to questions about the physical assistance the student required during remote instruction, the director of special education indicated that the need for physical assistance varied by discipline (Tr. p. 116). She noted that for academics and speech, there was less physical involvement and most of the assistance needed would involve material management or someone to present objects to the student in a particular way (Tr. p. 116). In addition, she noted that given the student's visual impairment someone at home would need to know how to position the screen for the student, set up a switch for him, and redirect his attention to improve his focus (Tr. p. 116). For OT and PT, and depending upon the activity in these areas and what the student was medically cleared for, the student would typically need someone to help with positioning, basic or stretching exercises under the guidance of a therapist who could watch, provide feedback and direction how to do something, whether it was range of motion exercises or working on getting the student positioned differently to ensure he would not have skin breakdown, and/ or that would give him better access visually to the things around him (Tr. p. 117). The director of special education stated "I believe [the student]'s mother and if she had any additional assistance or aides at home, then, they also would have been providing that assistance," however she wasn't sure if any such aides were in the student's home (Tr. pp. 117-18). She testified in general terms that the therapists provided training and education to parents, especially during telehealth sessions so that parents would understand the activities and could help carryover specific skills (i.e., getting student in/out of bathtub) (Tr. pp. 118-19). The director of special education did not know the specifics of what the parent received (Tr. p. 119). She described how the providers could provide the student with directions, visually observe his response and determine whether something was done correctly or if additional guidance was needed (Tr. p. 120). The director testified that the consistent directive to staff was to continue to do their best to meet IEP goals, be considerate of any additional needs the parents might have, and to give their clinical advice in any capacity that could be of assistance (Tr. p. 121).

With the assistance of an interpreter, the parent stated that at the time of her hearing testimony in April 2021 the student was participating in remote learning (Tr. p. 143; see Tr. pp. 132, 138). The parent reported that during the 2020-21 school year, the student attended in-person instruction in January 2021, but he returned to remote learning because he was going to have surgery on both of his hips on March 25, 2021 (Tr. p. 144). The parent testified that she planned for the student to return to in-person learning "as soon as" he recovered from his surgery and that the recovery period was going to take about two months (Tr. p. 144). She indicated the student could not go to school because he had casts on his feet and used a pillow that prevented him from going to school in person (Tr. p. 144). The parent further noted that the student had a "very big" surgery in September 2020 on his spine that resulted in a long recovery during which the student received remote instruction (Tr. p.145).

The parent testified that during the student's remote learning from iBrain, every teacher got on the iPad and all the student's therapists helped the parent get "all his classes and everything the

way it was supposed to do" (Tr. p. 145). All necessary equipment was delivered to her, including an iPad that belonged to the district, a stander, and a trainer (Tr. pp. 145-46).[14] The parent stated, "[s]o we've been doing everything remotely the way it should be" (Tr. p. 145). Further, the parent reported that the paraprofessional "was here daily," while the teacher or therapist was on-line, providing instructions on how to do things, and she assisted as well, because it took two people to move "them around" (Tr. pp. 145-46). The parent received training on how to use the "big equipment" she received, either through instructions, or a salesman or someone came to her home to teach her how to use the equipment (Tr. p. 146). The parent reported that the paraprofessional knew how to use the equipment and on two occasions, the therapist "came over to help" her (Tr. p. 146). Other equipment received were smaller items such as balls, and things that light up or vibrate (Tr. p. 147).

Further, the parent's testimony indicated she was at home with the student every day during remote learning (Tr. p. 148). Moreover, she stated that she communicated with iBrain personnel "all the time" (Tr. p. 148). She reported that anytime she needed something, she was able to stay in touch with a teacher, and/or a therapist through texts, WhatsApp, email, or any other way (Tr. p. 148).

3. Progress

With regard to the student's progress, the iBrain director of special education indicated the student made progress towards his annual academic and related service goals identified on his (iBrain) IEP (Parent Ex. K at p. 3). She reported that during the 2020-21 school year, the student made progress with respect to his use of assistive technology devices, his awareness of and response to his environment and people around him, and some academic areas (Parent Ex. K at p. 3). According to the director of special education's testimony, the student was "eager" to follow directions and one of his biggest challenges was that he got very excited wanting to do something (Tr. p. 104). When presented with a choice of two things, it was sometimes hard to get the student to understand the next step of what was being asked of him (Tr. p. 105). With regard to this, the student showed improvement in his comprehension, although it continued to be a challenge and he still needed a lot of visual modifications and support for attention purposes (Tr. p. 105). The director of special education noted that the student would try to do his very best every day (Tr. p. 106). The director reported that to track the student's progress, iBrain focused on IEP goals and session notes across disciplines (Tr. p. 107). Therapists wrote quarterly reports where they

[14] According to the parent's testimony about the equipment she received, the stander was "a machine that [wa]s) in the shape of a bed, where the kid [c]ould) lay, and then with a lot of security that you put around it and a lot of buttons and sticks, he [c]ould) stand up – he [c]ould) be standing up to one hour" (Tr. p. 147). The parent noted the student was only able to use the stander after "the doctor gave the okay" (Tr. p. 147). The parent indicated the trainer was "like a walker where you put the kid, and then he [wa]s) able to take some steps with the help of a paraprofessional or [her]self), and the therapist was online through the iPad giving us instructions on how to do it" (Tr. p. 147). The only piece of equipment the parent did not have at home that the student used in school was a bicycle that he used to pedal himself (Tr. p. 148). The parent stated, "… obviously I don't have that at home," presumably because both the student's legs were casted (Tr. pp. 148).

reviewed session notes and determined if the student made consistent, inconsistent, or emerging progress (Tr. pp. 107-08).[15]

Although the parent did not indicate when the student's progress occurred in relation to his two surgeries involving the spine and lower extremities, she testified that for the first time he was able to sit down by himself and stand up for about five or seven minutes by himself (Tr. p. 149). She testified that the student had never been able to do either without someone holding on to him (Tr. p. 149).[16]

In summary, the evidence above weighs in favor of the parent and based on the totality of the evidence in the hearing record, I find that iBrain was an appropriate unilateral placement for the student for the 2020-21 school year and the IHO's denial of tuition reimbursement to the parent on that basis must be reversed.

Lastly, during the impartial hearing, the attorney for the district indicated that the district was not alleging concerns specific to equitable considerations (Tr. p. 71). Therefore, such arguments were waived, and it is not necessary to address whether equitable considerations warrant a reduction or denial of tuition reimbursement in this case.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated June 10, 2021, is modified by reversing that portion that which found that the student's unilateral placement at iBrain was not appropriate for the 2020-21 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the cost of the student's tuition and related services at iBrain for the 2020-21 school year.

Dated: **Albany, New York**
September 17, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER

[15] The hearing record did not include the therapists' quarterly progress notes. However, the 2020-21 IEP dated March 23, 2020 revealed detailed information about the student's present level of performance with regard to participation in the iBrain school environment (Parent Ex. C at pp. 1-13).

[16] The IHO noted that the private transportation contract in evidence is in Spanish and that no translation was provided to her. The due process complaint notice in this proceeding contains a request for private transportation but does not contain any alleged deficiency with respect to the special transportation services provided by the district. The hearing record is not developed on this point and the district was required to pay for the services pursuant to pendency, so no further discussion is warranted on this record.