The University of the State of New York

The State Education Department
State Review Officer
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No. 23-136

Application of a STUDENT WITH A DISABILITY, by her 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 Ezra Zonana, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the International Academy for the Brain (iBrain) for the 2022-23 school year. The 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 parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

The CSE convened on February 18, 2022 and June 21, 2022, to formulate the student's IEP for the 2022-23 school year (see generally Parent Ex. D; Dist. Ex. 2). The parent disagreed with the recommendations contained in the February 2022 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2022-23 school year and, as a result, by letter dated June 17, 2022 notified the district of her intent to unilaterally place the student at iBrain and seek public funding for that placement (see Parent Exs. D; G). 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).

An impartial hearing convened on September 9, 2022 and concluded on April 20, 2023 after nine days of proceedings (Tr. pp. 1-193). In a decision dated June 2, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year and determined that iBrain was not an appropriate unilateral placement for the student (IHO Decision at pp. 5-22). Accordingly, the IHO denied the parent's request for funding of the cost of the student's tuition at iBrain for the 2022-23 school year and denied the parent's request for funding of transportation and the cost of 1:1 nursing services for the student (id. at pp. 4, 20, 22). Additionally, the IHO directed the district to conduct evaluations of the student in all areas of suspected disability and to reconvene a CSE to make modifications to the student's IEP (id.).

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 thereto is also presumed and, therefore, the specific allegations and arguments will not be recited here. Given that the district has not cross-appealed from the IHO's finding that the district failed to offer the student a FAPE during the 2022-23 school year, the crux of the parties' dispute on appeal is whether the IHO erred in finding that iBrain was not an appropriate unilateral placement for the student and in the event the IHO did err, what the appropriate remedy would be.[1]

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,

[1] Since the district does not appeal from the IHO's finding that the district failed to offer the student a FAPE during the 2022-23 school year, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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]).[2]

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

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

VI. Discussion

A. 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

[2] 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).

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).

The IHO found that although iBrain's IEP was "comprehensive," the parent had failed to meet her burden to prove that iBrain was an appropriate unilateral placement because the hearing record showed that "the mandates set forth in that IEP were not all being met" and "there [wa]s scant evidence in this record regarding the progress the [s]tudent ha[d] made while attending [iBrain]" (IHO Decision at pp. 8-12).

The parent argues that the IHO erred in finding that iBrain was not an appropriate unilateral placement, contending that, at the time the student was placed at iBrain, the placement was likely to produce progress and not regression.

The district argues that the IHO's finding that iBrain was not an appropriate placement for the student should be affirmed because of iBrain's "complete failure" to deliver related services as mandated by her iBrain IEP (Answer at ¶ 5).

The parent cites to the case B.R. v. New York City Dep't of Educ. (910 F. Supp. 2d 670, 677 [S.D.N.Y. 2012]) for the theory that "[t]he 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" (Req. for Rev. ¶¶24-25 emphasis

in original). However, that case concerns the adequacy of a program recommended by a CSE, noting that "retrospective testimony that the school district would have provided additional services beyond those listed in the IEP may not be considered in a Burlington–Carter proceeding" (B.R., 910 F.Supp. 2d at 766 quoting R.E. v New York City Dept. of Educ., 694 F.3d 167, 186 [2d Cir. 2012]). The parent's view that a unilateral placement is only assessed at the time of the placement decision also elides the portion of the standards above potentially requiring proof of educational and related services being implemented in a unilateral placement (Gagliardo, 489 F.3d at 112 [holding that parents must "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"]) as well as the fact that consideration of the student's progress in attendance at the unilateral placement is a relevant factor to determining the appropriateness of the unilateral placement.

Related to the implementation of the unilaterally obtained services during the 2022-23 school year, is the student's progress. 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 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; 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. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).[3] 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]).[4]

[3] 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"]).

[4] But the district, or the IHO cannot hold the parent to an outcome-based standard because the IDEA was not designed to ensure guaranteed outcomes for students with disabilities, even with the provision of specially designed instruction for their unique needs (see Walczak, 142 F.3d at 133 [stating that "IDEA requires states to provide a disabled child with meaningful access to an education, but it cannot guarantee totally successful results"]; M.H., 685 F.3d at 245 [noting that the "[t]he purpose of the Act was instead 'more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside' [citations omitted]]). Thus, to the extent that the district argues that the hearing record lacks objective evidence of the student's progress at iBrain during the 2022-23 school year, a finding of progress is not a per se requirement 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

With regard to the parties' dispute over whether iBrain provided the student with specialized instruction to address the student's unique needs, the evidence shows that the IHO correctly determined that the parent did not meet her burden to prove that iBrain provided an appropriate unilateral placement for the student during the 2022-23 school year.

The hearing record contains sufficient information to identify the student's special education needs for the 2022-23 school year. The iBrain plan indicated that student had health needs related to her infantile spasms, legal blindness, hearing loss, and global developmental delays (Parent Ex. C at pp. 48-53). In her written testimony, iBrain's director of special education stated that the student's classification of a student with "TBI" warranted the use of a direct instruction model as well as an intensive regimen of related services (Parent Ex. J ¶¶ 1, 12). Regarding cognitive present levels of performance, the February 2022 iBrain plan indicated the student was often self-directed and required significant support and repetition in order to follow directions, benefitted from the use of multisensory books with tactile support, and did not yet recognize letters, colors, numbers, shapes, or her name in print (id. at pp. 2, 17). Staff from iBrain reported that the student required consistent support from her 1:1 paraprofessional in order to engage with materials, attend, follow directions, communicate, and interact with others as well as for assistance with her safety (id. at pp. 3, 14).

With respect to her speech-language needs, the iBrain plan indicated that the student was nonverbal, communicated using facial expressions, vocalizations, body language, and was learning to use augmentative and alternative communication (AAC) devices (Parent Ex. C at pp. 1, 4). She presented with mild bilateral hearing loss for which she wore hearing aids; most often communicated by crying to express her wants and needs; benefited from a quiet low stimulus environment to reduce distraction and frequent breaks to increase attention and participation; required visually accommodated materials such as illuminated materials, dimly lit room, and toys with an auditory component; and required the full assistance of a familiar person to observe her emotional state, body movements, and behaviors to determine her wants and needs (id. at pp. 26-28, 32). The iBrain plan stated that the student had been participating in five 60-minute sessions per week of speech-language therapy in an individual setting to address all of her speech, language, and oral motor/feeding goals and that the mandate was necessary to make certain that the student experienced success in the most supportive, accommodated, and appropriate environment for her needs (id. at pp. 26, 35).

The iBrain plan stated that due to the student's hearing challenges, the team recommended two 60-minute sessions per week of hearing education services, in support of increasing the student's understanding and use of language to communicate, process information, and to complete tasks and it was noted that these sessions were also necessary to ensure that the student generalized her developing skills and understanding across all activities in the school day (Parent Ex. C at pp.

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dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; see also Frank G., 459 F.3d at 364). However, a finding of progress is, nevertheless, a relevant factor to be considered because, under the totality of the circumstances, it can lend support to other evidence adduced by parents who are attempting to satisfy the second Burlington/Carter criterion (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]; see T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]).

36, 87). The student had also received a diagnosis of cortical visual impairment and legal blindness; according to the iBrain plan, the student "was able to use her vision functionally when provided with illuminated or spotlighted materials in a dark or dimly lit room" (id. at p. 17). To address vision needs, iBrain staff recommended that the student receive three 60-minute sessions per week of vision education services (id. at pp. 17, 87).

In the area of occupational therapy (OT), the iBrain plan indicated that the student benefited from an alternate seating position, repetition of tasks, and rest breaks that involve preferred sensory input involving movement, vestibular input and/or proprioceptive input to increase her engagement and productivity, and reportedly the student required activities that involve sensory regulation throughout the school day (Parent Ex. C at pp. 36-38). The iBrain plan stated that the student would continue to benefit from five sessions of individual OT per week and that she required 60-minute sessions to allow adequate time for transitioning to the appropriate therapy space, transfers, preparatory activities, equipment setup, rest breaks, demonstrations, redirection, repetition, processing time, and care giver education (id. at p. 40).

Reportedly, the student was nonambulatory and required moderate to total assistance in dressing, toileting, and grooming skills and required minimal assistance in feeding and transfers (Parent Ex. C at pp. 1, 4-8). Staff from iBrain also reported that the student's frequent spasms interrupted her motor control process, such that it took her a few moments to get back to tasks and that on days when she experienced seizures, her endurance levels were lower and she was more difficult to motivate (id. at p. 15). Regarding physical therapy (PT), the iBrain plan reported that the student required equipment including but not limited to a gait trainer, stander, bunches and balls; intermittent redirection to tasks and rest breaks between activities; the consistency of daily, 60-minute PT sessions using a push-in and pull-out method in order for maximal participation in PT and to make gains in physical development (id. at pp. 40-43).

The student's identified management needs included a class environment with limited visual and auditory distractions, the support of a 1:1 paraprofessional, adaptive equipment, access to an AAC device, sensory rest breaks, use of mats and floor time, alternative seating positions, multi-sensory approach, adaptive feeding utensils, and verbal and tactile cueing (Parent Ex. C at pp. 46-48).

Turning to the issue on appeal, in affidavit testimony the parent stated that she re-enrolled the student at iBrain for the 2022-23 school year because it was appropriate for the student and she was making progress there (see Parent Ex. I ¶ 11). The director explained that the February 28, 2022 implementation date for most of the services offered in the iBrain plan was "not exactly" on the start date of the school year, but that the majority of the implementation of that plan would be during the 2022-23 school year and also that this plan was "essentially the one that we're continuing off of for this school year" (Tr. pp. 134-35; Parent Ex. C at pp. 86-88).

For the 2022-23 school year the February 2022 iBrain plan offered a 12-month program consisting of a 6:1+1 special class placement along with related services consisting of five 60-minute sessions per week of individual OT, PT, and speech-language therapy; three 60-minute sessions per week of individual vision education services; two 60-minute sessions per week of individual hearing education services; one 60-minute session per week of individual orientation and mobility services; and one 60-minute session per month of parent counseling and training

(Parent Ex. C at pp. 86-87).[5] In addition, the February 2022 iBrain plan called for the support of a 1:1 paraprofessional throughout the school day, transportation services, assistive technology services and devices, and training for school personnel in the areas of seizure safety, use of adaptive equipment, assistive technology, and vision-based adaptations (id. at pp. 86-89). The February 2022 iBrain plan included annual goals in the areas of academics, social skills, vision, hearing, assistive technology, speech-language, oral motor, PT, OT, self-care, music therapy, parent counseling and training, and paraprofessional support (id. at pp. 54-82). An individualized health plan outlined the student's assessment data, nursing diagnosis, goals, nursing interventions, and expected outcomes related to needs associated with the student's diagnoses (id. at pp. 48-53).

In her written testimony the director stated that the student began attending iBrain in October 2021 and had attended the 12-month extended school year program at iBrain during the 2022-23 school year (Parent Ex. J ¶ 11). The director stated that, during the 2022-23 school year, the student attended a 6:1+1 special class and received the related services and supports, including 1:1 paraprofessional services, contained in the iBrain plan and detailed above (compare Tr. p. 156; Parent Ex. J ¶¶ 13-17, with Parent Ex. C at pp. 86-87). However, during the impartial hearing evidence emerged that significant portions of the related services recommended in the iBrain plan for the student's 2022-23 school year were not being provided to the student.

With respect to the delivery of related services during the 2022-23 school year, the iBrain director of special education testified that the school was short of providers in each department and that the student was receiving her services weekly but not at the full mandates set forth in the iBrain plan (Tr. pp. 156-57, 159, 161, 164, 167-68). The director testified that it was her understanding that the student received related services "at least a few times a week," that it was "most typically two to three times per week at least" for each of the mandated related services and that she could not confirm that the student had received all of the up to five sessions of a particular related service in any week during the year (see Tr. pp. 161-63). She explained that the school was planning to make up any and all sessions that were missed, in some cases "over the break" (Tr. pp. 157, 160, 162-63). The director indicated that it was her understanding that additional OT providers were going to start at the beginning of May 2023, bringing the school "back to capacity with [OT]" but she did not indicate that shortages in other related services areas had been remedied (see Tr. pp. 159-60, 165, 167).

The director acknowledged that she did not have the exact data on the "fluctuations" in services because she did not oversee related services (Tr. pp. 158-59). She also stated that she believed iBrain maintained records of the number of sessions of related services that the student had received over the 2022-23 school year, but she did not have them, and none were entered into the hearing record (Tr. p. 164; see Parent Exs. A-M; Dist. Exs. 1-2).

Without any records detailing the amount of related services actually provided to the student, the best estimate of the services the student received is from the director's testimony, which indicated that the student was receiving "typically two to three" related service sessions per week without specifying any specific area, which when compared with the recommended program

[5] While within the annual goals section, the iBrain plan included music therapy annual goals and the recommendation for music therapy services, the plan's summary of recommended special education programs and services did not indicate a recommendation for music therapy (Parent Ex. C at pp. 75-78, 86-87).

show that the student received somewhere around or a little above half of the recommended speech-language therapy, OT, and PT services (compare Parent Ex. C at p. 87, with Tr. pp. 161-63). Further, as the testimony above was given at a hearing date in May 2023, it appears unlikely that there was enough time to reasonably make up such a large amount of missed services before the end of the 2022-23 school year. Additionally, this shortage of implemented sessions is of heightened concern since the iBrain plan highlighted the necessity of the consistency of daily, five days a week, therapy sessions for the student to make gains and progress (Parent Ex. C at pp. 35, 40, 41, 69, 71, 75).

Therefore, while the February 2022 iBrain plan may have been adequate to meet the student's needs in terms of its recommendations for the student's program, the director acknowledged that the student had missed a substantial amount of the services which were recommended in the iBrain plan. Given that a large part of iBrain's educational programming for the student consisted of related services, and further considering the statements included in the iBrain plan indicating the student required five sessions per week in each of speech-language therapy, OT, and PT (Parent Ex. C at pp. 35, 40, 41), the failure of iBrain to adhere to its plan and deliver the mandated related services, as recommended, supports the IHO's finding that the parent failed to prove that iBrain provided educational instruction specially 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 also argues that contrary to the IHO's findings, she provided "a substantial amount of evidence, testimony and otherwise," showing the student's progress at iBrain. The district argues that the parent failed to present evidence of progress. In considering the evidence of progress made by the student at iBrain during the 2022-23 school year, I note again that no one factor, including progress, is necessarily dispositive in determining whether a parent's unilateral placement is reasonably calculated to enable the child to receive educational benefits; rather it is the totality of the circumstances that must be considered in assessing the appropriateness of a unilateral placement. Additionally, a unilateral placement is not mandated by the IDEA or State law to provide services in compliance with a plan such as an IEP. Rather, it is well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of the student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). "The test for the private placement 'is that it is appropriate, and not that it is perfect'" (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877–78 [2d Cir. 2016] [citations omitted]). Accordingly, while a finding of progress would not in itself be dispositive, it could be sufficient to overcome the evidence noted above regarding the failure to deliver the student's related services.

At the outset of this discussion, although the iBrain director of special education and the parent reference provider progress reports and "quarterly reports," the hearing record does not include any progress reports, quarterly reports, or provider notes from the 2022-23 school year, which would have been useful indicators of progress (Tr. pp. 97, 131, 185; see Parent Exs. A-M; Dist. Exs. 1-2).

Instead, review of the evidence in the hearing record reveals a lack of clarity with respect to whether the progress referenced therein occurred prior to or during the 2022-23 school year (see Tr. pp. 153-57, 173-77; Parent Exs. C; I; J; Dist. Ex. 2). Specifically, the parent's written testimony included a general statement that she reenrolled the student at iBrain, where she was making progress, yet although the parent's affidavit was not signed or notarized; on the last page, at the notary signature line, an August 2022 date was typed, which would have been too early to observe progress for the school year at issue (Parent Ex. I at p. 2).[6] During cross-examination, when asked to elaborate on the student's progress referenced in her affidavit, the parent explained that the student knew "how to stand up all on her own," became more verbal, "became more exploring," was "better tracking, and was using a sippy cup slowly (Tr. pp. 92-93).

In affidavit testimony, the iBrain director stated that the student continued to make progress in skills across all academic and related service domains in the relatively short time that she had attended iBrain and that she anticipated the student to continue to build on the progress she had made (Parent Ex. J ¶¶ 18, 19). The director noted that examples of the student's progress included an increased ability to follow one-step directions to complete class activities, increased independence in undressing herself, improved understanding cause and effect, improved ability to make choices, improved ability to sustain joint attention, and increased distance in walking in a gait trainer (id.). However, as with the parent's affidavit, the director's unsigned affidavit bears a date of August 2022, and it appears that the testimony was in regard to progress made before the 2022-23 school year (Parent Ex. J).

During the April 20, 2023 hearing, the director acknowledged that she did not work as a classroom teacher or a related service provider for the student and did not provide any services in "that direct capacity" (Tr. p. 172). She further stated that her work with the student was "mostly observational" and that she was usually able to stop and see the student for a few minutes at least a couple of times per week and that it was "her aim" to do a longer observation of about a half an hour approximately once a month (Tr pp. 171-72).

However, the director stated that she remembered the providers speaking about recent progress that the student had made but could not recall progress specific to each goal and could not be "100 percent sure" if the student was on track to meeting the goals in the February 2022 iBrain plan (Tr. pp. 174-75). The director stated that based on her conversations with the student's providers, they had generally seen pretty consistent progress and that from her own observations of the student "since she started with us," she had made a lot of progress in her ability and willingness to participate in a range of activities, in her level of engagement, in her understanding of cause and effect activities, in her ability to use communication devices, and in following directions (Tr. p. 176).

Although there is some anecdotal evidence of progress in the hearing record, I decline to overturn the IHO's finding that the documentary evidence did not demonstrate meaningful progress for the student during the 2022-23 school year. Here, the hearing record lacks consistent information about the level of related services the student received, and does not show that the student made progress (see L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 490–91 [S.D.N.Y. 2013]

[6] The parent swore to the truth of the affidavit testimony at the impartial hearing (Tr. p. 76).

[in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; L.K., 932 F. Supp. 2d at 490 [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd, 471 Fed. App'x 77 [2d Cir. June 18, 2012]). Accordingly, while progress is not in and of itself dispositive of the appropriateness of a unilateral placement and a unilateral placement is not bound by the same standards as a district with respect to implementing a written education plan (Carter, 510 U.S. at 13-14 (recognizing that a private school placement is not required to follow the same procedural process of developing their own written IEPs for students in the same way as public school districts are), under the circumstances presented here, where the unilateral placement has deviated significantly from the specialized instruction it initially presented as an appropriate level of services for the student, a lack of demonstrable progress by the student under the program as actually delivered only further compounds the parent's inability to prove that iBrain was an appropriate unilateral placement for the 2022-23 school year.

Consequently, the IHO correctly found that the parent did not meet her burden to establish the appropriateness of the services provided to the student by iBrain during the 2022-23 school year.

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 and that the parent has not carried her burden of demonstrating the appropriateness of the unilateral placement at iBrain for the 2022-23 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations weighed in favor of the parent's request for relief.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

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

STEVEN KROLAK
STATE REVIEW OFFICER