The University of the State of New York

The State Education Department
State Review Officer
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No. 22-138

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by John Henry Olthoff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail Eckstein, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the International Institute for the Brain (iBrain) for the 2021-22 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 has been the subject of a prior State-level administrative appeal concerning the student's 2018-19 school year (Application of a Student with a Disability, Appeal No. 20-036). Accordingly, the parties' familiarity with the student's educational history preceding that matter is presumed and such history will not be repeated herein.

The district conducted a psychoeducational evaluation on February 2, 2019, when the student was in kindergarten at iBrain (see Dist. Ex. 6).[1] The resultant evaluation report indicated

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

that the student had received diagnoses of cerebral palsy, cortical visual impairment, seizure disorder, and hypoxic ischemic encephalopathy, which occurred after cardiac arrest in association with complications from Hirschsprung's disease (id. at p. 1). At the time of the evaluation, the student was non-ambulatory, non-verbal, dependent on others to meet her needs, and used a dynamic display device, eye gaze machine, and a gait trainer at school (id.). The student was fed through a gastrointestinal tube (g-tube) and had a tracheostomy (id.; see Parent Ex. H at p. 1). The report also indicated that the student was receiving the related services of physical therapy (PT), occupational therapy (OT), and speech-language therapy (Dist. Ex. 6 at p. 1).

On May 28, 2019 and May 5, 2020 iBrain developed IEPs for the student for the 2019-20 and 2020-21 school years (see Dist. Exs. 8; 9). iBrain staff determined that the student had a traumatic brain injury and recommended that the student receive a 12-month program in a 6:1+1 special class with 1:1 paraprofessional and 1:1 nurse services (Dist. Exs. 8 at pp. 1, 41, 42; 9 at pp. 1, 35-36). Additionally, iBrain recommended related services consisting of five 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, five 60-minute sessions per week of individual speech-language therapy, and three 60-minute sessions per week of individual vision education services (Dist. Exs. 8 at p. 42; 9 at pp. 35-36).

On May 6, 2020, a CSE convened for the student's annual review and to develop an IEP with a projected implementation date of May 22, 2020 (see Parent Ex. C).[2] Finding the student eligible for special education as a student with a traumatic brain injury, the CSE recommended a 12-month program consisting of a 12:1+(3:1) special class placement in a specialized school together with full time 1:1 school nurse and 1:1 paraprofessional services and a variety of related and assistive technology services (see id. at pp. 1, 30-32).[3, 4]

On January 12, 2021 iBrain developed an IEP to be implemented beginning January 29, 2021, which continued to recommend the same program and services as the May 2020 iBrain IEP (compare Parent Ex. D at pp. 1, 43-45, with Dist. Ex. 9 at pp. 1, 35-37).

On January 19, 2021, a CSE convened and created an IEP to be implemented beginning on February 8, 2021 (Dist. Ex. 1 at pp. 1, 51). The CSE recommended a 12-month 6:1+1 special class placement in a specialized school with full-time 1:1 nursing services and full-time group paraprofessional services (id. at pp. 45-47). The CSE also recommended five 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, five 60-minute sessions per week of individual speech-language therapy, three 60-minute sessions per week of individual vision education services, and one 60-minute session per month of group parent counseling and training (id. at pp. 45-46). The January 2021 CSE meeting minutes indicated that

[2] The hearing record contains two copies of the May 2020 IEP (compare Parent Ex. C, with Dist. Ex. 5). For purposes of this decision, only the parent exhibit is cited.

[3] The student's eligibility for special education as a student with a traumatic brain injury is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.2[zz][12]).

[4] In July 2019 and July 2020, the parents filed due process complaint notices alleging that the district had denied the student a FAPE for the 2019-20 and 2020-21 school years, which were consolidated in October 2020 by the IHO presiding over those matters (Parent Ex. B at p. 3 n.1).

the parents were not in agreement with the district's specialized school recommendation because they were concerned for the student's safety, health, and skills progression (Dist. Ex. 3 at p. 7).

The district sent the parents a prior written notice, dated June 15, 2021, summarizing the recommendations from the January 2021 CSE meeting, and a school location letter, bearing the same date, advising the parents of the public school building to which the district assigned the student to attend for the 2021-22 school year (Dist. Ex. 2 at pp. 1-2, 6).

On May 29, 2021, the IHO in the prior matter issued a decision that ordered the district to make direct payment to and/or reimburse the parents for tuition for iBrain, related services, and transportation for the 2019-20 and 2020-21 school years (Parent Ex. B at p. 62).

In a letter dated June 23, 2021, the parents provided the district with 10-day notice of their intent to unilaterally place the student at iBrain for the 2021-22 extended school year and seek public funding for that placement (Parent Ex. G at p. 1). The parents asserted that the district's recommendations did not appropriately address the student's educational needs and that the assigned school could not implement the proposed program (id. at p. 2).

On July 1, 2021 iBrain prepared an IEP "[r]eport [u]pdate" and continued to recommend the same program and services as the January 2021 iBrain IEP, with the addition of three 60-minute sessions per week of individual music therapy (compare Parent Ex. H at pp. 1, 44-46, with Parent Ex. D at pp. 1, 43-45).

On July 2, 2021, the parents executed an enrollment contract with iBrain for the student's attendance during the 2021-22 school year (Parent Ex. I). The contract specified a base tuition which included the cost of an individual paraprofessional and a school nurse (id. at p. 1). The contract further calculated the amount of supplemental tuition owed for the school year based on specified hourly rates and the frequency/duration of the student's recommended related services (id. at p. 2).[5]

A. Due Process Complaint Notice

By due process complaint notice dated July 6, 2021, the parents asserted that the district denied the student a free appropriate public education (FAPE) for the 2021-22 extended school year (Parent Ex. A at p. 1). Initially, the parents requested pendency and asserted that the student's pendency placement was at iBrain based on the unappealed May 29, 2021 IHO decision (id. at pp. 1-2).

Regarding the 2021-22 school year, the parents contended that the district failed to create an appropriate IEP designed to meet the student's unique needs as the annual goals were inadequate (Parent Ex. A at p. 3). Additionally, the parents alleged that the district failed to mandate sufficient related services that would prevent regression and confer meaningful educational benefit (id. at p. 4). The parents asserted that the district could not implement the services recommended because

[5] The parents also executed a transportation agreement with Sisters Travel and Transportation, dated July 22, 2021, for transportation services for the student for the 2021-22 extended school year, including a bus with air conditioning, wheelchair accessibility, sitting space to accommodate a person to travel with the student, and a paraprofessional (see Parent Ex. K).

it did not recommend an extended school day (id.). The parents also asserted that the district did not recommend appropriate assistive technology, music therapy, parent counseling and training, or paraprofessional services for the student (id. at pp. 4-5). The parents contended that the district failed to recommend an appropriate school placement as a 6:1+1 placement within a district specialized school would not have been appropriate for the student (id. at p. 5).

The parents requested findings that the district did not offer the student a FAPE for the 2021-22 extended school year and that iBrain was an appropriate unilateral placement for the student and an order requiring the district to directly pay iBrain for the full cost of the student's tuition and transportation (Parent Ex. A at p. 6).[6]

B. Impartial Hearing Officer Decision

The parties proceeded to impartial hearing on October 12, 2021, which concluded on May 17, 2022, after four days of proceedings (see Tr. pp. 1-92).[7] During the impartial hearing, the district indicated that it would not present witnesses in the case, but that the parents "ha[d] the burden to establish that the unilateral placement . . . [was] specifically designed to meet the student's needs" and that should the parents fail to meet that burden their requested relief should be denied (Tr. p. 33). Further, the district asserted that if equitable considerations demonstrated that the parents were not entitled to relief, the district would request that relief be denied (id.).

In a decision, dated August 31, 2022, the IHO found that the district failed to meet its burden to prove that it offered the student a FAPE for the 2021-22 school year (IHO Decision at pp. 6, 8, 21).

Regarding the appropriateness of the student's unilateral placement at iBrain, the IHO noted that the descriptions of the student's needs from the district's IEP were not disputed by the parents (IHO Decision at p. 13). The IHO held that the parents were concerned about the district's ability to implement the IEP but that the parent failed to "demonstrate that the program she wanted was implemented at iBrain" (id.). The IHO found that the only evidence of the student's program at iBrain was a class schedule and the testimony of the director of special education at iBrain (director) and noted that there was no testimony from a teacher or service provider and no progress reports from the 2021-22 school year (id.). Moreover, the IHO noted that there "was no documentary evidence presented on the functioning and attendance of the student for the school year in issue" other than the class schedule (id.). The class schedule indicated that the student was in related services most of the day, which the IHO noted was charged as a "supplemental" tuition (id. at pp. 13-14). The IHO indicated that the parent was unable to answer questions regarding the tuition and had "little understanding of the financial obligation" she had entered into with iBrain (id. at p. 14). The IHO held that the parents offered "no iBrain IEP or progress reports" for the 2021-22 school year and did not enter attendance records (id.). The IHO reviewed the July 2021

[6] Regarding transportation, the parents specifically requested reimbursement and/or prospective funding with "limited travel time, ventilator, air conditioning, lift bus/wheelchair accessibility, a travel nurse, transportation paraprofessional, and related services as required" (Parent Ex. A at p. 6).

[7] The first day of the impartial hearing was devoted to identifying the student's pendency placement (see Tr. pp. 1-27). The parties agreed that the unappealed May 29, 2021 IHO decision formed the basis for the student's stay-put placement (see Tr. pp. 4-5, 14, 16-17).

iBrain IEP, which she indicated was for the 2020-21 school year (id. at pp. 14-16). After a review of that IEP, the IHO held "if a large portion of the student's program was held remotely, it [was] unclear from the evidence what that instruction looked like during the 2021/2022 school year" (id. at pp. 16-17).[8] The IHO found that the testimony of the iBrain director was vague and failed to provide sufficient information regarding the student's hybrid schedule (id. at pp. 16-18). Similarly, the IHO described the testimony of the parent as vague (id. at p. 18). The IHO determined that there was "not a sufficient record" to find that the unilateral placement of the student at iBrain for the 2021-22 school year was appropriate to meet the student's needs (id. at p. 19).

Turning to equitable considerations, the IHO held that the cost of iBrain was "problematic for full tuition funding" even if the school was found to be appropriate for the student (IHO Decision at p. 19). Again, the IHO noted that it was unclear how the student was receiving instruction through her hybrid model and found there was "no evidence which support[ed] the cost for the 'base tuition fee'" considering that the majority of the student's day consisted of delivery of related services, which were billed as a supplemental fee (id. at p. 20). The IHO found that the student only received 30 minutes per day of academic instruction, which did not justify the cost of the base tuition fee (id.). Moreover, the IHO noted that there was no evidence regarding what related services the student "actually received" during the school year at issue (id.). Further, the IHO noted that, although there was a transportation contract in evidence, there was no documentation regarding how often the student was taken to school (id.). The IHO determined that "based on cost alone, the equities would favor a reduction or denial of full tuition" (id. at p. 21). The IHO also indicated that, although the parents claimed to have fully participated in the process, they had not visited the assigned public school site (id.). Based on the foregoing, the IHO found that equitable considerations did not weigh in favor of an award of the costs of the student's tuition at iBrain for the 2021-22 school year (id.). Additionally, the IHO noted that the prior finding that iBrain was appropriate for the student in the past was not enough to find in favor of the parents in this instance (id.). The IHO denied all of the parents' requested relief (id.).

IV. Appeal for State-Level Review

The parents appeal. The parents contend that the IHO erred in finding that the student's unilateral placement at iBrain was not appropriate and that equitable considerations did not weigh in favor of an award of the costs of the student's tuition.[9]

[8] Further, the IHO took issue with the lack of evidence regarding the student's paraprofessional's credentials as she determined that, according to the July 2021 iBrain IEP, the paraprofessional "played the most important role" in the student's program (IHO Decision at p. 16).

[9] The parents submitted an affidavit from a matter involving a different student with a disability as proposed additional evidence with their request for review. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the evidence is not necessary in order to render a decision and, therefore, it has not been considered.

The parents argue that the IHO erred by finding there was no evidence of the appropriateness of the iBrain program for the 2021-22 school year as the IHO "willfully or negligently disregarded" the documentary evidence in the hearing record. Moreover, the parents argue that the IHO erred in finding that there was no evidence of progress during the 2021-22 school year.[10] The parents argue that there was an iBrain IEP for the 2021-22 school year in the hearing record and that the district adopted "nearly all aspects" of this IEP, which was "essentially" a concession that the program was appropriate.

Next, the parents contend that the IHO erred in finding equitable considerations did not favor an award of the costs of the student's tuition, related services, and transportation. Initially, the parents note that the district made no claim that the parents did not cooperate with the CSE or timely provide 10-day notice of their intent to unilaterally place the student. Moreover, the parents argue that district did not present any evidence that the cost of iBrain or the transportation contract were unreasonable.[11] The parents contend that the hearing record demonstrates that the student received remote instruction when she did not attend school in person. The parents assert that, if the IHO was uncertain about the services the student received, it was her obligation to complete the hearing record. Additionally, the parents argue that the program the student received at iBrain during the 2021-22 school year was "substantially similar" to the program that was found appropriate by a prior IHO regarding the 2020-21 school year and there was no indication that the student's needs had changed significantly for the 2021-22 school year.

The parents request that an SRO determine that iBrain was an appropriate placement for the student for the 2021-22 school year and that equitable consideration favor an award of full tuition and costs of related services, including transportation, for the 2021-22 school year.

In its answer, the district responds to the parents' allegations with general admissions and denials and requests that the IHO's decision be upheld in its entirety. The district acknowledges that the IHO's finding that it failed to offer the student a FAPE was appropriate and should not be disturbed. The district also asserts that the IHO properly determined that the parents did not meet their burden to prove that iBrain was an appropriate unilateral placement and that equitable considerations did not weigh in favor of an award of the costs of tuition and related services.[12]

[10] The parents contend that the IHO did not allow further testimony on progress and that if the IHO needed additional evidence on progress, it was the responsibility of the IHO, as the fact-finder, to elicit that information.

[11] Also, the parents argue that the IHO misrepresented how much academic instruction the student was receiving at iBrain.

[12] The parents prepared, served, and filed a reply to the district's answer in this case. However, State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent triggering the parents' right to compose a reply. As such, the parents' reply fails to comply with the practice regulations and will not be considered.

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 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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

Initially, as neither party has appealed the IHO's determination that the district failed to meet its burden to prove that it offered the student a FAPE for the 2021-22 school year, that finding is final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Accordingly, the remaining issues to be addressed relate to relief sought by the parents.[13]

[13] In the due process complaint notice the parents requested that the IHO order the district to provide the student with assistive technology services and devices, and/or reimburse the parents for any associated costs, as relief (Parent Ex. A at p. 7). During the impartial hearing the parent testified that the student had recently received a

A. 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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). 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 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

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new assistive technology device and the IHO did not specifically address the parents' request for assistive technology in the decision (Tr. p. 75; see IHO Decision). On appeal, the parents do not allege that the IHO erred by not ordering assistive technology as relief. State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). As such, any request for assistive technology as a form of relief has been deemed abandoned and will not be addressed.

> 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. Student Needs

While the student's needs are not in dispute on appeal, a discussion thereof is necessary to evaluate the appropriateness of the parents' unilateral placement of the student at iBrain for the 2021-22 school year.

At the time of the July 1, 2021 iBrain IEP report update, the student was almost nine years old, attending iBrain, and had received diagnoses of Hirschsprung's disease, traumatic brain injury, Lennox-Gestalt syndrome, hypoxic ischemic encephalopathy, cortical visual impairment, and cerebral palsy (see Parent Ex. H at p. 1). The iBrain IEP reported that the student was non-verbal, non-ambulatory, and relied on a tracheostomy and a g-tube (id.). The student's brain injury resulted in severe impairments in cognition, language, memory, attention, abstract thinking, reasoning, judgment, problem solving, information processing and speech; while the student demonstrated intellectual and cognitive potential to learn and excel, the student's rate of progress was dictated by her health and well-being (id.). The iBrain IEP stated that the student required physical support for all activities of daily living, she used a wheelchair and required assistance for mobility, and her intensive management needs required highly individualized support within a 6:1+1 class environment provided with a 1:1 paraprofessional throughout the day and a 1:1 nurse to attend to her medical needs (id. at pp. 1, 2). The student received all nutrition and hydration via her g-tube and needed regular suctioning as an effective swallow was not noted (id. at p. 6).

With respect to speech and language functioning, the iBrain IEP stated that the student communicated through the use of facial expressions, body movements, pleasure/displeasure vocalizations with her Passy-Muir speaking valve in place, an eye gaze augmentative and alternative communication (AAC) device, a wobble switch when connected to a voice output device with pre-recorded core word/phrase, and yes/no bracelets (Parent Ex. H at pp. 3, 5). However, the student required verbal and tactile prompting and prolonged processing time to initiate AAC device activations, and her communication participation was highly dependent on her alertness level, willingness to participate and interest in a task (id. at p. 5).

According to the iBrain IEP, the student required 1:1 academic instruction, which focused on improving the student's listening skills, ability to follow instructions with adult support, attend to a screen or book, answer "wh" questions, and attention/participation in non-preferred activities during academic sessions (Parent Ex. H at p. 2).

The iBrain IEP reported that the student had a strong desire to socially engage with peers, had strong relationships with her family, her twin brother, and familiar staff at school, and would smile and shift her eye gaze in response to social interactions and turn-taking activities (Parent Ex.

H at pp. 8, 15). The student was motivated by gross motor activities and displayed excitement through smiling and laughing (id. at p. 8).

Regarding the student's physical development, the iBrain IEP reported that the student's quality of movement was typical of a child with spastic quadriplegic cerebral palsy with limited range of motion due to increased muscle tone and spasticity (Parent Ex. H at pp. 15, 16). Every six months the student required botox injections for the major muscles in the upper and lower extremities to maintain range of motion and keep the joints within functional mobility (id. at p. 16). The student required maximum assistance for all activities and transfers and was unable to reach for objects across the body (id. at pp. 15, 16). The student was provided with a rifton pacer gait trainer, ankle foot orthosis, and a compression vest to support walking up to 15 steps (id. at p. 16; see Dist. Ex. 6 at p. 2). The iBrain IEP also noted that the student was provided bilateral finger extension splints, hand splits, and environmental modifications to support stretching, joint protection, and increased participation in activities (Parent Ex. H at p. 7). Due to the student's visual impairment, she needed objects placed six inches away from eye level, and modifications included presentation of objects in the right, central, and left portions of her visual field with simplification of backgrounds to support visual processing (id. at pp. 2, 19).

2. iBrain

The iBrain director testified that the student had attended iBrain since July 2018 and continued to attend for the 2021-22 school year (Tr. p. 58; Parent Ex. M ¶¶ 1, 11). Within her affidavit testimony, the director indicated that iBrain was a "highly specialized special education program" for students with acquired brain injuries or brain-based disabilities that featured a 12-month school year calendar and offered services during an extended school day (Parent Ex. M ¶ 5). The director testified that iBrain provided students with IEPs focused on improving functional skills appropriate to each student's cognitive, physical, and developmental levels (id. at ¶ 8). Further, iBrain provided a "collaborative and multi-disciplinary approach" incorporating practices from the medical, clinical, and educational fields (id.). The director noted the importance of the student's disability classification as a student with a traumatic brain injury for the 2021-22 school year as it "warrant[ed] the use of a direct instruction model and inform[ed] the clinical approach taken throughout the interdisciplinary program (related services)" (id. at ¶ 11).

Turning to the issues raised on appeal, the parents assert that the IHO erred in finding that iBrain was not an appropriate unilateral placement. Specifically, the parents argue that the IHO disregarded evidence regarding the student's program, progress, and staff qualifications related to the 2021-22 school year.

Regarding the student's 2021-22 school year program at iBrain, the hearing record contains iBrain IEPs dated January 12, 2021 and July 1, 2021, and the student's schedule (Parent Exs. D; H; L).[14] Review of the July 1, 2021 iBrain IEP report update shows that it provided extensive

[14] The January 12, 2021 and the July 1, 2021 iBrain IEPs both reflected an implementation date of January 29, 2021 (Parent Exs. D at pp. 1, 43-45; H at pp. 1, 44-46). While the IHO found that the iBrain IEPs in evidence concerned the 2020-21 school year (see IHO Decision at p. 14), the July 2021 update of the document, including the addition of services (music therapy) tends to support a finding that the school intended the document to govern the student's programming going forward as well (see Parent Ex. H). Further, the programming that the iBrain director testified that the student received during the 2021-22 school year mirrored the recommendations set forth

information about the student's present levels of performance and needs in the areas of education, speech and language/communication, oral motor/feeding, occupational and physical therapies, vision, assistive technology, conductive education, cognitive and social/emotional development, self-care skills, as well as her management needs (see Parent Ex. H at pp. 1-22). The iBrain IEP included an individualized healthcare plan that identified the responsibilities of the nurse and/or paraprofessionals in addressing intervention needs of the student related to tracheostomy care, g-tube feeding, and medication administration, developing and implementing an emergency evacuation plan, maintaining skin care integrity, maintaining hygiene, grooming and toileting care, developing and implementing an emergency care plan related to food allergies, and utilizing devices and equipment due to mobility needs (id. at pp. 23-27).

Additionally, the iBrain IEP included annual goals and short-term objectives to address the student's identified needs in the areas of literacy, cognition, social skills, vision education, conductive education, speech-language therapy, PT, OT, assistive technology, music therapy, and parent counseling and training, as well as goals for the paraprofessional in working in conjunction with the student and in consultation with the student's teachers, therapists, and nursing staff (Parent Ex. H at pp. 28-41). Additional supports written in the student's iBrain IEP required training of school personnel in the areas of two-person transfers, vision adaptations and functioning, seizure safety, assistive technology use, and tracheostomy care and precautions (id. at pp. 45-46).

The evidence in the hearing record shows that during the 2021-22 school year the student attended a 12-month program in a 6:1+1 class and received five 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, five 60-minute sessions per week of individual speech-language therapy, three 60-minute sessions per week of individual music therapy, three individual 60-minute sessions per week of vision education services, one 60-minute session per week of individual assistive technology training, and the parents received one 60-minute session per month of parent counseling and training (Parent Exs. H at 44-45; M ¶¶ 12-15, 17).[15] Additionally, the student received 1:1 nurse and 1:1 paraprofessional services on a daily, full time basis, as well as special transportation accommodations (Parent Exs. H at pp. 44-45; M ¶¶ 15-16). According to the iBrain daily schedule, the student received a 30-minute block of time each day referred to as "1:1 Academics" in which she was provided one-on-one academic instruction (Parent Ex. L). Further, 30-minute classroom activity time blocks were scheduled

in the July 2021 iBrain IEP (compare Parent Ex. H at pp. 44-46, with Parent Ex. M ¶¶ 12-13, 15-17). To the extent that the iBrain IEP models the requirements underlying a district IEP, a district would be obligated to convene a CSE to develop an IEP at least annually (20 U.S.C. 1414[d][4][A]; 34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]). A district IEP generated in January 2021 and updated in July 2021 would no doubt be deemed operative moving into the 2021-22 school year. Indeed, the iBrain director testified that the date of the district's CSE meeting "coincided with about the date" of iBrain's "IEP review" for the student (Tr. p. 59). Accordingly, notwithstanding references in the document to the 2020-21 school year, the evidence in the hearing record supports a finding that July 2021 iBrain IEP set forth programming recommendations that were carried into the 2021-22 school year.

[15] iBrain provided music therapy to the student via teletherapy beginning in October 2020 (Parent Ex. H at p. 12). Music therapy was added to the student's January 2021 iBrain IEP (see Tr. p. 60; compare Parent Ex. H at pp. 1, 12, 44, with Dist. Ex. 9 at pp. 1, 35-37).

throughout the week in the areas of "ADLS," morning meeting, sensory time, group games, and literacy (id.).

The director testified that the student was in a 6:1+1 classroom during the 2021-22 school year with similar peers who also were non-verbal, non-ambulatory, and at her academic functioning level (Parent Ex. M ¶ 18). The director testified that during the 2021-22 school year the student was on hybrid schedule and received a combination of in-person services "multiple times per week" and remote services "two days a week" (Tr. p. 63).[16] According to the director, the parents determined that the hybrid schedule "worked better for [the student]" but that "the option remain[ed] for her to come to school at any point" (Tr. p. 64). The director stated that iBrain sent a paraprofessional home to provide in-person support to the student during remote services that were provided live and synchronously through "Zoom" (id.).

Notwithstanding the foregoing, the IHO found that the hearing record lacked progress reports, descriptions of instruction, attendance records, or evidence of the student's functioning during the 2021-22 school year to support a finding that the iBrain program was appropriate (see IHO Decision at pp. 13-19).[17] However, in assessing the appropriateness of a unilateral placement for tuition reimbursement purposes, parents must demonstrate that the private school provides specialized instruction tailored to the student's unique individual needs; this evidence may, at times, consist of descriptions of the school's programmatic elements without more specific evidence related to the student's experience with the individualized program during the school year at issue. Indeed, some courts have noted that evidence of the general educational milieu of a unilateral placement can be relevant for purposes of awarding tuition reimbursement, and in some cases may constitute special education, while recognizing that such considerations nonetheless do not abrogate the requirement that the appropriateness of a unilateral placement continues to rest on a finding of specialized instruction which addresses a student's unique needs (see W.A. v. Hendrick Hudson Cent. School Dist., 927 F.3d 126, 148-49 [2d Cir. 2019] [indicating that "a resource that benefits an entire student population can constitute special education in certain circumstances" but cautioning that features such as small class size might be the sort of feature that might be preferred by parents of any child, disabled or not], cert denied, 140 S. Ct. 934 [2020]; T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2017]); see also Bd. of Educ. of Wappingers Cent. School Dist. v D.M., 831 Fed. App'x 29, 31 [2d Cir. 2020] [acknowledging an SRO's statement that the standard for an appropriate unilateral placement had become less demanding but reiterating that the appropriate analysis is the "totality of the circumstances" standard]).

In this instance, while the hearing record is limited with respect to the detailing the student's experience in the recommended program at iBrain during the 2021-22 school year, the evidence

[16] The January 2021 CSE meeting minutes reflected reports from the student's teacher at iBrain that the student had "recently started coming into school 3 days per week" (Dist. Ex. 3 at pp. 1, 3).

[17] To the extent the IHO took issue that the hearing record lacked evidence of the qualifications of staff working with the student or their training (IHO Decision at p. 13), as noted above, the private school need not employ staff certified by the State (Carter, 510 U.S. at 13-14). Further, the "[c]ontributors" to the development of the student's July 1, 2021 iBrain IEP listed their respective credentials within the document and the iBrain IEP provided for training of staff for two-person transfers, vision adaptations and functioning, seizure safety, assistive technology use, and tracheostomy care and precautions (Parent Ex. H at pp. 45-47).

in the hearing record sufficiently describes the elements of the program, which align with the student's needs. Moreover, the hearing record is not devoid of evidence of the student's progress in the program, albeit such evidence is generally stated.[18] In affidavit testimony, the director stated that she had "observed and [was] aware of the progress [the student] ha[d] made and continue[d] to make in skills across all academic and related service domains in her educational program at iBrain, including during the current, 2021-2022 extended school year" (Parent Ex. M ¶ 19). The director further reported that she anticipated the student would continue to build on progress already made, as long as she was provided with "continuity" with regard to her educational program (id.). Within affidavit testimony, the parent reported that the student had made "steady" progress since starting at iBrain within multiple areas including her strength, attention, and academic skills, noting that prior to starting there, the student barely held up her head and had "a very short attention span" (Parent Ex. N. ¶ 12). The parent reported additional progress related to the student's use of the gait trainer in the number of steps the student took and the length of time she used it (id.). Further, the parent testified regarding the student's progress in learning to play games and taking turns, as well as socializing and interacting with her peers (id.). Specifically, during the 2021-22 school year, the parent noted that the student was able to communicate more because of the increased regularity with which the student used her assistive technology device (id.). Additionally, the parent described the student's progress in making multi-range choices and selecting multiple photos on the device screen to form sentences, along with the student's progress in using her Tobii eye gaze device (id. at ¶ 13).

Based on the foregoing, given the July 2021 educational plan, coupled with the evidence that the student attended the contemplated program during the 2021-22 school year, the totality of the evidence supports a finding that iBrain provided instruction and services specially designed to meet the unique needs of the student and was an appropriate placement for her during the 2021-22 school year, and the IHO's decision to the contrary is against the weight of the evidence (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

B. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758

[18] While a student's progress is not dispositive of the appropriateness of a unilateral placement, a finding of some progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]). It stands to reason that the converse must also be true, i.e., that a lack of evidence of progress is not dispositive of the appropriateness of a unilateral placement.

F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Initially, it is undisputed that related services were part of the supplemental tuition calculated separately from the base tuition for iBrain and that iBrain did not deliver the transportation services to the student but that, instead, the services were delivered by a separate agency (see Parent Exs. I; K). A parent may structure a unilateral placement in this manner, for example, by obtaining outside services for a student in addition to a private school placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). However, here, the IHO found that the services were excessive in terms of their cost and that therefore equitable factors did not support the parents' request for relief.

Among the factors that may warrant a reduction in tuition based on equitable considerations is whether the frequency of the services or the cost for the services was excessive (M.C., 226 F.3d at 68; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K., 674 Fed. App'x at 101; E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private school or agency was unreasonable or regarding any segregable costs charged by the private school or agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

Initially, there was no argument presented and the IHO did not find that the amount of services provided to the student exceeded the level that the student required in order to receive a FAPE such that a reduction of the amounts charged for each of the segregable costs would be warranted. Accordingly, the issue of excessiveness is specific to the cost of the programming. The district did not argue that the cost of iBrain was unreasonable during the impartial hearing until its closing brief and, even then, only argued that the cost of the transportation services was unreasonable (see Tr. pp. 1-93; see also Dist. Post-Hr'g Br. at pp. 18-19). Relatedly, the district did not present any evidence that the cost of iBrain or the transportation services was excessive, i.e., by reference to evidence of lower-cost programs and/or services that were comparable to and available in the same geographic areas or correlated to the length of the school day. The district also did not attempt to show whether similar services to those being provided to the student at iBrain could have been provided at significantly lower cost by the district somewhere in its public schools.

In determining that the costs of the student's program at iBrain including base and supplemental tuition and transportation costs were excessive, the IHO opined that, for a portion of each week the student "did not go to school" and, therefore, did not "benefit[] from the services of the 'school nurse' and was not using the school facilities, whatever they may be"; the majority of each school day consisted of related services which were billed as part of the supplemental tuition; and the student only received 30 minutes of academic instruction per day (IHO Decision at pp. 20-21). Initially, while the student did not attend in person instruction for a portion of each week, as discussed above, on those days, she did receive instruction remotely with 1:1 paraprofessional support in the home (Tr. pp. 63-64). There is no basis for a finding that it was unreasonable for iBrain to adopt one cost structure for all students enrolled in the school but offer parents different options for the location of instruction. Nor is there any evidence in the hearing record about the costs associated with in-person versus remote delivery of instruction. As to the IHO's concerns about the student's schedule, the student's extended school day program went from 8:30 am until 5:00 pm Monday through Friday (Parent Ex. L). According to the July 2021 IEP, the related services were to be implemented on a "Push in/Pull out" basis, indicating that they could be delivered in the classroom depending on the activity (Parent Ex. H at p. 44). Thus, in addition to the 30-minute period allotted for academic instruction, the student could have been in the classroom for receipt of related services as well as for those portions of the schedule set aside for ADLs, morning meetings, sensory time, group games, literacy, and lunch (Parent Ex. L). Accordingly, without more, the IHO's concerns about the base and supplemental tuitions are without support in the hearing record.

Ultimately, the hearing record was not developed on the issue of the reasonableness of the costs of the program and the responsibility for this lies with the district for not presenting any evidence on the issue and with the district and the IHO for the not raising the issue during the impartial hearing so that the parents were on notice and could present appropriate evidence.

Next, the district's argument regarding excessiveness of the costs of the transportation services stems from the fact that the contract requires payment whether or not transportation services are utilized (Dist. Post-Hr'g Br. at p. 18). In a recent case, a district court reviewed similar contracts with the same transportation company and determined that the terms of the contracts required parents "to pay fees irrespective of whether the students use[d] the services" (Abrams v. New York City Dep't. of Educ., 2022 WL 523455 at p. *5 [S.D.N.Y. Feb. 22, 2022]). The district does not dispute that this student required special transportation services and would have received such services through the district had it offered a FAPE. Further, during the impartial hearing, the district did not offer any evidence that other transportation options were available, which would have resulted in a more reasonable cost or identify any other company with whom the parents could have contracted that would not have charged for the days when the student did not utilize the services. Indeed, if the district had provided special transportation to the student, it is unlikely that the district would incur no transportation expenses on the school days that the student was unable to attend school. For instance, when a school district purchases a bus or other vehicle with which it transports students, it is not necessarily relieved of the obligation to maintain the vehicle at the ready, pay drivers, purchase insurance, or have available fuel in place, and public taxpayers bear those expenses even if a student does not attend school on a particular day. Similarly, it is logical that the transportation company is required to have a vehicle and staff to transport the student each school day per the terms of the contract, even if the student did not utilize the service

on a particular day and that the parents are liable to the transportation company for those costs. Accordingly, the district's argument is without merit.

If the IHO was concerned with excessive costs, it would have been permissible for her to instruct the parties to develop the evidentiary record. However, in the present matter, the IHO's determination that the costs of the student's programming were excessive and thereby warranted a reduction or denial of relief is without support in the hearing record.

As a final matter related to equitable considerations, the IHO found that the parents failed to visit the assigned public school site and that this further weighed against an award of relief (IHO Decision at p. 21). In her affidavit testimony, the parent indicated that she had toured the assigned public school site "in the past" and that, based on her observations, the school "did not have the proper facility nor staffing" (Parent Ex. N ¶ 7). During the impartial hearing, the parent elaborated that the district had assigned the student to same public school site "multiple times" (Tr. p. 78). She further indicated that she "tried to contact the recommended school . . . many times this year in order to tour the location and ask them questions, but they did not respond to [her]" (Parent Ex. N ¶ 9; see Tr. pp. 80-81). She also indicated that it "was impossible" to tour the school in 2021 (Tr. pp. 78-79). The district offered no evidence to rebut the parent's testimony that she toured the assigned public school site in the past and made efforts to tour the school again in 2021. Accordingly, the evidence in the hearing record does not support the IHO's finding that the parents' failure to visit the assigned school constituted an equitable consideration that weighed against an award of tuition funding.

VII. Conclusion

The hearing record demonstrates that iBrain was an appropriate unilateral placement for the student for the 2021-22 school year and that equitable considerations weigh in favor of awarding the parents' the relief sought. As such, the district is ordered to directly pay the full cost of the student's tuition at iBrain as well as the transportation services for the 2021-22 school year.[19]

[19] In the due process complaint notice, the parents sought an order requiring the district to directly pay iBrain for the costs of the student's tuition (Parent Ex. A at p. 6). To the extent a parent cannot afford to front the costs of the services, the district may be required to directly fund the services, but only if it is shown that the parent was legally obligated to pay for the services but, due to a lack of financial resources, had not made payments (see Mr. & Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [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]). 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., 758 F.3d at 453). Here, it is undisputed that the parents executed an enrollment contract with iBrain that included base and supplemental tuition costs (Parent Exhibit E). In her affidavit testimony, the parent stated the parents' employment situation, household income, and inability to pay the costs of the student's programming (Parent Ex. N ¶ 17). While the hearing record could be better developed in this regard, for example with documentation of the parents' financial resources, here, the district was already obligated to directly fund the majority of the student's programming at iBrain for the 2021-22 school year (which has since ended) as the pendency placement, less the costs of music therapy (see Tr. pp. 14, 16-17). Accordingly, in addition to the testimony about the parents' inability to pay, there is also little to be gained by requiring a different means of payment for the balance of the student's tuition due that exceeds that already owed by the district under pendency.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated August 31, 2022, is modified by reversing those portions which found that the parents did not meet their burden to prove that iBrain was an appropriate unilateral placement for the student for the 2021-22 school year and that equitable considerations would warrant a reduction or denial of an award of tuition funding; and

IT IS FURTHER ORDERED that the district is directed to fund the costs of the student's tuition at iBrain, including the supplemental tuition, for the 2021-22 school year, as well as the costs of special transportation.

Dated: **Albany, New York**
January 5, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER

Therefore, to the extent it has not already done so pursuant to pendency, the district will be required to directly fund the costs of the student's tuition and transportation for the 2021-22 school year.