



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-052

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

Appearances:

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

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for respondent (the district) to directly fund the costs of the student's tuition costs 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 in this matter has been the subject of prior impartial hearings, as well as appeals to the Office of State Review, related to the 2018-19, 2020-21, and 2021-22 school years (see Application of a Student with a Disability, Appeal No. 22-055; Application of a Student with a Disability, Appeal No. 19-132; Application of the Dep't of Educ., Appeal No. 19-019; Application of a Student with a Disability, Appeal No. 18-116). Accordingly, the parties' familiarity with the student's educational history preceding this case is presumed and will not be repeated in detail herein.

Briefly, the student has previously received diagnoses of cerebral palsy, scoliosis, seizure disorder, and cortical visual impairment (CVI); additionally, the student demonstrates "severe

impairments in his cognition, language, vision, memory, attention, reasoning, abstract thinking, judgment, problem solving, and information processing and speech" (Parent Ex. C at p. 1).¹ The student is nonverbal and non-ambulatory and communicates through a variety of communication modalities including vocalizations, alternative and augmentative communication (AAC), gestures, facial expressions, and eye gaze (id. at pp. 1-3, 7, 13, 15, 29). Further, the student receives all medications, nutrition, and hydration via a g-tube (id. at pp. 1, 5, 7, 26-27).

The student had previously been unilaterally placed at the International Academy of Hope during the 2017-18 school year and first began attending iBrain as a unilateral placement during the 2018-19 school year (Dist. Ex. 1 at p. 2; see Application of a Student with a Disability, Appeal No. 18-116).² The student did not attend school during the majority of the 2020-21 school year and returned to iBrain on June 8, 2021 (Dist. Exs. 1 at p. 2; 2 at p. 1). Turning to the period at issue in this proceeding, on April 16, 2022 iBrain developed a report and education plan for the student to be implemented beginning April 27, 2022 (Parent Ex. C at p. 1).³ The 2022 iBrain education plan was a privately developed document that mimicked nearly all of the elements of a public school IEP (see generally, Parent Ex. C). The 2022 iBrain education plan included recommendations that the student receive a 12-month program in a nonpublic school and instruction in a 6:1+1 special class with the support of a full-time 1:1 paraprofessional and a full-time 1:1 nurse (id. at pp. 65-67). With regard to related services, the 2022 iBrain education plan provided five 60-minute sessions per week of individual occupational therapy (OT), five 60-minute sessions per week of individual physical therapy (PT), five 60-minute sessions per week of individual speech-language therapy, two 60-minute sessions per week of individual vision education services, two 60-minute sessions per week of individual indirect assistive technology services, assistive technology devices, parent counseling and training, as well as other supports for school personnel on behalf of the student (id.). The 2022 iBrain education plan also provided for transportation services including supervision provided by a nurse, air conditioning, a lift bus/wheelchair ramp, a wheelchair (regular size), and limited travel time of 60 minutes (id. at p. 64).

On April 27, 2022, the CSE convened for the student's annual review and developed an IEP for the student with a projected implementation date of May 2, 2022 (Parent Ex. D). The April 2022 CSE found the student eligible for special education and related services as a student with a traumatic brain injury and recommended a 12-month program in a 12:1+(3:1) special class in a

¹ During the portion of the impartial hearing wherein the parties discussed the student's pendency placement the parent entered certain exhibits into the hearing record; however, subsequently marked exhibits with the same lettering as the exhibits previously entered. For clarity in this decision, the parent's exhibits that were entered during the pendency portion of the hearing will be referenced as "Pendency" exhibits (Parent Exs. A-I; Parent Pendency Exs. A-E).

² 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).

³ The iBrain report and educational plan has two dates listed on the cover page, the date of the initial report (April 16, 2022) and the date of the "[r]eport [r]evision" (November 23, 2022) (Parent Ex. C at p. 1). For consistency in this decision, this exhibit will be referred to as the 2022 iBrain education plan.

specialized school (*id.* at pp. 1, 64, 66).⁴ The CSE also recommended that the student receive five 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, two 60-minute sessions per week of individual vision education services, four 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of group (3:1) speech-language therapy, along with the support of a full-time 1:1 health paraprofessional for safety, feeding, and ambulation, and individual school nurse services as needed (*id.* at p. 65). Additionally, the CSE recommended one 60-minute session per month of parent counseling and training (*id.*). Regarding assistive technology, the CSE recommended that the student be provided with a dynamic display speech generating device (SGD), switches, and two 60-minute sessions per week of individual assistive technology services (*id.* at p. 66). In addition, the CSE also found that the student needed specialized transportation which included transportation from the closest safe curb location to school, a 1:1 paraprofessional for supervision, a lift bus, and a wheelchair (*id.* at pp. 70-71).

In a prior written notice and school location letter, both dated May 20, 2022, the district identified the evaluative information relied on by the April 2022 CSE, described the proposed programming offered by the CSE, and informed the parent of the public school site the student had been assigned to attend for purposes of receiving the services listed in the public school IEP (Parent Ex. E).

On June 16, 2022, the parent executed an agreement for the provision of transportation of the student to and from iBrain for the 2022-23 school year (Parent Ex. F). On June 17, 2022, the parent signed an enrollment contract with iBrain for the student's attendance from July 6, 2022, to June 23, 2023 (Parent Ex. H). By letter dated June 17, 2022, the parent notified the district of her intent to continue the unilateral placement of the student at iBrain for the 2022-23 school year and seek district funding for the costs of the student's attendance (Parent Ex. G). The student attended iBrain during the 2022-23 school year (*see* Parent Ex. C at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated July 6, 2022, the parent asserted that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A at p. 1). Initially, the parent requested an order finding that the student's pendency placement should be based on a May 23, 2021 IHO decision in a prior proceeding regarding the 2019-20 school year (*id.* at p. 2; Dist. Ex. 1 at pp. 7-8).

The parent disagreed with the results of the district's March 7, 2022 psychoeducational evaluation, arguing that such evaluation failed to thoroughly assess the student in all areas of his suspected disability and further requested an independent neuropsychological evaluation (Parent Ex. A at p. 6). The parent alleged that the district denied her meaningful participation in the April 2022 CSE process and predetermined the student's program as recommended in the April 2022 IEP (Parent Ex. A at p. 7).

⁴ 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 200.1[zz][12]).

According to the parent the April 2022 IEP failed to include: appropriate present levels of performance; include sufficient clinical evaluative data; a baseline against which progress can be measured; appropriate goals; an appropriate class size ratio; appropriate transportation accommodations (*i.e.* limited travel time); and 1:1 nursing services (Parent Ex. A at p. 7). The parent also argued that the district failed to recommend music therapy services as a related service (Parent Ex. A at p. 7).

The parent alleged that the district failed to offer a "program and placement" that was uniquely tailored to meet the student's needs for the 2022-23 school year (Parent Ex. A at p. 5). Specifically, the parent asserted that the April 27, 2022 IEP and recommended school location failed to offer a FAPE for the 2022-23 school year (*id.*). According to the parent, the April 2022 IEP failed to provide an appropriate class size, further arguing that the student required a "6:1:1" class with intensive 1:1 instruction from a special education teacher to make progress (*id.* at p. 5). The parent also argued that the recommended 12:1+4 special class was "grossly inappropriate" because it was "too large and too crowded" to provide the student with a "quiet, distraction-free environment he need[ed] in order to make progress" (*id.*). Further the parent alleged that the student has "highly intensive management needs" which mandated a placement in a class with no more than six students who have similar needs and abilities (*id.* at pp. 5-6).

Next the parent alleged that the district failed to recommend an appropriate school location arguing that the recommended school location could not have implemented the April 2022 IEP as written (Parent Ex. A at p. 6). According to the parent, the assigned school site would have been unable to offer the student all of his recommended services without depriving him a substantial amount of instructional time in the classroom (*id.*). The parent contended that the recommended school location did not have a dedicated location for the student's recommended speech-language therapy pull-out sessions and that the locations where speech-language therapy took place would expose the student to other student who have behavioral needs (*id.*). Additionally, the parent alleged the school location presented safety risks and could not have provided the appropriate lighting the student needed to be able to engage with educational materials (*id.*).

The parent asserted that the unilateral placement of the student at iBrain was appropriate and there were no equitable considerations which would bar reimbursement (Parent Ex. A at p. 7). For relief, the parent requested direct payment of the cost of tuition at iBrain for the 2022-23 extended school year as well as the cost of related services, 1:1 nursing services, and a 1:1 paraprofessional (*id.* at pp. 7-8). The parent also requested prospective funding of special transportation with specific accommodations and an independent neuropsychological evaluation at public expense. The parent also sought an order directing the district to conduct necessary evaluations of the student within 30 days and to reconvene the CSE.⁵

B. Impartial Hearing Officer Decision

On October 28, 2022, the parties proceeded to an impartial hearing before the Office of Administrative Trials and Hearings (OATH) and first addressed the student's pendency (stay-put)

⁵ The parent's July 2022 due process complaint notice identified another student's name within her request for the district to reevaluate the student (Parent Ex. A at p. 8).

placement (Oct. 28, 2022 Tr. pp. 1-15).⁶ Following the October 28, 2022 appearance, the IHO issued an interim decision addressing pendency, which determined that the parties did not dispute that a May 23, 2021 IHO decision in a prior proceeding regarding the 2019-20 school year governed the student's pendency placement in this proceeding (Interim IHO Decision at p. 4; see Parent Ex. B). The IHO directed the district to fund the student's attendance, related services, 1:1 paraprofessional, 1:1 private nurse, and special transportation services at iBrain from the date the due process complaint notice was filed until a final resolution of the matter was reached (Interim IHO Decision at p. 5).

The impartial hearing reconvened on the merits on November 29, 2022, and concluded on January 27 2023, after four additional days of proceedings (Nov. 29, 2022 Tr. pp. 1-15; Dec. 2, 2022 Tr. pp. 1-8; Dec. 9, 2022 Tr. pp. 1-8; Dec. 29, 2022 Tr. pp. 9-17; Jan. 27, 2023 Tr. pp. 1-16). In a final decision dated February 13, 2023, initially the IHO noted that the district did not seek to introduce any evidence during the impartial hearing (IHO Decision at pp. 2-3; see Nov. 29, 2022 Tr. pp. 1-15) and found that the district failed to meet its burden that it offered a FAPE to the student for the 2022-23 school year (IHO Decision at pp. 4-5). Specifically, the IHO found that while the April 2022 IEP was admitted into the hearing record by the parent, the district offered "no explanation as to how the CSE made its recommendation, how the IEP appropriately describe[d] the st]udent, or whether the IEP [wa]s meaningfully calculated to confer [an] educational benefit" and further that the weight of the evidence supported the conclusion that the district failed to offer the student an educational program reasonably calculated to offer a FAPE for the 2022-23 school year (id.).

With respect to the unilateral placement of the student at iBrain, the IHO concluded the "[p]arent ha[d] not met [her] burden under Prong II by showing that [the s]tudent's individual special education needs were addressed" (IHO Decision at p. 6). The IHO found that the weight of the evidence did not establish that the student's individual special education needs were addressed by iBrain, and that the instruction offered was "reasonably calculated to enable the child to receive educational benefits" (id.). Specifically, the IHO noted that the while the 2022 iBrain education plan was provided during the impartial hearing, the parent did not provide any witness testimony to support the iBrain education plan (id.). The IHO noted that the 2022 iBrain education plan generally discussed the student's present level of functional performance, strengths, needs, and progress; however, the IHO described it as general information that was insufficient to establish that the unilateral program was specifically designed to meet the student's needs (IHO Decision at p. 6). In particular, the IHO held that the parent failed to provide specific information as to the types of services provided to the student and how those services tied into the student's needs and educational program (id.). Furthermore, the IHO found it was unclear what progress the student made while attending iBrain and how the progress, if any, related to the education program offered by iBrain (id.). The IHO denied the parent's request for tuition reimbursement with related services (id.).

With respect to the parent's request for an independent neuropsychological evaluation, the IHO held that since the parent expressed disagreement with the district's March 7, 2022

⁶ Most of the volumes of the transcripts submitted to the Office of State Review were not paginated consecutively. Accordingly, the transcript citations in this decision will reference the hearing date and corresponding page number.

psychoeducational evaluation and because the district failed to either provide the requested IEE or file a due process complaint notice to defend its evaluation, the parent was entitled to the requested IEE at public expense (IHO Decision at p. 7). As such, the IHO ordered the provision of an independent neuropsychological evaluation at public expense (*id.*). The IHO also ordered the parent to provide the district with copies of the independent neuropsychological evaluation report within 10 days after the completion of the report (*id.*).

IV. Appeal for State-Level Review

The parent appeals and asserts that although the IHO correctly determined that the district failed to meet its burden that it offered the student a FAPE for the 2022-23 school year, the IHO erred in finding that iBrain was not an appropriate unilateral placement for the student for the 2022-23 school year. The parent also argues that equitable considerations support the parent's requested relief, including that she is entitled to direct payment for the student's unilateral placement at iBrain.

Specifically, the parent argues that she need only show that the unilateral placement provides educational instruction specifically designed to meet the unique needs of the student, supported by such services as are necessary to permit the student to benefit from instruction. The parent further asserts that the necessary inquiry regarding the appropriateness of a unilateral placement is whether the program reasonably could have been expected, at the time of placement, to offer meaningful educational benefit to a student. The parent argues that the 2022 iBrain education plan is a "comprehensive document" regarding what academic instruction and services the student is receiving at iBrain. The parent argues that the CSE adopted most of the student's 2022 iBrain education plan into its April 2022 IEP, which indicated that the CSE agreed that the iBrain programming was appropriate.

Further, the parent alleges that the 2022 iBrain education plan does not only contain "general information" about what the student is receiving but also includes an extensive list of academic and related service annual goals, as well as a comprehensive assessment of the student's management needs and academic levels of performance. Also, the parent argues that because iBrain has been found to be appropriate at prior impartial hearings relating to the 2018-19, 2019-20, 2020-21 and 2021-22 school years, at the time the parent enrolled the student at iBrain for the 2022-23 school year, she reasonably believed that the placement at iBrain was likely to produce progress and not regression.

Lastly, the parent alleges that equitable considerations favor a full award of tuition and related services costs, including transportation costs, for the student at iBrain during the 2022-23 extended school year and that she is entitled to have the district directly pay iBrain. As such, the parent requests a determination that iBrain is an appropriate placement for the student for the 2022-23 extended school year and that equitable consideration favor an award of full tuition and costs of related services, including transportation, for the 2022-23 school year.

In its answer, the district responds to the parent's material with a variety of admissions and denials and requests that the SRO dismiss the parent's appeal. In particular, the district does not address the IHO's finding that it failed to offer the student a FAPE for the 2022-23 school year but asserts that the IHO properly determined that the parent did not meet her burden to prove that

iBrain was an appropriate unilateral placement and that she is not entitled to an award of direct public funding of the costs of the unilateral placement at iBrain.⁷

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 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

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 2022-23 school year and the determination that the parent is entitled to the requested IEE at a public expense, such findings are 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 parent.

⁷ The parent 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 parent's right to compose a reply. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

A. Unilateral Placement

The parent appeals the IHO's finding that she did not meet her burden to show that iBrain addressed the student's individual needs and offered instruction that was reasonably calculated to enable the student to receive educational benefits.

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 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 parent's unilateral placement of the student at iBrain for the 2022-23 school year. At the outset of this discussion, I note that the district offered no evaluative information into evidence, which was ultimately its burden to bear in this matter (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [holding that if the report and assessment information from the unilateral placement is deficient, the responsibility for the deficiency lies with the district, not the parents]). As indicated in the district's May 2022 prior notice, the April 2022 CSE relied on a March 11, 2022 vocational assessment, a March 11, 2022 social history update, an April 6, 2022 psychoeducational assessment, and an April 28, 2022 teacher report; however, those documents were not introduced into evidence for this matter and further, the April 2022 IEP only names such assessments but does not provide any information which may have been contained within the assessments or reports (see Parent Exs. A-I; Parent Pendency Exs. A-E; Dist. Exs. 1-2).⁸ Therefore, for purposes of this decision, I will rely on the student's needs as reflected in the 2022 iBrain education plan in order to determine whether iBrain was an appropriate unilateral placement for the student (Parent Ex. C).⁹

With respect to the student's cognitive functioning, the 2022 iBrain education plan stated that student was assessed with the measure "Quest Maps Learning and Assessment tool for Profound and Multiple Disabilities," which evaluated the student's cognitive skills (Parent Ex. C at p. 10). On the adapted cognitive assessment, out of a maximum possible score of 172 in each area, the student received a score of 48 in the area of consistency, a score of 51 in the area of independence, and a score of 49 in the area of generalization (id.).¹⁰ According to the iBrain education plan, the student's performance and participation varied depending on his level of alertness, and with assistance and support from his paraprofessional, he participated in a range of classroom activities and benefitted from a multisensory approach to keep him engaged (id. at p.

⁸ Included in the April 2022 IEP are results from a March 7, 2022 psychoeducational evaluation; however, an evaluation with that specific date was not reflected on the May 2022 prior written notice (see generally Parent Exs. D at pp. 1-3; E at p. 2).

⁹ Just as the iBrain education plan mimicked the elements of a public school IEP, it is apparent that CSE personnel then copied portions of the iBrain education plan directly into the April 2022 IEP (compare Parent Ex. C at pp. 1-2 with Parent Ex. D at p. 6), likely because the district and parent do not have significantly differing views of the student's needs and only diverge in certain areas with regard to how to address those needs. It can be said of both the public and private educational teams in this case that imitation is the highest form of flattery.

¹⁰ According to the iBrain education plan, "[t]he Quest for Learning curriculum skills were measured using iBrain metrics measuring independence, consistency, and generalization of skills," with each skill scored in each of the three areas, with possible scores between 0-4, resulting in a maximum possible score of 172 (Parent Ex. C at p. 10).

8). The student most often required maximal verbal and tactile cuing along with increased time to aid cognitive processing (id.).

Regarding the student's communication skills, the 2022 iBrain education plan stated that the student communicated through modalities including a voice output switch, the picture exchange communication system (PECS), vocalizations, gestures, eye gaze, facial expressions and had begun to trial a Tobii Dynavox device with speech generating software (TD Snap) using eye gaze (Parent Ex. C at p. 2). The iBrain education plan noted that the student made progress with switch use when given occasional tactile prompts to lift his wrist (id.). According to the results of the March 2022 Dynamic AAC Goals Grid 2 (DAGG-2), with regard to receptive and expressive language skills, the student achieved scores correlating to Level 2 (emergent transitional) with scattered skills in Level 3 (context dependent communicator) (Parent Ex. C at pp. 17-18). Receptively, the student responded to common gestures and understood that "photographs or picture symbols represent objects, common actions, people, or situations" and that he followed simple instructions with regard to routines and followed conversation when alert (id. at p. 18). Regarding expressive language skills, results of the March 2022 DAGG-2 assessment indicated that the student utilized multiple means of AAC to communicate including "high-tech AAC, switches, and high contrast picture cards placed on a black felt board" (id.). Further, the assessment indicated that the student also utilized gestures, body language, facial expression, and behavior purposefully to communicate; however, the reliability of those means of communication varied from day to day (id.).

The 2022 iBrain education plan indicated that the student's visual impairment significantly affected his access to visual information, and he required consistent, accurate presentation of reduced visually complex materials to build skills to use eye gaze technology for communication (Parent Ex. C at p. 12). The student benefitted from extended time for viewing, correct placement of simplified visual materials, and repetition (id. at p. 13). Further, at times he presented with "decreased arousal, motivation, or increased loss of visual stamina after a prolonged period of time utilizing his eye gaze device or high contrast picture symbols" (id. at p. 16).

Turning to the student's academic skills, the 2022 iBrain education plan stated that the student was able to utilize an AAC device to participate in academic tasks such as identifying the month, day of the week, season, year, or holiday with support from his paraprofessional (Parent Ex. C at pp. 14, 15). At iBrain, in the area of literacy the student was working on increasing his attention and actively engaging in reading activities (id. at p. 14). Additionally, the plan noted that the student required a learning environment with limited visual and auditory distractions, support from his 1:1 paraprofessional to help him stay on task (id. at p. 2). The student benefitted from breaks throughout the day to stay focused and regulated, and concepts must be repeated "in order for him to retain skills and knowledge and attain mastery" (id.). According to informal assessment measures of the student's reading skills, the student reportedly recognized some letters, enjoyed being read to, and during academic tasks, scanned between two choices of picture cards and used his switch device to confirm his choice (Parent Ex. D at p. 2). In writing, the student made marks on a paper with hand over hand prompts; however, he was unable to independently trace lines, letters, or shapes independently (id.). In math, the student labeled some numbers and objects as big or small on his device with prompts, and counted objects accurately with adult assistance (id.).

With regard to the student's social skills, according to the 2022 iBrain education plan the student had shown improvement in this area, noting that when the student was happy he smiled, laughed, and vocalized, and when upset, he communicated through facial expressions and closing his eyes (Parent Ex. C at p. 3). Additionally, the iBrain education plan revealed that the student enjoyed social games in a group such as Uno, music activities, and morning meeting in his classroom (*id.*). The student was working on producing social greetings and closures and engaging in conversation using switches with pre-recorded phrases to ask and answer questions (*id.*). Further, the iBrain education plan noted that although the student enjoyed being around both unfamiliar and familiar peers and staff, he required "occasional prompting to initiate communication" but was "very motivated by interacting with his peers and familiar adults as evidenced by his smile, vocalizations, and increased energy levels" (*id.*). The iBrain education plan also noted that the student benefited from participating in a small group of three to four peers to "increase his focus and successful communication attempts"; at times the student required assistance from a familiar communication partner to help interpret his communications attempts, specifically during his exposure to unfamiliar people, topics, or environments (*id.* at pp. 3, 4).

Regarding gross motor skills, the 2022 iBrain education plan indicated that the student used a manual tilt-in-space wheelchair for functional mobility across all environments (Parent Ex. C at p. 7). The student required complete assistance for navigating his environment and for transfers (*id.*). According to the plan, the student presented with low trunk muscle tone with hypertonic extremities, and he demonstrated very limited active, poorly graded, and uncoordinated movement (*id.* at pp. 7-8). The student was unable to actively move his lower extremities and presented with extensor tone with passive movement (*id.* at p. 8). Additionally, the student was "unable to initiate a chin tuck to raise his head from [a] mat in supine" (*id.* at pp. 10-11). According to the 2022 iBrain education plan, the student required and was provided with a gait trainer, knee immobilizers, bilateral ankle foot orthosis, and a supine stander to support standing in an upright position for an increasing duration of time and address the student's medical needs (*id.* at pp. 11, 31-32, 38, 54). The plan also noted that the student was provided with bilateral hand splits, and environmental modifications to support stretching, joint protection, and increased participation in activities (*id.* at pp. 7, 10, 20, 23, 28).

With respect to the student's fine motor skills, the 2022 iBrain education plan noted that the student was able to participate in activities via actions such as elbow flexion to activate a switch; however, the student required total assistance to handle objects and he was "unable to assume or maintain grasps secondary [to his] wrist and finger contractures, as well as limitations in distal active and passive range of motion" (Parent Ex. C at p. 5). According to the plan, the student utilized his bilateral upper extremities interchangeably with no preferred hand dominance (*id.* at p. 6). When activating a switch, the student demonstrated increased active movement in his left upper extremity and thus, a switch was usually positioned above his left dorsal wrist (*id.* at p. 6). About the student's ability to reach, the iBrain education plan stated that the student demonstrated the initiation of bilateral shoulder extension, shoulder elevation, and elbow flexion but did not initiate forward or lateral reaching (*id.*). Further, according to the iBrain education plan, the student presented with limitations in his ability to use a finger pinch, isolate his finger, voluntarily release objects, place objects in his hand or re-adjust his grasp of objects in his hands (*id.*). Also, the student presented with "[c]ontractures in his bilateral upper extremities [which] limit[ed] [his] participation in bilateral coordination tasks" (*id.* at p. 7).

As for the student's oral motor skills, according to the 2022 iBrain education plan, the student was assessed using the "Oral Speech Mechanism (via Talk Tools promoter feeding evaluation checklist)," Feeding and Swallowing Evaluation checklist, parent/caregiver report, and clinical observation/opinion (Parent Ex. C at pp. 26-27). According to the results of the informal assessments the student presented with "globally low tone as evidenced by open mouth posture" and "poor secretion management and anterior spillage of his secretions" (*id.* at p. 26). The iBrain education plan indicated that the student had intermittent "difficulty coordinating his breath and swallow as evidenced by his occasional coughing on his own secretions" (*id.*). Further, the student "require[d] frequent suction[ing] to remove his oral secretions" because "a consistent effective swallow [wa]s not always observed" (*id.*).

Regarding the student's self-care skills, according to the 2022 iBrain education plan, the student required full physical assistance from up to two people with all activities of daily living including dressing, toileting, grooming, feeding, and mobility transfers; however, he, "demonstrated the ability to initiate retraction of his arms through a loose jacket by initiating elbow flexion and shoulder extension" (Parent Ex. C at pp. 4-5). Further, with respect to equipment needs and other supports, the student required a wheelchair for mobility, a "ROHO seat cushion" for pressure relief, frequent re-positioning and pressure checks, bilateral resting hand splints, stretching due to his contractures, a 1:1 nurse to monitor his physical needs, medical safety, g-tube, suctioning and secretion management, monitoring of his frequent pressure ulcers, a 1:1 paraprofessional throughout the school day and therapy sessions to "assist[] with initiation and termination of movements, total assist transfers, multi-modal cues . . . set-up of equipment, donning/doffing of orthotics, access to and use of assistive devices and assistive technology" in addition to helping the student navigate all environments (*id.* at pp. 7, 9).

With respect to vocational skills, the 2022 iBrain education plan noted that the student "enjoy[ed] exploring his environment and the community as evidenced by exhibiting excitement, such as smiling and laughing, during environmental exploration" (Parent Ex. C at p. 9). According to the iBrain education plan, the student's vocational sessions, "involve[d] increasing his participation in his work-related duties as a maintenance assistant at school, given the support of his therapist and 1:1 paraprofessional" (*id.*). More specifically, the student's tasks included "drafting and responding to emails, checking in with classrooms about their supply inventory/what they need[ed], and handing out supplies" (*id.*). Further, the iBrain education plan indicated that the student completed job related tasks one or two times per week in OT by "utiliz[ing] his eye gaze along with one and two step switch activation to make choices and express preferences regarding th[ose] tasks," which required "minimal to moderate verbal and tactile cues to make consistent and accurate choices" (*id.*). In addition, the student "underst[ood] that first, [he] need[ed] to ask the teachers what supplies they need[ed]" before he could "get it and give it them" (*id.* at p. 23).

In conjunction with the supports and services described above, the 2022 iBrain education plan included strategies to address the student's management needs such as aided language stimulation; modeling and repetition; extended processing time; repetition of verbal clues with physical clues; opportunities for visual exploration; movement to encourage visual attention; direct instruction, multisensory support and repeated directions; a highly structured, small classroom with reduced visual and auditory stimuli and distractions; one on one instruction utilizing a direct instructional model; task lighting/backlighting; enlarged materials, high contrast, bright, bold

images; horizontal presentation; access to AAC; access to an instructional laptop with resources and software about literacy and math skills; real objects provided when possible, "then move to images of real items"; additional processing time, verbal, visual, tactile cues, and partner assisted scanning to provide choices for activities and communication; student should be addressed by name and staff should not speak about him without including him in the conversation; multi-sensory environment surrounded by peers; quiet, non-distracting environment when visually fatigued; verbal cues, praise and sufficient motivation to remain engaged; rest breaks as needed; high tech eye gaze SGD; "TD Snap software"; single voice output switches; mounting system for AAC devices; ankle foot orthoses worn during the day to prevent deformity and contracture; daily use of stander, adaptive bicycle, gait trainer, and benches; and the student's interests should be incorporated into his school day (Parent Ex. C at pp. 37-38). Additionally, the 2022 iBrain education plan described that the student needed a high degree of individualization of his curriculum and that his curriculum must meet the student's "high management needs" (*id.* at p. 8).

2. iBrain — Specially Designed Instruction

The evidence in the hearing record regarding the student's 2022-23 school year program at iBrain consists of the 2022 iBrain education plan (Parent Ex. C). The IHO acknowledged that the 2022 iBrain education plan "generally discuss[ed]" the student's present levels of performance, strengths, needs, and progress; however, he held that the information provided was insufficient to establish that iBrain was "specifically designed to meet [the s]tudent's needs," in that the parent failed to provide "specific information as to the types of services provided to [the s]tudent and how those services tied into [the s]tudent's needs and educational program" (IHO Decision at p. 6). For the reasons set forth below, review of the 2022 iBrain education plan sufficiently supports the parent's assertion on appeal that iBrain provided instruction and services specially designed to meet the student's unique needs and, therefore, was an appropriate unilateral placement for the student for the 2022-23 school year.

As discussed at length above review of the 2022 iBrain education plan report shows that it went considerably beyond the IHO's characterization of "general" insofar as it provided extensive information about the student's present levels of performance and needs in the areas of cognition, social skills, classroom participation, fine motor and gross motor skills, academics, vocational skills, vision, assistive technology and AAC, speech-language/communication, oral motor/feeding, OT, PT, and management and equipment needs (*see* Parent Ex. C at pp. 1-44).¹¹

The IHO's conclusory statement that the parent "failed to provide specific information as to the types of services provided to [the s]tudent and how those services tied into [the s]tudent's needs" is contrary to the documentary evidence. First, the 2022 iBrain education plan included approximately 18 annual goals with accompanying short-term objectives specific to the student in the areas of literacy, math, social skills, assistive technology, speech-language therapy, PT, OT, and music therapy (Parent Ex. C at pp. 44-62). To address the student's needs in literacy, math, and social skills, the 2022 iBrain education plan included annual goals which targeted answering inferential questions about a reading or academic activity, identifying various forms of currency,

¹¹ The 37 pages describing the student's present levels of performance in the April 2022 IEP provided a similar level of extensive detail regarding student's needs (Parent Ex. D at pp. 1-37).

and initiating conversations and asking questions to unfamiliar peers and adults (id. at pp. 44-46). The student's annual goals in these areas were to be measured by teacher observation, and iBrain recommended that the student receive instruction in a 6:1+1 special class setting (id. at p. 65).

The 2022 iBrain education plan included speech-language annual goals targeting the student's need to increase receptive language skills, pragmatic language skills, expressive language skills utilizing an AAC device, and tolerance for oral-motor exercises utilizing tools and sensory stimulation (Parent Ex. C at pp. 49-53). To address these needs, iBrain recommended that the student receive five 60-minute sessions per week of speech-language therapy (id. at pp. 53, 66). In the areas of PT and OT the 2022 iBrain education plan included six annual goals targeting the student's ability to maintain a sit position, take two steps and maintain an upright body position, and increase participation in academic, self-care, classroom, vocational, and leisure activities (id. at pp. 53-58). The student's PT and OT annual goals were to be addressed during five 60-minute individual sessions per week of both PT and OT (id. at p. 65).

Regarding vision education services the 2022 iBrain education plan contained two annual goals requiring the student to sustain his gaze to activate cause-and-effect games and activities and maintain visual fixation on curriculum-based materials with visual accommodations for CVI (Parent Ex. C at pp. 46-47). Also, the 2022 iBrain education plan included an annual goal targeting increased independence and proficiency with switch-use and an eye gaze SGD to participate in academic, therapeutic, and community activities (id. at p. 48). To address these annual goals, iBrain recommended that the student receive two 60-minute sessions per week of vision education services, and two 60-minute sessions of assistive technology services (id. at p. 66).

Regarding music therapy, the 2022 iBrain education plan included two annual goals for the student to increase comprehension and sequencing skills through "Music Executive Functioning Training," and initiate vocalizations with the use of "Therapeutic Singing" exercises (Parent Ex. C at pp. 58-59). iBrain recommended that the student receive two 60-minute individual sessions per week of music therapy and one 60-minute session of music therapy in a group per week to address these annual goals (id. at p. 66).

The 2022 iBrain education plan included an individualized healthcare plan that identified the responsibilities of the nurse and/or paraprofessional in addressing the intervention needs of the student regarding safety precautions related to seizure activity, aspiration risk and adequate intake, development and implementation of an emergency evacuation plan, maintaining skin integrity and hygiene, grooming and toileting care, and the use of devices and equipment due to mobility needs (Parent Ex. C at pp. 39-43). Two annual goals related to the duties of the student's paraprofessional included consulting with the school nurse regarding the student's medical needs, addressing the student's feeding, toileting, and ambulation needs, and consulting with the student's special education teacher and therapists regarding the student's academic and therapeutic needs (id. at pp. 59-62). To address these needs, iBrain provided full-time, 1:1 nursing and paraprofessional services (id. at p. 66).

Further, the 2022 iBrain education plan also included an annual goal regarding parent counseling and training and provided one 60-minute session per month of parent counseling and training to meet this need (Parent Ex. C at p. 66). Additional supports included in the student's iBrain plan required training of school personnel in the areas of two-person transfers, vision

adaptations and functioning, seizure safety, assistive technology use, and training for orthotics and related supports (id. at p. 67).

The evidence specifically describes each of the special education services offered to the student at iBrain and they clearly align with the student's needs. The IHO's statement that the parent failed to describe with specificity how the program and placement provided by iBrain "tied" into the student's needs is simply untrue (see IHO Decision at pp. 5-6). Upon my independent review of the hearing record, as discussed above the 2022 iBrain education plan shows that it adequately described the student's specific present levels of performance and special education needs, and contrary to the IHO's finding, iBrain developed annual goals and recommended a program of supports and services specially designed to meet those needs (see Parent Ex. C).

Turning next to the IHO's statement that the parent did not provide witness testimony to support her case, the hearing record shows that the parent had previously disclosed intended direct testimony by affidavit of two witnesses one of which was the parent, the witnesses were unavailable for cross-examination and counsel for the parent decided to withdraw the proposed direct testimony and proceed on the documentary evidence (Jan. 27, 2023 Tr. pp. 4-6). The district then objected to the remaining documentary evidence offered by the parent, asked that it be stricken, and sought dismissal of the entire case (id. at pp. 5-6). The district reasoned the parent's documentary evidence must be stricken due to a lack of foundation, that is, due to a formal rule of evidence (id. at p. 8). 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).

Notably, the IHO explicitly overruled the district's objection on this point and noted that the documentary evidence was admissible and that he would give them the appropriate weight (Jan. 27, 2023 Tr. p. 10). That ruling was correct. At the time of the decision, it appears that the IHO might have had second thoughts and would have preferred that witness testimony or other evidence concerning the student's educational needs and the delivery of services to him at iBrain had been provided by the parent to further bolster or corroborate the services described in the 2022 iBrain education plan, but the IHO did not provide any reasoning for the change in approach. In this case, the parent's detailed documentary evidence was the only evidence to which weight could be given, and as described above, it provided an ample basis upon which to conclude that the unilateral placement of the student at iBrain was appropriate for the 2022-23 school year.¹² The

¹² The transcript makes clear that the district's attorney thought he was going to cross examine the parent's proposed witnesses based upon prehearing disclosures; however, it is also clear that the district waived the right to present evidence in this case and did not even attempt seek to present rebuttal evidence after the parent elected

lack of such additional evidence does not render the iBrain education plan inadequate to demonstrate that iBrain was an appropriate unilateral placement for the student.

Turning to the IHO's finding that it was "unclear what progress [the s]tudent ha[d] made and how the progress, if any, relate[d] to the educational program offered by" iBrain (IHO Decision at p. 6), a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, [2d Cir. Dec. 26, 2012]; L.K., 932 F. Supp. 2d at 486-87; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).¹³ However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

In the request for review the parent cites to three sections within the 2022 iBrain education plan which highlight the student's progress while attending iBrain (Req. for Rev. at ¶ 27; see Parent Ex. C at pp. 17, 21, 30). Upon review of the three sections, it is difficult to determine when the student made the progress described as the iBrain education plan has two dates, the date of the initial report (April 16, 2022) and the date of the revised report (November 23, 2022) (Parent Ex. C at p. 1). Within the progress sections indicated by the parent, the iBrain education plan used language such as "[t]his past academic year, [the student] has shown great progress towards . . .," "has made steady progress in this area," "is quickly approaching goal criteria to meet his annual goals," and "[o]ver the past year" (see id. at pp. 17, 21, 30). It is unclear from the language used if the 2022 iBrain education plan was referencing the 2021-22 school year, the 2022-23 school year or the 2022 year in general. Further, the 2022 iBrain education plan indicated that the student's rate of progress was affected by his presenting medical needs, and "fluctuating levels of arousal . . . due to the severity of his diagnoses" (id. at p. 30). Despite the lack of information on when the student made progress, as read, the 2022 iBrain education plan was individualized to

not to proceed with witnesses as initially planned. In other words, the district's plan to defend itself was to rely on opposing counsel to present certain evidence, a plan that is at best a very risky strategy. In this case, the strategy has backfired on the district.

¹³ Conversely, the Second Circuit has also noted that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . 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"]; 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"]).

meet the student's unique needs and designed to help him make progress towards his annual goals.¹⁴

As stated previously, most of the information regarding the student, including his present levels of performance and service recommendations from the 2022 iBrain education plan, were carried over to the April 2022 IEP (compare Parent Ex. C at pp. 3-5, 10-12, 17-19, 22-27 with Parent Ex. D at pp. 1-5, 8, 12-13, 16-20, 23-28, 29-30). This suggests 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 education plan was appropriate and individualized to meet the student's needs. Based on the foregoing, given the 2022 iBrain educational plan, 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. Equitable Considerations

The parent argues that equitable considerations favor a full award of tuition and related services, including transportation, as she attended the April 2022 CSE meeting, visited the proposed assigned public school, provided the district with timely notice of unilateral placement, and did not fail to make the student available for district observations and evaluations.

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 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"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public

¹⁴ Regarding progress, the 2022 iBrain education plan specifically indicated that the student had shown progress in his ability to differentiate between increasing complex vocabulary words using picture symbols, use consistent wrist movements to activate switches, and towards his assistive technology, receptive and expressive language, and PT annual goals and gross motor function (see Parent Ex. C at pp. 14, 17, 21, 31, 33).

school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger., 348 F.3d at 523-24; Rafferty, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Further, 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. F; H). 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).

In the present matter, the district has not raised any equitable considerations that would warrant a reduction or denial of the parent's requested tuition reimbursement. Moreover, the evidence in the hearing record confirms the parent's assertion that she attended the April 2022 CSE meeting, participated during the meeting, shared information from iBrain with the CSE, and provided the district with timely notice of her intent to unilaterally place the student at iBrain (see Parent Exs. D at p. 75; G). Accordingly, I find that equitable considerations weigh in favor of the parent's requested relief.

C. Parent's Financial Obligation and Ability to Pay

The parent requests that the district fund the student's attendance at iBrain by directly paying iBrain, rather than by reimbursing the parent for the out-of-pocket costs of the student's tuition. The district argues that direct payment is not warranted because the parent failed to demonstrate the financial hardship that an award for direct payment requires (Answer ¶ 20).

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]). 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]).

With respect to the parent's financial obligation, the hearing record includes an enrollment contract signed by the parent on June 17, 2022 for the student's attendance at iBrain for the 2022-23 school year (Parent Ex. H). The contract with iBrain set out a base tuition that included the cost of academic programming, related services, a school nurse, and an individual paraprofessional for the student (id. at pp. 1-2). The contract further indicated that related services were not a part of the base tuition but would be included in the total tuition which would be paid in three installments (id.). The contract also indicated that assistive technology devices were not included in the base tuition but were included in the supplemental tuition (id.). The contract provided that the parent would be responsible for the tuition and supplemental costs for the student's attendance at iBrain (see id. at pp. 2-3). Further, the hearing record includes a transportation service agreement with Sisters Travel and Transportation Services, LLC, for the transportation of the student to and from iBrain for the 2022-23 12-month school year that the parent executed on June 16, 2022 (see Parent Ex. F). Here, the iBrain contract is sufficient to demonstrate that the parent incurred a financial obligation to pay the costs of the unilateral placement inclusive of related services and transportation.

With regard to the parent's ability to pay, since the parent selected iBrain as the unilateral placement and her financial status is at issue, it was the parent's burden of production and persuasion with respect to whether she had the financial resources to "front" the costs of the services (Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041). As discussed above, the parent has established a financial obligation for the costs of the student's tuition at iBrain; however, as correctly argued by the district, the parent has not demonstrated an inability to pay. For example, there is no evidence in the hearing record regarding the parent's financial resources, such as a copy of a recent tax return or evidence regarding the parent's assets, liabilities, income, or expenses. Given the lack of information in the hearing record regarding the parent's financial resources, direct payment is not an appropriate form of relief; however, tuition reimbursement, as well as reimbursement for the costs of transportation,

shall be awarded for the student's attendance at iBrain during the 2022-23 school year upon proof of payment for services delivered.

VII. Conclusion

Having found that the parent met her burden to prove that iBrain is an appropriate unilateral placement for the student for the 2022-23 school year and that no equitable considerations warrant a denial or reduction of relief, the parent is entitled to tuition reimbursement for the cost of iBrain and transportation expenses for the 2022-23 school year.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated February 13, 2023, is modified by reversing those portions which found that the parent did not meet her 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 payment and attendance, the district shall be required to reimburse the parent for the costs of the student's attendance at iBrain for the 2022-23 school year, including tuition and costs for related services, 1:1 paraprofessional, transportation, and fees.

Dated: **Albany, New York**
 April 27, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER