



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 23-041

Application of a STUDENT WITH A DISABILITY, by his 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., and Peter G. Albert, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition and transportation costs at the International Academy for the Brain (iBrain) for the 2022-23 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 two prior State-level administrative appeals concerning the student's 2019-20 and 2020-21 school years (Application of a Student with a Disability, Appeal No. 21-115; Application of a Student with a Disability, Appeal No. 21-006). Accordingly, the parties' familiarity with the student's educational history preceding those matters is presumed and such history will not be repeated here in detail. Briefly, the student attended iBrain since January 2020 (Tr. p. 130; Parent Ex. I ¶ 12).¹ He has received diagnoses of cerebral palsy, a seizure

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

disorder, dysgenesis of the corpus callosum, strabismus, astigmatism, hyperopia, and global development(al) delay (Parent Ex. E at p. 1). The student was non-verbal and communicated using facial expressions, eye gazing, and through use of a communication device with an eye gaze accessory (id.). The student was non-ambulatory and used a wheelchair throughout the day for functional mobility (Parent Exs. D at p. 15; I at ¶ 10). Due to impaired tone, decreased overall strength, and impaired motor and cognitive skills, the student required adult support for all activities of daily living (Parent Ex. D at p. 15). The student enjoyed social interactions (Parent Ex. D at p. 17).

The student began the 2021-22 school year at iBrain in a 6:1+1 special class with a 1:1 paraprofessional, but later attended an 8:1+1 special class for a trial period "in order to increase the social skill level of his peer group to facilitate remote group activities" (Parent Ex. E at pp. 1, 101). The student's sessions were primarily conducted using telehealth for both individual and integrated group sessions as part of the parents' desire to keep him safe from Covid (id. at p. 2; see Dist. Ex. 1 at pp. 24, 26-27, 118). On March 7, 2022, the student resumed in-person attendance at iBrain two days a week (Parent Ex. E at p. 2).

The CSE convened on March 16, 2022, to review the student's IEP (Parent Ex. F at pp. 67-68, 73). The IEP reflects that the parents were seeking "additional years of service" pursuant to the State's "COVID waiver for extension of school-age based services" (id. at pp. 48, 75).² Finding the student remained eligible for special education and related services as a student with a traumatic brain injury, the March 2022 CSE recommended that the student attend a 12-month, 6:1+1 special class in a specialized school with related services including: five 60-minute sessions per week of individual occupational therapy (OT); one 60-minute session per month of group parent counseling and training; five 60-minute sessions per week of individual physical therapy (PT); four 60-minute sessions per week of individual speech-language therapy; and one 60-minute session per week of group speech language therapy (id. at pp. 1, 67-69). The March 2022 CSE additionally recommended that the student receive the support of a 1:1 paraprofessional for health, ambulation, feeding, and safety, the use of a dynamic display speech generating device (SGD) and two 60-minute sessions of assistive technology services (id. at p. 68). The March 2022 CSE also recommended the student receive special transportation with specific accommodations (id. at p. 73).

In a prior written notice to the parents dated April 5, 2022 the district summarized the March 2022 CSE's recommendations and the parents' stated concerns (see Parent Ex. O at pp. 1-3). In a separate school location letter to the parents of the same date, the district identified the specific public school site to which the district assigned the student to attend to receive the program and services set forth in the March 2022 IEP (id. at p. 5).

By letter dated June 17, 2022, the parents notified the district of their intention to unilaterally place the student at iBrain for the 2022-23 school year (12-month program) and to seek funding from the district for the student's placement (see Parent Ex. G at pp. 1-2). In the letter, the parents indicated some of the disagreements they had with the recommendations in the

² The student had turned 21 years old prior to the March 2022 CSE meeting (see Parent Ex. F at p. 1).

March 2022 IEP as well as disagreements with the assigned public school site, including that the school was not fully wheelchair accessible (id.; see Parent Ex. P).

In a second school location letter, dated June 21, 2022, the district identified a different public school site for the student to attend (Parent Ex. Q at p. 5); however, the parents had the same concerns about accessibility of the building (see Parent Ex. R). In addition, the district provided the parents with two prior written notices bearing the date June 21, 2022, the first of which again summarized the March 2022 CSE's recommendations (Parent Ex. Q at pp. 1-3; Dist. Ex. 2). The second June 2022 prior written notice described the district's rationale for denying the parents' request for a functional vision assessment of the student (Dist. Ex. 2).

The student attended iBrain for the 2022-23 school year (Parent Ex. I at ¶ 13).

A. Due Process Complaint Notice

In a due process complaint notice dated July 6, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A at p. 1). Specifically, the parents contended that the district failed to evaluate the student in all areas of suspected needs, having failed to recommend music therapy and vision education evaluations, and that the May 2022 CSE failed to consider a continuum of placement options for the student, predetermined the student's placement, and denied the parents meaningful participation in the IEP process (id. at pp. 5-6). In addition, the parents alleged that the CSE failed to recommend sufficient related services in that music therapy was omitted and a visual assessment had not been completed to determine if vision-based services were required, failed to recommend necessary music therapy and vision education annual goals, and failed to recommend appropriate transportation accommodations (id.). The parents also asserted that the district failed to assign the student to attend an appropriate school location at which the student's IEPs could be implemented because the schools identified by the district posed safety risks to the student, could not provide an appropriate peer group, and could not implement portions of the student's IEP (id. at p. 5).

In addition to the above, the parents asserted that iBrain was an appropriate unilateral placement for the student and equitable considerations weighed in favor of their requested relief (Parent Ex. A at pp. 4, 6). For relief, the parents requested that the district be required to fund an independent functional visual assessment as well as all costs associated with the student's attendance at iBrain for the 2022-23 school year, including tuition, related services, 1:1 paraprofessional services, and special education transportation (id. at p. 7). The parents also requested that the district fund the student's placement at iBrain as the student's stay-put placement during the pendency of the proceedings (id. at pp. 1-2).

B. Impartial Hearing Officer Decision

On August 30, 2022, the parties proceeded to an impartial hearing, which concluded on December 21, 2022, after three days of proceedings (see Tr. pp. 1-143). In an interim decision dated August 31, 2022, the IHO determined that the student's pendency placement during the proceedings was based on a prior IHO decision and consisted of the following: funding for the parents' unilateral placement of the student at iBrain, inclusive of the costs of related services, as well as funding for special education transportation services with appropriate accommodations for

the student, at a fair market rate, to the extent such transportation was actually provided (IHO Ex. I at p. 5).

The district moved to dismiss the parents' due process complaint notice, arguing that the student had aged-out of eligibility, and the parents opposed the motion, arguing that the district had voluntarily extended the student's eligibility (see Dist. Mot. to Dismiss; Parent Opp. to Mot. to Dismiss). In an interim decision, dated November 11, 2022, the IHO denied the district's motion, finding that the district had used its discretion to extend the student's eligibility for special education services "in March 2022, and beyond" (IHO Ex. II at pp. 1-7).³

In a final decision dated January 23, 2023, the IHO found that the district failed to sustain its burden to prove that it offered the student a FAPE, primarily because the district had not presented any witnesses or testimony explaining the appropriateness of the student's recommended program for the 2022-23 school year and had only offered two documents—a copy of the March 2022 IEP and the ordered transcript of the CSE meeting—into the hearing record (IHO Decision at pp. 4, 6-7).

The IHO also determined that the parents failed to sustain their burden to prove that the unilateral placement at iBrain was appropriate, finding that the parents had not provided sufficient evidence regarding appropriate instruction at iBrain, how the program was individualized for the student, or the qualifications and skills of the providers at iBrain, and noting that there were no class schedules or progress reports offered into evidence (IHO Decision at pp. 11-13). The IHO noted that the lengthy IEP produced by iBrain for the student could not substitute for the testimony of qualified witnesses to explain the student's program and progress with personal knowledge, which could be subjected to cross-examination (id. at pp. 12-13). Also, the IHO found that the student attended iBrain in person only two days per week and there was a lack of evidence concerning how the "home program" portion of the unilateral placement was delivered, controlled, and monitored with respect to the "five-times per week push-in related services" among other things (id. at p. 13). The IHO also noted that there was insufficient evidence of the student's need for music therapy and services regarding visual impairment (id. at pp. 13-14).

Next, the IHO determined that the parents had not established that their eligibility for direct payment relief because they had not shown any legal or financial obligations for the costs of the student's tuition at iBrain (IHO Decision at pp. 7-9, 15). Lastly, the IHO identified no other equitable bars to tuition reimbursement but, based on the aforementioned determinations, denied the parents' request for relief in all respects (id. at p. 16).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO correctly determined that the district failed to offer a FAPE to the student for the 2022-23 school year but erred in finding that iBrain was not an appropriate unilateral placement for the student and that the parents were not eligible for the relief requested. With respect to the appropriateness of iBrain, the parents assert that contrary to the IHO's determination that the hearing record lacked information on the qualifications of iBrain's

³ The IHO also issued an interim decision, dated November 11, 2022, directing the district to provide the parties with a transcription of the March 2022 CSE meeting (IHO Ex. III).

providers, the student's classroom teacher had a Master of Science degree in education and was obtaining a special education certification and was therefore an appropriate educator for the student. The parents assert that the IHO essentially ignored the iBrain IEP for the student, which contained extensive information about the student's program and how it was provided at iBrain. Further, the parents assert that the district relied upon the iBrain IEP in creating the March 2022 IEP for the student.

The parents also assert that the IHO erred in finding that they were not entitled to the relief they requested, asserting that if the IHO needed additional information to determine whether the parents had a financial obligation to iBrain, he should have sought the evidence to supplement the record, and further assert that the omission of the iBrain enrollment contract at the impartial hearing was a clerical error that should not prejudice the parents. The parents submitted a copy of a June 2022 enrollment contract as proposed additional evidence. For relief, the parents request that the IHO's decision be reversed and that the district be directed to fully fund the student's placement at iBrain including related services and transportation for the 2022-23 school year.

In an answer the district responds to the parents' material allegations and asserts that the IHO's decision should be upheld in its entirety. The district contends that the parents' additional evidence in the form of the enrollment contract should not be considered because it could have been offered as evidence during the impartial hearing and subjected to inquiry from the district during the hearing.⁴

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

⁴ 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 submit a reply. As such, the parents' reply fails to comply with the practice regulations and will not be considered.

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 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]).⁵

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

On appeal, neither party is challenging the IHO's denial of the district's motion to dismiss or the IHO's findings that the district failed to offer the student a FAPE for the 2022-23 school year or that the parents cooperated with the CSE and equitable considerations did not bar reimbursement. Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). I turn now to the main issue on appeal: the appropriateness of the unilateral placement of the student at iBrain.

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, 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

⁵ 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).

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 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).

At the outset, the IHO indicated that, in the absence of witnesses describing and testifying to the contents of iBrain's IEP, the document was "no more than a self-serving document" (IHO Decision at pp. 12-13). Accordingly, the IHO found the iBrain IEP, alone, was insufficient evidence to demonstrate the appropriateness of the unilateral placement. The IHO's rationale could be read as a finding that the iBrain IEP was not authenticated by testimony and, therefore, did not warrant consideration. However, the formal rules of evidence applicable in civil actions generally do not apply in impartial hearings (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 68 [2d Cir. June 24, 2013] [citing Richardson v. Perales, 402 U.S. 389, 400 (1971) for the proposition that the strict rules of evidence do not apply in an administrative proceeding

and noting that application of the Daubert gatekeeper requirement is highly questionable in IDEA proceedings]; Council Rock Sch. Dist. v. M.W., 2012 WL 3055686, at *6 [E.D. Pa. July 26, 2012]; Matos v. Hove, 940 F. Supp. 67, 72 [S.D.N.Y. Sept. 25, 1996], citing Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 [7th Cir. 1977]; Cowan v. Mills, 34 A.D.3d 1166, 1167 [3d Dep't 2006]; Tonette E. v. New York State Office of Children and Family Servs., 25 A.D.3d 994, 995-96 [3d Dep't 2006]). This is in part because the "IDEA hearings are deliberately informal and intended to give [hearing officers] the flexibility that they need to ensure that each side can fairly present its evidence" (Schaffer, 546 U.S. at 61).

At most, the lack of testimony pertaining to the iBrain IEP may warrant affording the document less weight overall given the totality of the evidence. The IHO may have preferred that additional witness testimony or other evidence concerning the student's educational needs and the delivery of services to him at iBrain had been offered by the parent; however, the hearing record is developed beyond the iBrain IEP and includes witness testimony that tends to corroborate that the services described in the 2022 iBrain IEP were delivered to the student during the 2022-23 school year. The questioning during cross examination by the district representative did little to rebut the parents' presentation of evidence, and similarly the IHO did not ask for further development of the record or ask clarifying questions that would cast doubt regarding the delivery of educational services under the 2022 iBrain IEP. As discussed below, the hearing record as a whole provides sufficient basis upon which to conclude that the unilateral placement of the student at iBrain was appropriate for the 2022-23 school year and the IHO's reasoning to the contrary was not supported by the evidence.

Turning to the evidence in the hearing record, the March 2022 iBrain IEP indicated that the student had extensive and intensive needs in the areas of cognition, academics, communication and socialization, gross and fine motor development, activities of daily living, and self-care (see Parent Ex. E at pp. 5-8, 58-73). The student used a manual tilt-in-space wheelchair for all functional mobility needs, equipped with laterals, swing-away footrests, and a head rest to address proper positioning (id. at p. 9). In addition, the student used bilateral ankle foot orthotics (AFOs) for all weight bearing activities and bilateral resting hand splints to preserve the integrity and range of motion in his hands (id. at p. 10). To communicate, the student used an augmentative and alternative communication (AAC) device, specifically a Tobii I-16 with eye-gaze activation software (id. at p. 105). The student required a 1:1 paraprofessional to help him engage in activities as well as assist with transfers, positioning, equipment set-up, and provide additional physical assistance and cueing when necessary (id. at p. 10).

The March 2022 iBrain IEP described the instruction and related services provided by the school at that time, as well as the manner in which they were provided. As an initial matter, the IEP noted that most of the student's sessions were conducted via telehealth both individually and integrated in group sessions and that on March 7, 2022 the student had "resumed in-person twice a week" (Parent Ex. E at p. 2). The iBrain IEP listed several of the student's providers, with post-nominal letters (i.e., reference to their position, degree, or accreditation) (id. at p. 106).

With regard to academics, the iBrain IEP indicated that iBrain provided the student with individual and small group instruction "to grow his abilities academically" and noted that the student had demonstrated "slow steady progress" in his literacy, math, and social skills (Parent Ex. E at p. 1). The iBrain IEP indicated that "literacy activity [wa]s prompted by and implemented

with a combination of visual and auditory learning materials such as educational videos and songs" (id. at p. 20). As detailed in the IEP, the student's literacy goals were to increase his attention span and to actively engage in individual and small group reading activities (id. at p. 21). According to the IEP, the student responded to a story or informational reading by identifying characters and events by using his communication device with maximal support (id. at p. 20). An upcoming goal was for the student to increase his comprehension by answering "wh" questions using his communication device, facial expression, and eye gazing with maximal support (id. at p. 21). The iBrain IEP stated that in the area of cognition the student was similarly provided with visual and auditory learning materials such as videos and songs and was working on an annual goal related to seasons and seasonal changes (id.). The student practiced matching seasonal symbols and identifying symbols related to national holidays, and the iBrain IEP indicated that the student's work toward this goal would continue (id.). The IEP indicated that the student continued to benefit from consistent, 30-minute individual sessions of direct instruction once a day (id. at p. 23).

In terms of social skills, the iBrain IEP indicated that the student enjoyed social interaction with peers and adults and was socially motivated to communicate (Parent Ex. E at pp. 1, 3). The student had been observed to smile and vocalize upon seeing familiar communication partners and peers (id. at p. 3). The iBrain IEP indicated that the student used his "high-tech eye-gaze device" to greet and interact with others but noted that his accurate and intentional use of the device was highly dependent on his positioning, energy level, mood, interest level and/or general well being on a given day (id.). According to the iBrain IEP, the student enjoyed social activities like group meetings regardless of in-person or remote via Zoom setting (id. at p. 22). He demonstrated his delight by smiling widely and vocalizing while interacting with peers and adults (id.). However, the IEP also indicated that because the student was learning remotely, he was limited in his ability to practice social skills (id. at p. 10).

With regard to OT, the iBrain IEP indicated that the student's therapy sessions began with preparatory activities that included a 15-20 minute range of motion routine that addressed the student's passive range of motion in his bilateral upper extremities including shoulders, wrists, elbows, and hands (Parent Ex. E at p. 47). The remainder of the session focused on various occupation-based skills such as self-feeding, gross motor tasks, and AAC device activation, as determined by a weekly schedule (id. at pp. 30, 47). The iBrain IEP indicated that the student required a 1:1 paraprofessional to assist with transfers, functional mobility, hygiene, safety and engagement in tasks (id. at p. 47).

The iBrain IEP indicated that, at the time it was developed, the student was receiving PT via telehealth five times per week for 60 minutes (Parent Ex. E at p. 50). The iBrain IEP explained that a typical 60-minute PT session focused on mat mobility training and seated activities designed to improve the student's flexibility, static/dynamic balance, posture and positioning, activity tolerance, coordination, gross motor strength, safety, joint and skin integrity, and body awareness (id. at p. 52). Telehealth sessions began with the student being transferred from his wheelchair to the couch and was followed by 10 minutes of stretching and passive range of motion of the student's upper and lower extremities in order to prepare him for work on functional activities (id.). For the next 10 minutes the student worked on activities designed to strengthen his core and lower extremity muscles to promote physical independence in mobility (id.). According to the iBrain IEP, the following 15 minutes were spent trying to actively engage the student's muscles in his trunk, neck and extremities through log rolling, sitting on a bench, working on weight shifts while

sitting on a couch, and maintaining therapeutic kneeling (*id.*). The student spent the 15 minutes after that working on functional activities such as transitioning to standing, kicking a ball, pushing on his hands, and extending his upper trunk in prone or prone on elbows (*id.*). The final 10 minutes of the student's therapy session consisted of a visual inspection of the student's feet for redness or skin breakdown, donning his orthotics, and transferring and positioning the student in his wheelchair (*id.*). The iBrain IEP noted that proper positioning and alignment of the student's equipment was crucial for him to be able to perform other activities such as reaching and using his "eye-gaze device" (*id.*). The IEP indicated that the student's "paraprofessional perform[ed] and engage[d] [the student] in activities, as well as transfers, donning and doffing of the braces during sessions" (*id.*). In addition, the IEP indicated that environmental modifications needed to be made to ensure the student's safety in PT sessions and throughout the day including "adjusting [the student's] wheelchair's pelvic and chest harness for appropriate fit and positioning his chair and working on soft mats to prevent injury" (*id.*). The iBrain IEP noted that the student was non-ambulatory and used a wheelchair as his main source of transportation both indoors and outdoors (*id.* at p. 50).

According to the March 2022 iBrain IEP, as a result of the student's brain-based disorder, he experienced difficulty with fine and gross motor movements and the coordination necessary for speech production (Parent Ex. E. at p. 33). The iBrain IEP noted that the student received speech-language therapy services via telehealth and therefore his opportunities for interaction with his in-person peers was limited (*id.* at p. 4). With regard to the student's present levels of performance in speech, the iBrain IEP indicated that student could become easily distracted in large groups in and around his therapy sessions regardless of service provision format (in-person or telehealth) as well as by noises that occur around the therapy space (*id.* at p. 37). The iBrain IEP indicated that telehealth treatment sessions typically occurred with the student and his paraprofessional in a separate/individual room of the student's home and with the clinician on Zoom in a quiet room at the iBrain facility (*id.*).

With respect to the student's speech-language therapy sessions, the iBrain IEP indicated that on a typical day the student's session began with his paraprofessional providing feedback to the clinician regarding how the student was feeling and whether there were any notable changes for the clinician to be aware of (Parent Ex. E at p. 33). The clinician would greet the student and the student would be prompted to discriminate between hello and goodbye on his AAC device in order to provide an appropriate response (*id.*). The IEP stated that following the introductory conversation the student's paraprofessional was instructed to navigate to the yes/no page on his device and the student was "offered choices regarding what he would like to do first via partner assisted scanning" (*id.*). For the remainder of the session the student made choices for and engaged in a variety of structured and unstructured activities related to his speech and language (*id.* at p. 34). The activities included following simple, one-step directions, activating his device to engage in simple cause/effect tasks, identifying objects, and acknowledging his communication partners by turning his head to localize to them or changing his facial expression (*id.*). The student's speech-language therapy sessions ended with a brief conversation related to the day's activities and then

the student was prompted to produce a social closure by discriminating between "hello" and "goodbye" on his device (id.).⁶

The March 2022 iBrain IEP indicated that as part of the student's program he was also receiving two 60-minute individual telehealth music therapy sessions per week and one 60-minute telehealth music therapy session in a group per week (Parent Ex. E at p 52). Some of the sessions were "[p]ush-[i]ns" for academics or during afternoon class meeting (id. at p. 55). According to the iBrain IEP, in a typical music therapy session the student began by engaging in a hello song "to encourage smooth transitions into music therapy and generalize skills within the realm of greetings and communication" (id. at p. 56). The student then engaged in song choice using his AAC device which promoted self-expression, independence, and increased communication skills (id.). The iBrain IEP indicated that the student occasionally engaged in therapeutic music performance, described as "the playing of musical instruments in order to exercise and stimulate functional movement patterns' . . . or localization exercises" (id. at p. 56). The IEP noted that the student had contractures in his hands that made hand-held instruments hard to grasp and further noted that the use of instruments and instrument play during music therapy could provide motivation to practice functional movements and fine motor skills (id.). The iBrain IEP indicated that the student's music therapy sessions ended with goodbye song to help transition out of the session and provide structure (id.).

With respect to assistive technology, the March 2022 iBrain IEP indicated that the majority of the student's assistive technology sessions had been conducted via telehealth due to concerns over the COVID-19 pandemic at the request of the family (Parent Ex. E at pp. 27, 32-33). The student's 1:1 paraprofessional was present during telehealth sessions and was "crucial for use of carryover of his device across various environments" (id. at p. 27). The iBrain IEP indicated that in a typical assistive technology session the student engaged in a good morning song with the provider using his AAC device to greet the clinician, given supportive help from his paraprofessional (id. at p. 28). The student most commonly used pages related to yes/no, greetings, and want/not (id.). The student's icons were arranged top to bottom, as he demonstrated difficulty shifting his gaze from left to right; still, the student demonstrated a preference for the upper portion of his device and benefitted from verbal and gestural cues to sustain his gaze on lower icons (id. at pp. 27-28). According to the iBrain IEP, as the student was "extremely motivated by music" the clinician would ask him if he wanted to listen to music and he would use his yes/no page to respond "yes" using eye gaze (id. at p. 28). The clinician provided the student with non-preferred choices to encourage him to shift his gaze downward and select "'no'" (id.). The iBrain IEP noted that the student had difficulty accessing icons in the lower portion of his device and that it was important to provide him with the needed motivation to reject or protest an activity (id.). The

⁶ The iBrain IEP stated that the student's oral motor mechanism was assessed informally through clinician observation, as the student's sessions were primarily conducted via telehealth (Parent Ex. E at p. 44). The report noted that as the student continued to receive consistent telehealth services "the clinician plan[ed] to train his primary paraprofessional to provide daily oral motor exercises" (id.). When the paraprofessional was adequately trained by the speech-language pathologist and approved to administer various techniques, the paraprofessional would perform under the supervision of the speech-language pathologist via telehealth (id.). In addition, the iBrain IEP noted the student had recently begun in-person services and oral-motor exercises and techniques would be administered in-person via the speech-language pathologist and training of the paraprofessional would occur during direct sessions (id.). The speech-language pathologist observed the student feeding once in-person and continued to observe the paraprofessional feed the student his breakfast via telehealth sessions once a week (id.).

student practiced using his "want" page that included icons for "want" and "not" (id.). The student closed the session by saying "goodbye" (id.).

The director of special education at iBrain provided direct testimony by affidavit indicating in part that iBrain offered its students a wide variety of related therapy services, including OT, PT, speech therapy, vision education, assistive technology services, parent counseling and training, and services for the deaf and hard of hearing (Parent Ex. I at ¶ 9). All of these therapy services were designed to support the education of iBrain's students and were provided to the students, as needed, usually in 60-minute intervals (id.). These 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.). Doing so was critical for students with brain injuries because they had a severe deficit in their ability to generalize skills (id.). Students at iBrain generally required 60-minute sessions because of transferring and re-positioning needs, additional transition time and rest, and repetition needs to foster neuroplasticity (id.).

The iBrain special education director's direct testimony showed that as of August 2022, the student was attending a 6:1+1 special class and received five 60-minute sessions per week of OT, four 60-minute sessions per week of PT, four 60-minute individual sessions and one 60-minute group session per week of speech and language therapy, three 60-minute individual sessions and one 60-minute group session per week of music therapy, three 60-minute sessions per week of vision education services, and one 60-minute session per week of assistive technology services (Parent Ex I at ¶ 13). According to the iBrain special education director the student had an AAC device and related supports and devices for use throughout the day across all school environments (id.). The student's support staff was provided with training to handle and address his unique conditions (id.). The iBrain special education director reported that in addition to his 6:1+1 special class and related services, the student had a 1:1 paraprofessional all day, every day, to help him to participate in his educational program (id. at ¶ 14). The student's parents also received a 60-minute parent counseling and training sessions monthly to support his educational needs and promote carryover and consistency of skills from school to home (id.). Further, the student received special transportation accommodations, including a 1:1 travel paraprofessional, limited travel time, air conditioning, a lift bus, and wheelchair accessibility (id. at ¶ 15).

During further testimony at the impartial hearing in December 2022, the iBrain special education director provided additional insight into the student's program at iBrain during the 2022-23 school year. The iBrain special education director reported that, specific to the student, the 1:1 paraprofessional had been "really very integral" (Tr. p. 74; see Parent Ex. I at ¶ 6). She noted that the student had been working closely with his paraprofessional, something that facilitated a lot of the student's progress (Tr. p. 74.). According to the special education director, the student's paraprofessional had "been responsible . . . for the daily care and things like that, but also for helping to carry over skills . . . through the day from all of the different departments" (Tr. pp. 74-75). The iBrain special education director noted that the student's paraprofessional "was able to give the providers a lot of feedback about how [the student] was doing in generalizing the skills that he'd learned in the sessions into other parts of his day and other therapies" (Tr. p. 75). The special education director indicated that the feedback provided by the paraprofessional helped the student's providers to be able to adjust what they planned on working on with the student, when to request push-in sessions, and what types of activities to try with him (id.).

The special education director noted the 1:1 paraprofessional had been working with the student both at school and at home (Tr. p. 76). At the time of the impartial hearing, the student was part-time in person and part-time remote, and he stayed with the student in both circumstances and worked with the family to carry-over skills across settings (id.).

Additional testimony by the iBrain special education director indicated the student attended iBrain in-person on Mondays and Wednesdays, and remotely on the other days (Tr. p. 89). The 1:1 paraprofessional was at home with the student when services were conducted remotely (Tr. p. 89). According to the special education director, "it's the same schedule and everything's just provided remotely with the live support of the para[professional]" (Tr. p. 89).⁷ With regard to related service providers, the iBrain special education director testified that aside from the 1:1 paraprofessional, iBrain did not send related service providers into the home for remote sessions (Tr. p. 91).

Moving to the provision of related services, the iBrain special education director reported that all related services sessions were provided on a push-in and pull-out basis with that determination being made depending on what activities were going on, what the therapists were working on, and how the student was doing (Tr. pp. 96-97). She noted that typically, the related service providers tried to plan the push-ins in advance and consulted with the teachers about what lessons and activities were taking place (Tr. p. 97). The iBrain special education director explained that related service providers requested "push-ins for specific students, specific times to go along with what skills they wanted to address," and based on what would be going on in the classroom (id.). Then, the teachers created a master schedule (id.). Some of the push-in sessions were done in small group activities, and some of them were done one-on-one (id.). With regard to the student in the instant case, the iBrain special education director reported that all of his related services were provided on a push-in and pull-out basis and that most of the student's push-in sessions occurred when he attended iBrain in person, "just because it's a little easier to facilitate than trying to have multiple people on the screen" (Tr. p. 98). According to the iBrain special education director, when the student attended iBrain remotely most sessions were pull-out sessions (Tr. p. 99). The student's 1:1 paraprofessional was with him during each session (Tr. p. 100).

The iBrain special education director explained the role of the student's 1:1 paraprofessional during related services sessions (Tr. pp. 100-01). She reported that the paraprofessional helped with the manipulation of items and physical repositioning of the student (id.). The iBrain special education director described the student as a tall young man (and explained that repositioning the student into chairs, required someone who was pretty strong or two people to help the student reposition himself, such as for the purpose of trying to get the

⁷ Testimony by the special education director indicated that at iBrain, any time a student received instruction, they were not considered absent because they were receiving services (Tr. p. 90). She noted that included days that the student was at iBrain in person, days that the student was home, but the paraprofessional was with him, as well as any days that the family wanted a home program (Tr. p. 90). According to the iBrain special education director, "the family might want a home program that either they would do with him or if the para[professional] was there, they will do the home program" (Tr. p. 90). She noted that sometimes if the family was unsure of what time they would be home to schedule a live session, "they might want activities and stuff sent over that they could do when they were available" (Tr. pp. 90-91). iBrain considered the student present under any of these three circumstances (Tr. p. 91). The student was also considered present if he missed school for some kind of excused reason, such as doctor's appointments or illness (Tr. p. 91).

student's head in the correct place on his head rest to activate his eye gaze device (Tr. p. 101). The paraprofessional also assisted the therapist by physically working with the student, or sometimes by holding items so that the therapist could do things tactilely with the student (id.).

The iBrain special education director testified that while the therapists would be doing hands-on interventions with the student, such as working on a specific movement, the paraprofessional would be holding or handing specific items to the student to facilitate the actual activities (Tr. pp. 101-02, see Tr. pp. 108-09). The paraprofessional also helped with transfers of the student between different activities throughout the day, including in between sessions, transferring him to sit in different locations, and going to different parts of the building to do different types of activities (id.). When asked why the student required 60-minute related services sessions, the iBrain special education director indicated, that there was "a ton of things for [the student] to work on, and he need[ed] the clinician's support to work on all of those things (see Tr. pp. 118-20).

With regard to the daily 30-minute academic session provided to the student, the iBrain special education director testified that the 30-minute sessions were conducted with the student's teacher and 1:1 paraprofessional present (Tr. p. 121). She reported that they followed a direct instruction model which targeted the use of individualized supports and materials, and required a high level of mastery of the skills (id.). The iBrain special education director indicated that instruction targeted the student's specific academic skills, using materials that were modified and adapted for his visual needs (id.). She further indicated that the teacher and 1:1 paraprofessional integrated the student's use of his AAC device to respond to questions (id.).

The iBrain special education director reported that with regard to transportation, the same 1:1 paraprofessional who worked with the student during the educational program traveled with the student to address his transportation needs (Tr. pp. 113-14).

The foregoing demonstrates that the programming offered at iBrain provided elements aligned with the student's needs and was designed to help him make progress towards his annual goals. Most of the information regarding the student, including his present levels of performance and service recommendations, were the same or similar between the March 2022 district IEP and iBrain's March 2022 IEP (compare Parent Ex. F, with Parent Ex. E), suggesting broad agreement between the CSE and iBrain staff who observed and worked with the student while he attended iBrain, that the recommended program in the 2022 iBrain IEP was appropriate and individualized to meet the student's needs. While the IHO found insufficient evidence in the hearing record to describe the iBrain program—in person and remote—the foregoing discussion demonstrates that, to the contrary, the evidence sufficiently described the elements of the program and services that addressed the student's needs. Beyond the sufficiency of the evidence, the IHO did not directly make a finding about the appropriateness of the remote delivery of services and the district has not otherwise argued that the delivery method used to provide the student with instruction or services was inappropriate. Absent further arguments regarding the appropriateness of any aspect of the iBrain plan or the manner in which it was implemented, the inquiry is at an end.

Based on the foregoing, given the 2022 iBrain IEP, coupled with the evidence that the student is attending the contemplated program during the current 2022-23 school year, the totality of the evidence supports a finding that iBrain provided individualized instruction and services

specially designed to meet the unique needs of the student and was an appropriate placement for him during the 2022-23 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. Relief

As a final matter, the parents challenge the IHO's decision to the extent it found that, had the unilateral placement been found appropriate, the parents would not have been entitled to the relief they requested because they did not establish their financial obligation. On this point, the parents offer a copy of a June 2022 enrollment contract as proposed additional evidence.

It is well settled that parents who reject a school district's IEP and choose to unilaterally place their child at a private school without consent or referral by the local educational agency do so at their own financial risk (Burlington, 471 U.S. at 373-74; Carter, 510 U.S. at 14; Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020], cert. denied, 141 S. Ct. 1075 [2021], reh'g denied, 141 S. Ct. 1530 [2021]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 356-58 [S.D.N.Y. 2009] [finding the parent in that matter had no financial standing to sue for direct retrospective payment to private placement where terms of enrollment contract absolved her of responsibility for paying tuition]). In such instances, retroactive reimbursement to parents by a school district is an available remedy under the IDEA (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192).

Alternatively, with regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014] [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]; but see Ferreira v. New York City Dep't of Educ., 2023 WL 2499261, at *10 [S.D.N.Y. Mar. 14, 2023] [finding no authority requiring "proof of inability to pay . . . to establish the propriety of direct retrospective payment"]). It has been held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]).⁸

⁸ The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 360). The Mr. and Mrs. A. Court held that, in fashioning such

On the question of the parents' legal obligation to fund the student's tuition, I will consider the June 22, 2022 enrollment contract entered into between the parents and iBrain providing for the student's attendance at iBrain during the 2022-23 school year, which the parent submitted as additional evidence (*see* SRO Ex. A).⁹ The IHO did not make a specific determination as to the sufficiency of the evidence of the parents' ability to pay the student's tuition. Within her affidavit testimony, the student's mother referenced the family's income and expenses and indicated that they "would not be able to pay upfront the costs of tuition, related services, and special transportation at iBrain" (Parent Ex. J at ¶ 16). The district has thus far been required to directly fund the student's attendance at iBrain for the majority of the 2022-23 school year pursuant to pendency (IHO Ex. I). At this point, I will decline to deny the parents' requested direct funding relief for the small remainder of the school year on the ground that the parents had not offered more specific documentation of their inability to pay. Accordingly, the district shall be required to directly fund the costs of the student's attendance at iBrain for the 2022-23 school year upon the parents' submission of proof of delivery of the programming and services by iBrain.

VII. Conclusion

The weight of the evidence in the hearing record supports a finding that, contrary to the IHO's determination, the student's unilateral placement at iBrain for the 2022-23 school year was appropriate and the parents are entitled to relief in the form of direct payment of the costs of the student's attendance at iBrain. I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (769 F. Supp.2d at 430).

⁹ 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]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (*see M.B. v. New York City Dep't of Educ.*, 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; *A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist.*, 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). On the other hand, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; *Application of a Student with a Disability*, Appeal No. 08-030; *Application of a Child with a Disability*, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]). While the additional evidence that the parents offer in the present matter was available at the time of the impartial hearing, I find that it is necessary in order to render a decision in this matter. Accordingly, as a matter of my discretion, the additional evidence is considered on the question of the parents' legal obligation to pay the student's tuition costs at iBrain for the 2022-23 school year.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated January 23, 2023, 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 2022-23 school year; and

IT IS FURTHER ORDERED that, upon proof of attendance and delivery of services by iBrain, the district shall be required to directly fund the costs of the student's attendance at iBrain for the 2022-23 school year.

Dated: **Albany, New York**
 May 1, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER