The University of the State of New York

The State Education Department
State Review Officer
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No. 23-100

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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 in part her request for direct payment of her son's tuition costs at the International Academy for the Brain (iBrain) for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it offered an appropriate educational program to the student for the 2022-23 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[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 appeal has been the subject of two prior State-level administrative review proceedings involving the student's stay put placement and the merits of a tuition reimbursement dispute for the 2021-22 school year during which the parent had unilaterally placed the student at iBrain (see Application of a Student with a Disability, Appeal No. 22-056; Application of a Student with a Disability Application of a Student with a Disability, Appeal No. 21-234). The parties' familiarity with this matter is presumed and, therefore, the facts related to the student's educational history, the procedural history of the case, and the IHO's decision will

not be recited here in detail. Briefly, the CSE convened for an annual review on December 17, 2021, to revise the student's IEP for the remainder of the 2021-22 school year and a portion of the 2022-23 school year (see generally Parent Ex. F). In June 2022, the parent sent a ten-day notice disagreeing with the recommendations contained in the December 2021 IEP, as well as with the particular public school site to which the district assigned the student to attend and, as a result, notified the district of her intent to unilaterally place the student at iBrain for the 2022-23 school year (see Parent Exs. A; I).

In a due process complaint notice, dated July 6, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). The parent requested direct payment to iBrain for the full cost of tuition, "in addition to the costs of related services, 1:1 private duty nursing services, and a 1:1 paraprofessional, as needed" (id. at p. 8). The parent also requested direct payment for the "special education transportation with limited time travel, a 1:1 transportation nurse, air conditioning, a lift bus[,] and a regular-sized wheelchair" (id.).

An impartial hearing convened on August 30, 2022 and concluded on March 23, 2023 after eight days of proceedings (Tr. pp. 1-215). In a decision dated April 24, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year, that iBrain was an appropriate unilateral placement, that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement, and that the district had established that the ordered funding should be reduced by 15 percent because the student did not attend school for two months (IHO Decision at pp. 8-19). As relief, the IHO ordered the district to directly fund the cost of the student's tuition at iBrain in the amount of $243,712.00 and special education transportation at the rate of $345.00 per trip "only for trips actually made" for the 2022-23 school year (IHO Decision at pp. 18-19).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer and cross-appeal thereto is also presumed and, therefore, the specifics of the allegations and arguments will not be recited.

The following issues presented on appeal must be resolved in order to render a decision in this matter:

1. Whether the IHO erred in determining that the district failed to offer the student a FAPE in the 2022-23 school year.

2. Whether the IHO erred in determining that iBrain was an appropriate placement to address the student's needs for the 2022-23 school year.

3. Whether the IHO erred in determining that equitable considerations favored tuition funding.

4. Whether the IHO erred in reducing the amount of funding by 15 percent or otherwise erred in the ordered remedy.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).[1]

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).

[1] 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., 580 U.S. at 402).

VI. Discussion

A. FAPE

During the impartial hearing, the parties and the IHO considered the impact of the fact that the student's December 2021 IEP had been the subject of a prior impartial hearing concerning the 2019-20, 2020-21, and 2021-22 school years, which resulted in a decision dated April 12, 2022 wherein an IHO found that the district had failed to offer the student a FAPE for each of those school years (see Parent Ex. B at pp. 11-12, 19; IHO Decision at pp. 4-6). In the present matter, there was motion practice regarding the effect the prior IHO decision concerning the December 2021 IEP had on the present matter and the IHO issued an interim order on the topic dated December 30, 2022 (see IHO Exs. I-III). In the December 2022 interim order, the IHO determined that the principles of res judicata prevented the district from defending the appropriateness of the December 2021 IEP in the present matter; accordingly, the IHO held that the district's "Prong 1 case herein shall be limited to presenting qualified testimony regarding a change in circumstances relative to the [s]tudent's needs between December 17, 2021, and the start of the 2022-23 school year" (IHO Ex. III at pp. 4, 6).

In the present matter the district appeals from the December 2022 interim order in support of its cross-appeal asserting that the IHO erred in finding that the district failed to offer the student a FAPE during the 2022-23 school year. In this decision, I need not delve into a lengthier discussion to address the district's challenge the December 2022 interim order, because there is a significant substantive defect in the district's written plan that provides an independent basis to affirm the IHO's finding that the district failed to offer the student a FAPE in the 2022-23 school year as set forth below.

The December 2021 IEP was the IEP that remained in effect at the start of the 2022-23 school year and was the IEP that the district asserted offered the student a FAPE for the 2022-23 school year (Parent Ex. F; see Tr. pp. 35-36). The December 2021 IEP is a lengthy document that in many ways parallels the description of the student and recommendations for educational services set forth in the "iBrain Report and Plan" developed by iBrain on December 16, 2021 (see Parent Exs. E at pp. 1-68; F at pp. 1-68). In fact, the district school psychologist testified that the December 2021 CSE copied portions of the iBrain report into the December 2021 IEP (Dist. Ex. 1 at ¶ 8).[2]

The December 2021 IEP developed by the CSE stated that the student required as part of his environmental management needs, among other things, one-on-one instruction using a direct instruction model, a small class size of no more than six students and a small class with similar peers (Parent Ex. F at p. 39; see id. at pp. 11, 18, 29). The iBrain report and plan also contained environmental management needs that included one-on-one instruction, a small class size of no more than six students, and a small class with similar peers (Parent Ex. E at pp. 35-36). However, while the December 2021 IEP states that the student required a small class size of no more than six students, the IEP itself did not recommend such a class placement; rather it recommended placing the student in a class with a student/teacher/supplementary school personnel or related

[2] The mere duplication of privately developed materials is not in and of itself impermissible, provided the materials are accurate and appropriate to address the students needs.

service provider ratio of "12:1+(3:1)" (Parent Ex. F at p. 58; see 8 NYCRR 200.6[h][4][iii]). In addition to noting that the student required a small class size of no more than six students, the December 2021 IEP also noted in several locations that the student was, at that time, attending a class with a maximum of six students at the unilateral placement and was making progress in that setting (see Parent Ex. F at pp. 7, 9, 11-12, 15-23, 29, 31-32, 67). An internal incongruity of this magnitude, wherein a CSE identifies a specific class placement as a need for the student in the IEP but then fails to recommend that specific setting, requires finding that the IEP did not offer the student a FAPE.[3] Accordingly, on this basis, I decline to overturn the IHO's finding that the district failed to offer the student a FAPE for the 2022-23 school year.

B. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private 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

[3] It may be that a larger class placement, such as a 12:1+(3:1) class setting, would have been appropriate for the student, but the IEP itself indicated that it was not an appropriate setting.

> 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).

In this case, the IHO reasoned that the testimony of iBrain's director of special education (director) together with the documentary evidence persuaded him that iBrain was an appropriate unilateral placement for the 2022-23 school year and that the district presented no evidence to the contrary (IHO Decision at pp. 14-17).

With regard to the parties' dispute over whether iBrain was an appropriate placement to address the student's special education needs, a brief discussion of those needs is warranted. The student began attending iBrain in July 2021 and the hearing record contained a September 2021 IEP update report prepared by iBrain (Parent Exs. A at p. 3; D). In the report the student was described as "a charming, happy, nonverbal[,] and non-ambulatory [four]-year-old boy" (Parent Ex. D at p. 1). He was curious about his environment and motivated to explore his surroundings (id. at p. 3). The student had frequent seizures and had previously experienced 80-100 seizures per day of up to 12 seconds in duration, but medication changes had reduced their frequency, duration, and observable severity (id. at p. 1). According to the iBrain report, the student "exhibit[ed] frequent light gazing" behavior and demonstrated a short attention span (id. at p. 2). The student "require[d] a modified environment that reduce[d] visual and sound distractions in combination with individual and small group instruction to allow him to thrive academically" (id.). According to the iBrain report, the student required maximum adult assistance to engage with non-preferred tasks and to engage with peers (Parent Ex. D at p. 2). He was able to "shift his gaze to look at a peer with maximal verbal prompting" (id.). The student required moderate adult support to engage with literacy materials through visual, tactile, and auditory means (id.). The student also required frequent repetition of concepts to retain skills (id. at p. 3).

With regard to communication, the student expressed himself using vocalizations and was able to understand between five and ten words (Parent Ex. D at pp. 3-5). The student was "aware of others" and sought "caregivers for basic wants and needs" (id. at p. 5). He required the assistance of a familiar person to interpret his vocalizations, facial expressions, and body language (id. at p. 4). In addition, iBrain recommended the student trial various high- and low-tech assistive technology (id. at pp. 10, 37).

Regarding skills addressed by occupational therapy (OT), the iBrain report indicated that the student did not assist with dressing or toilet independently, and he required assistance with

mealtime and hygiene routines (see Parent Ex. D at p. 7). The student sat upright independently with supervision, demonstrated rolling skills, and was able to reach for desired toys (id. at pp. 7, 14). OT sessions focused on improving the student's "hand skills, stamina, sensory processing, and participation in activities of daily living (ADLs)" (id. at p. 7). With regard to motor skills, the student required a two-person transfer for all transitions and moderate assistance to roll and stand, tolerated a variety of therapeutic positions, and demonstrated improved ability to sit with close supervision (id. at p. 8). In physical therapy (PT) sessions, the student "work[ed] on gait training endurance and stepping pattern" (id.). The physical therapist reported the student "require[d] close supervision during all the activities and frequent rest breaks before transitioning to a different activity for energy conservation" (id.).

iBrain's teacher of the visually impaired reported that while the student used his vision to attend to highly contrasted and illuminated materials, when presented with visually complex materials with overhead lighting on, he exhibited reduced functional use of vision and demonstrated "visual characteristics associated with [c]ortical [v]isual [i]mpairment" (Parent Ex. D at p. 8). The student also demonstrated impaired blink reflex and hand flapping in front of his eyes (id.). During vision therapy sessions, the student required guided exploration of materials, familiar routines, and extended time to localize to and process visual materials (id. at p. 9). According to the iBrain report, "[w]hen overhead lights were on, [the student] fixed his gaze towards the light source[] and he was unable to focus his attention on activities or visual materials presented to him" (id. at pp. 16-17).

Similar descriptions of the student and his needs were included in an iBrain report and plan dated December 16, 2021 (compare Parent Ex. D with Parent Ex. E). Beyond what had already been described, the December 2021 iBrain report and plan included information about the equipment the student used at school and noted that he "maintain[ed] an upright seated position, however, require[d] constant supervision and tactile/verbal cues due to decreased safety awareness, trunk/extremity weakness, and seizure concerns" (Parent Ex. E at p. 8). At times, the student became "overstimulated and distracted by increased noises, voices[,] and visual stimuli" (id. at pp. 8-9, 15, 17, 25). iBrain staff indicated the student's arousal level varied, and, at times of low arousal, it impacted his ability to participate in activities (id. at pp. 9, 11, 13, 15, 19, 20, 21, 22, 23, 24, 25). The student performed best in a quiet environment with few distractions (id. at pp. 2, 10, 11, 28).

In November 2021, the district evaluated the student for assistive technology services (Parent Ex. E at pp. 17, 26). Based on his developing skills, the district evaluation team recommended the student for a "high-tech" device to use for communication (id. at p. 17). The December 2021 iBrain report and plan stated that the student had been observed to activate his switches to perform functions such as initiate/terminate an activity, make appropriate requests during an activity, make appropriate comments and greetings, respond to yes/no questions, make a selection of objects/actions/activities, participate in cause-and-effect activities, discriminate between core words, and express rejection (id.).

A neuropsychological evaluation was completed in January 2023 (Parent Ex. N). The neuropsychologist reviewed the student's educational history, including his receipt of early intervention services, his seizure history, and his diagnosis of Lennox-Gastaut Syndrome, "a rare, severe form of childhood onset epilepsy associated with multiple and concomitant seizure types,

cognitive dysfunction, and notable abnormalities on electroencephalogram" (id. at p. 2). She further indicated "[the student's] presentation [was] consistent with Lennox-Gastaut Syndrome (of likely secondary etiology), characterized by profound cognitive impairment, learning difficulties[,] and behaviors that can appear 'autistic-like'" (id. at p. 6). She noted that the student was affectionate and interested in others but that "[h]is physical limitations and cognitive delays, however, inhibit his ability to fully display his social interests" (id.). Based on the results of the evaluation, the neuropsychologist found the student did not "demonstrate symptoms consistent with an [a]utism [s]pectrum disorder" (id.). The neuropsychologist recommended a "treatment model involving high intensity repetition across a variety of treatment areas" (id.).

Regarding the student's programming at iBrain, testimony from iBrain's director described iBrain as an ungraded special education program specifically designed for students with brain injuries (Tr. p. 120; Parent Ex. L at ¶¶ 1, 5). The program operated on a 12-month calendar for an extended school day (id. at ¶ 5). During the 2021-22 school year, iBrain consisted of four 6:1:1 classes and two 8:1:1 classes for students ages 5 through 21 (id. at ¶ 7). Each student at iBrain received an IEP that focused on improving their functional skills in all areas (id. at ¶ 8). A variety of strategies were used at iBrain such as direct instruction, behavior management, therapeutic intervention, and social interaction (id.). iBrain offered a variety of related services following a push-in/pull-out model in 60-minute sessions to address students' needs for positioning, transition time, and repetition (id. at ¶ 9). The director testified that students were grouped based on a combination of factors such as "the similarity of their learning profile" such as the devices utilized by the students or the types of student academic goals in order to ensure the students have appropriate peer models, with "typically no more than four years between the students in each class" (Tr. pp. 120-21).

Specific to the student in this matter, iBrain's September 2021 recommendation included a 12-month program in a 6:1:+ special class with four 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, five 60-minute sessions per week of individual speech-language therapy, three 60-minute sessions per week of individual vision education services, one 60-minute session per month of individual or group parent counseling and training, and one 60-minute session per week of individual, indirect assistive technology services (Parent Ex. D at pp. 45-46).[4] Additionally, the body of the September 2021 iBrain IEP indicated that the student participated in music therapy "three times per week" (id. at p. 10).[5] To further address the student's needs, iBrain recommended a full-time individual paraprofessional, a full-time individual nurse, a number of assistive devices to be used throughout the day and supports for school personnel including trainings on seizure safety, safe feeding protocols, vision impairment, allergy protocols, and safety precautions (id. at pp. 46-47).

[4] iBrain developed a report and plan for the student in December 2021; however, he program recommendations from the September 2021 iBrain IEP were the same in December 2021 except for OT (compare Parent Ex. D at pp. 45-47 with Parent Ex. E at pp. 65-67).

[5] Music therapy was not included in the summary of recommended special education program and services section (see Parent Ex. D at pp. 45-46). The iBrain director clarified in testimony that this was an oversight; she stated, "I forgot to add music therapy on these last boxes of the template, they [are] in an earlier section" (Tr. p. 127).

The September 2021 iBrain IEP included a variety of human, environmental, and material management needs such as one-to-one instruction using direct instruction, aided language stimulation, additional processing time, adult support for interpretation of nonverbal communication, close supervision due to a history of seizures, an "adaptive environment to reduce light-gazing and increase[e] activity participation", a "small class size of no more than six students," frequent rest breaks to avoid fatigue, "access to AAC," an instructional laptop, adapted seating, and a gait trainer (Parent Ex. D at pp. 18-19). The iBrain IEP also included an individualized health plan to address the student's seizures, physical disability, and cognitive and visual impairments (id. at pp. 19-24). iBrain developed numerous annual goals to improve the student's academic, cognitive, social, vision, speech-language, oral motor/feeding, gross motor, play/leisure, and self-care skills and ability to use assistive technology (id. at pp. 25-37).

In her direct testimony by affidavit, the iBrain director testified that during the 2022-23 school year, the student attended iBrain in a 6:1+1 special class and received, among other things, four 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, five 60-minute sessions per week of individual speech-language therapy, three 60-minute sessions per week of individual vision education services, one 60-minute session per week of individual music therapy, three 60-minute sessions per week of group music therapy, and one 60-minute session per week of assistive technology services, and used an assistive technology device throughout the day across his school environments (Parent Ex. L ¶¶ 13, 14, 16). The director testified that the student's class consisted of five other students ranging in age from four to seven (Tr. pp. 121-22). She explained that many of the students in the classroom used the same assistive technology device as the student, and that "when he ha[d] peers who [were] working on the same thing" it was reinforcing for him (Tr. pp. 190, 191-92). According to the director, support staff in the student's classroom were trained on the student's specific needs including seizure training, feeding safety protocols, cortical visual impairment and related accommodations, and two-person lift training (Tr. pp. 150-51).

Although evidence of academic progress does not itself establish that the unilateral placement was appropriate, also contrary to the district's assertion on appeal, there is evidence in the hearing record that shows the student made progress at iBrain. The iBrain director testified that student's progress at iBrain was measured through daily collection of session notes which was then rated on a scale and reviewed quarterly (Tr. pp. 148-49). In addition, iBrain utilized assessments completed "in preparation for the next upcoming IEP" but may assess a student "more frequently to detect areas of progress" (Tr. p. 149).

The parent testified that the student showed progress at iBrain, albeit slow (Tr. pp. 196-97; Parent Ex. K ¶¶ 9, 11, 12, 25). The iBrain director testified that the student had made improvements since beginning at the school (Tr. p. 136). Specifically, she stated that the student made progress in many areas of academic achievement, "ma[d]e choices, ma[d]e requests" and that his ability to attend had increased (Tr. pp. 136-137). The student showed an increase in his ability to participate in activities with less need for redirection from placing his hands over his eyes (Tr. p. 137). The director stated that with the student's increased communication skills, he demonstrated more understanding of math and literacy concepts (id.). The director testified that the student's goals had changed from last year in that the student no longer required maximum support to engage with a goal, instead he required moderate support (Tr. pp. 142-43). She stated

the student had progressed from using a single switch device to a more complex device that allowed him to make choices (Tr. pp. 190-91).

Under the totality of the circumstances described above, the evidence in the hearing record shows that the IHO correctly determined that iBrain was an appropriate unilateral placement for the student for the 2022-23 school year, provided instruction specially designed to meet his unique needs, and that the student made progress.

The district's arguments to the contrary are anemic at best. The district contends on appeal that there were no schedules or attendance records entered into the hearing record so that it was not possible to confirm how much of the student's day was dedicated to academics or related services or how many days the student attended school, that iBrain did not provide appropriate supports for the student as he was "unengaged" for approximately 20 percent of the time he was in school, and that there was insufficient evidence of progress. These assertions are unavailing in light of the evidence in the hearing record.

The district's arguments primarily relate to the student's performance or attendance while receiving services at iBrain. This is likely because, similar to the district's recommended program, the student's program at iBrain consisted of five hours per week of individual OT, five hours per week of individual speech-language therapy, and five hours per week of PT, along with assistive technology devices and services, and recommendations for the support of 1:1 paraprofessional services and 1:1 nursing services (compare Parent Ex. E at pp. 65-66, with Parent Ex. F at pp. 58-59). In other appeals with similar students at iBrain, the district has argued along similar lines that the parents were required to show in detail that the unilateral placement provided a certain minimum amount of instructional time in academics set forth in 8 NYCRR 175.5, an inapplicable regulation concerning the computation of State aid (see Application of a Student with a Disability, Appeal No. 21-125). This time, the district's argument leaves out the reference to the regulation in its point about limited academic instruction time, but as before, fails to appreciate the fact that the student is, in many respects, appropriately working on basic developmental, preacademic, and academic readiness skills in his related services in virtually all of his special education programming due to his deficits as described above.[6]

Next, to the extent the district asserts that it was "impossible to confirm" the instruction and services the student received at iBrain, during cross-examination, the district elicited testimony from the iBrain director that tended to bolster the view that services were being delivered in accordance with the iBrain IEP (Tr. pp. 126-35, 148-49). While the district may accurately state the fact that the parent's evidence did not include attendance records for the 2022-23 school year, the district points to no authority that requires a finding that a unilateral placement is inappropriate if the parent fails to produce attendance records, especially when the district did not pursue that line of inquiry during the impartial hearing or seek to obtain or introduce such records in in order to refute the director's testimony describing the services that the student received at iBrain for the

[6] To be fair, the parent's attorneys have also lobbed a similar theory at the district, indicating that the district cannot provide sufficient "academic" instruction and related services within the school day and ignoring the manner in which related services and instruction in preacademic skills can be addressed in tandem with one another, something that seems to permeate both the district's proposed programming and iBrain's programming in this case (Application of a Student with a Disability, Appeal No. 22-055).

2022-23 school year (Parent Ex. L at ¶¶ 13-16). The district's vague speculation that other evidence might have presented a different picture of the student's programming at iBrain is insufficient to rebut the evidence that was presented during the hearing.[7] Additionally, as discussed below, to the extent that the student was absent from the unilateral placement for a period of time, the IHO appropriately addressed that point among the equitable considerations. Thus, contrary to the district's assertion, review of the iBrain documents shows that they explained in detail the program of academic instruction and related services the student would receive, and the iBrain director testified as to the student's specific programming (Parent Exs. D at pp. 3, 45-46; E at pp. 3, 65-66; L at ¶ 13).

I next, turn to the district's claim that iBrain was insufficiently supportive as the student at times presented with low arousal and exhibited reduced engagement in activities. As noted by the district, the September 2021 iBrain IEP and the December 2021 iBrain report and plan indicated that occasionally the student presented "with low arousal with eyes closed, sleeping or crying" and that when the student had difficulty engaging in activities when he had low arousal and when he was tired or agitated he exhibited increased self-stimming behaviors, further noting that on days when he presented like this he resisted most activities and that it occurred approximately one day per week (Parent Exs. D at p. 20; E at pp. 29-30). However, it must also be noted that this is only a small portion of how the student is described in the iBrain reports and it must be weighed against the expectations for the student. Omitted from the district's assertion is that the hearing record also includes extensive evidence showing that this student has a significant seizure disorder for which he takes medication and per parent report, at one point he had experienced 80-100 seizures per day, lasting up to 12 seconds (Parent Exs. D at p. 1; E at p. 1). Additionally, as discussed, the district does not offer any indication as to what an appropriate recommendation would have been to address the student's low arousal or present an argument as to why it would not be addressed with the support of individual paraprofessional services as well as individual nursing services. Although changes in medication have reduced the frequency of the student's seizures, in light of the student's significant health-related issues, it is disingenuous for the district to argue that the supports the student received while at iBrain, which included both a 1:1 nurse and 1:1 paraprofessional, were "insufficient to address and compensate for [the student's] deficits."

C. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. 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

[7] Other evidence might have been relevant to the district's attempts to defend the case, but there is no indication in the hearing record that the district sought out evidence through a subpoena signed by the IHO or by other permissible means.

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 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 v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Turning to the parties' disagreements over equitable considerations in this matter, the primary dispute concerns the IHO's 15 percent reduction of the amount of direct funding for tuition at iBrain during the 2022-23 school year (see IHO Decision at pp. 13-17).[8] The IHO based the reduction on a finding that the parent had voluntarily removed the student from iBrain and personally conducted a portion of the student's programming remotely for roughly two months at the beginning of the 2022-23 school year over a dispute between the parent and iBrain about which iBrain campus the student would attend (IHO Decision at pp. 16-18; see Tr. pp. 198-202). The parent contends that having found that iBrain was an appropriate unilateral placement and that equitable considerations otherwise supported reimbursement, the student's "lack of perfect attendance" was not a proper basis to reduce tuition funding on equitable grounds (Req. for Rev. ¶¶ 17-26).

The parent's testimony established that the decision to suspend the student's attendance at iBrain for a two-month period at the beginning of the 2022-23 school year was a voluntary choice made by the parent rather than something forced on the parent by circumstances such as the student's health, the Covid-19 pandemic, or an inability of iBrain to provide services (see Tr. pp.

[8] The district contends, as part of its cross-appeal, that the "costs of iBrain's tuition and related services are excessive" (Answer and Cross-Appeal ¶23). However, there is no evidentiary basis in the district's answer—other than a reference to the iBrain contract—or the hearing record that would support such a finding and I decline to make one without a more detailed argument and evidence of the costs being excessive.

198-202). The parent related that "in the first couple of months, [the student] didn't really attend . . . [h]e was doing a lot of home HET and visual remote learning" (Tr. p. 198). The parent further related that "[t]here was a discrepancy about which location he would attend. And I wanted him to attend the Manhattan location . . . [s]o I was holding off in person in the Brooklyn location" (id.). When asked the reason for his preference for a particular campus, the parent replied that it was more of a personal preference" based on the parent's overall experience with the borough rather than the school itself (Tr. pp. 199). Concerning the programming the student received during the time period the student was at home, the parent related that the iBrain curriculum was employed including "nursing, and everything was pretty much the same, except for being in the home and myself providing the services. But [iBrain] w[as] very good at directing, and he had the benefit of being [] at home, which he's very comfortable and responsive to" (Tr. p. 200). The student did not receive music therapy during this time period (id.).

Overall, the IHO's decision to place a limitation on tuition reimbursement was supported by the evidence and was not an abuse of his discretion to reduce tuition funding or reimbursement based on equitable considerations. It would be inequitable to require the district to pay for 100 percent of the costs associated with an appropriate unilateral placement when the parent voluntarily decided not to use the available programming due to personal preferences and, overall, I find the factual circumstances in this case wherein the parent returned the student to iBrain in person soon thereafter do not tip the balance of equitable circumstances so heavily in favor of the district as to deny tuition reimbursement completely. Accordingly, I will not disturb the IHO's 15 percent discretionary tuition reduction.

Additionally, I decline to disturb the IHO's order that the cost of transportation be funded on a "per trip" basis under the same equitable basis. During the two-month period when the student did not require transportation to and from iBrain, the reason the student did not require that service was a choice made by the parent to decline to send the student to the school. As noted by the parent, the transportation contract requires the parent to pay for the cost of transportation calculated on a per trip basis regardless of whether or not the student uses the service (Parent Ex. H at pp. 1-2). However, the normal reasons for absences from school such as a visit to the doctor or illness are not contemplated in this circumstance as the parent has made the decision to remove the student from the unilateral placement for a significant period of time for no reason other than the parent's personal preference. The parent's view that she can enter into a private transportation agreement, voluntarily decline to accept a portion of the services, and expect the district to reimburse her in full from the public fisc is unreasonable. Accordingly, I will uphold the IHO's order for funding of the costs of the student's transportation on a "per trip . . . only for trips actually made" calculation on an equitable basis as it would be inequitable to require the district to pay for services that the parent has refused (IHO Decision at pp. 18-19; Parent Ex. H).

D. Funding for 1:1 Nursing Services

The parent appeals from the IHO's finding that the request for funding for the costs of a 1:1 nurse had been withdrawn (IHO Decision at p. 2 n.1; see Req. for Rev. ¶ 33-39). The IHO noted the parent requested private duty nursing services in her due process complaint notice but deemed the request withdrawn finding that the parent had "submitted no evidence or testimony with respect thereto, and made no request for such funding in her closing brief" (IHO Decision at p. 2 n.1; see Parent Ex. A at p. 8). However, the parent asserts that there was evidence of the

student's need for 1:1 nursing services submitted into the hearing record. Indeed, the student's need for a 1:1 nurse is reflected in iBrain's September 2021 IEP, iBrain's December 2021 report and plan, the student's December 2021 IEP developed by the CSE, and the affidavit testimony of iBrain's director (see e.g., Parent Exs. D at p. 46; E at p. 64-66; F at pp. 59, 64; L at ¶¶ 14-16). Additionally, iBrain's director described the training the school's "nursing staff" participated in and the parent mentioned "nursing" as being part of the "home services" the student received (Tr. pp. 150-51, 199-200).

However, there is a problem in ordering funding or reimbursement for 1:1 nursing as there is no evidence in the hearing record as to how or by whom the student's 1:1 nursing services are provided, nor is there any evidence that the parent is legally obligated to pay for 1:1 nursing services for the student.

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

Unlike the E.M. case, there is no proof of any agreement, either written or oral, between the parent and whoever delivered individual nursing services to the student to show that the parent was responsible for the costs of the nursing services for the 2022-23 school year.

The contract for the student's attendance at iBrain for the 2022-23 school year noted in the "Supplemental Tuition" section that the "Base Tuition" does not include the cost of related services, a transportation paraprofessional, or "any individual nursing services" (Parent Ex. G at pp. 1-2). The contract further sets forth a list of "supplementary services" that the student's program will include, sets a cost for these services, and lists a variety of related services including OT, PT, speech-language pathology, vision education services, assistive technology, music therapy, and parent counseling and training (id.). However, individual or 1:1 nursing services are not set forth as being included in the student's program nor, presumably included in the $111,720.00 figure identified as the "total Supplementary Tuition for the 2022-23 school year" (id.). Thus, on this hearing record, there is insufficient basis to determine how 1:1 nursing services were delivered to the student, by whom they were provided, or whether the parent has a financial obligation to pay for such services. or, if so, what the cost of those services were. Accordingly, there is insufficient basis presented by the parent, focused solely on the student's need for 1:1 nursing services and providing no argument or evidence how or by whom such services were provided, who would be paid for such services, or how much they would cost. Under the circumstances presented in this matter, the parent's request for a determination that the district pay for privately obtained nursing services must be denied.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2022-23 school year, that iBrain was an appropriate unilateral placement and that equitable considerations supported a reduced tuition award, the necessary inquiry is at an end.

I have considered the remaining contentions, including the district's argument that the IHO erred in finding that the student's IEP could not be implemented at the particular school site assigned to the student, and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 16, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER