The University of the State of New York

The State Education Department
State Review Officer
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No. 23-271

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 Zack Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 those portions of a decision of an impartial hearing officer (IHO) which denied in part her request for direct funding for special transportation services for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's determination that the parent's unilateral placement of her daughter at the International Academy for the Brain (iBrain) was an appropriate placement and ordered it to fund the student's tuition costs at iBrain for the 2023-24 school year. The appeal must be sustained. 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 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. Briefly, the student in this matter has significant global developmental delays and began attending the International Academy for the Brain (iBrain) in April 2022 (Parent Exs. C at p. 1; I ¶ 11; Dist. Ex. 6 at pp. 2-3). The CSE convened on November 4, 2022 and finding the student eligible for special education as a student with a traumatic brain injury developed an IEP for the student with an implementation

date of November 14, 2022 (see generally Dist. Ex. 1).[1] On June 20, 2023, the parent disagreed with the recommendations contained in the November 2022 IEP, as well as with the public school site to which the district assigned the student to attend for the 2023-24 school year and, as a result, notified the district of their intent to unilaterally place the student at iBrain (Parent Ex. E). In a due process complaint notice, dated July 5, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year, raising issues related to the recommended 12:1+(3:1) special class, vision education services, music therapy, assistive technology, and transportation services—noting the lack of a recommendation for an air conditioned buss and limited travel time (Parent Ex. A).

An impartial hearing convened on September 18, 2023 and concluded on October 10, 2023 after three days of proceedings (Tr. pp. 1-125). In a decision dated October 23, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year, that iBrain was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 14-29).[2] The IHO then determined that the district's failure to show that it provided special transportation to the student rendered it responsible for the privately contracted special transportation services obtained by the parent, "but not necessarily the full contracted cost of the family's provider if that cost exceeds the upper limit of the market for comparable services" and that "absent a showing of unusual circumstances, the equities require that the amount to be reimbursed or paid by the district may be broadly informed by the market" (IHO Decision at p. 25). Although the IHO found that "there is no foundation in the record before me to define the market or its boundaries" he nonetheless ordered that, with respect to transportation services already provided, the district was obligated to reimburse or directly pay for the cost of the private transportation "capped by the highest of three objective measures of market rates" and set forth the three objective measures as the "approved Medicaid rate"; the "approved Medicare rate," and "the highest rate paid by the district during 2023-24 for comparable services in a comparable vehicle with comparable staff provided by either its Office of Pupil Transportation (OPT) or entities contracting with OPT to provide such services for students placed by the district" (id. at pp. 25-26). The IHO made additional rulings with respect to the district's funding for transportation "prospectively" and the parent's submission to the district of "requisite medical forms reflecting the need for accommodations" (id. at p. 26).

As relief, the IHO ordered the district to fund the cost of the student's tuition and "all items that would routinely be included on the student's IEP pursuant to law and regulation, such as related services and augmentative equipment" at iBrain for the 2023-24 school year (IHO Decision at pp. 27-28). Next, the IHO ordered the district to fund the costs of private transportation "for each day actually transported during the 2023-24 school year up to the date of this decision at the rate billed, capped by the highest of the three measures detailed above" (id. at p. 28). The IHO ordered that

[1] The student's eligibility for special education as a student with a traumatic brain injury is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

[2] The IHO also issued a July 24, 2023interim decision concerning the student's pendency placement and two interim decisions regarding translation services during the impartial hearing dated September 28, 2023 and October 10, 2023 (IHO Decision on Pendency; Sept. 28, 2023 Interim IHO Decision; Oct. 10, 2023 Interim IHO Decision).

"thereafter, for the balance of the 2023-24 school year, the district may either (a) continue to fund the student's transportation services from the private provider for the balance of the school year at the rate ordered here, or (b) provide such transportation services through [OPT], subject to the caveats noted above . . . reflecting the medical need for such accommodations" (id.). Lastly, the IHO made orders pertaining to translation of the IHO decision and hearing transcripts for the parent, district evaluation of the student, and provision of a copy of the decision to future CSE participants (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, the district's answer and cross-appeal, and the parent's reply and answer thereto are also presumed and, therefore, the allegations and arguments will not be recited in detail. The gravamen of the parent's appeal is that the IHO erred in limiting the funding for private transportation relief. The crux of the district's cross-appeal is that the IHO erred in finding that the unilateral placement at iBrain was appropriate for the student during the 2023-24 school year.

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]).[3]

[3] 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).

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

Neither party appeals from the IHO's determination that the district failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at pp. 14-22). As such, this finding 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]). Therefore, the only issues left to be resolved are whether the IHO erred in finding that the parent's unilateral placement of the student at iBrain for the 2023-24 school year was appropriate and whether the IHO erred in the relief ordered.

A. Unilateral Placement

The district appeals from the IHO's finding that the parent sustained her burden to show that iBrain was an appropriate unilateral placement for the student during the 2023-24 school year. Specifically, the district alleges that the record was "devoid of any evidence" that the program provided to the student was individualized to meet the student's unique needs or that the student made progress at iBrain (Answer ¶¶ 13-15).

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 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 hearing record shows that the student began attending iBrain in April 2022 and that iBrain had developed an education plan for the student with a date of the original report listed as May 20, 2022 and a list of dates for report updates including October 5, 2022, November 3, 2022, and July 7, 2023 (Parent Ex. C at p. 1; H at p. ¶ 5). It is unclear from the hearing record if iBrain developed an education plan for the 2023-24 school year or if the recommendations contained in the iBrain education plan would have constituted the student's program for the 2023-24 school year.[4] However, as noted above, a private school need not develop its own IEP for a student (Carter, 510 U.S. at 13-14).

[4] Review of the iBrain education plan shows that it had been updated in October 2022, November 2022, and July 2023; however, there is little indication within the report which information in the plan was updated or when it was updated (see Parent Ex. C). The iBrain education plan did note the dates for some assessments as it indicated that communication and language assessments (Dynamic AAC Goals Grid 2, Communication Function

In his written testimony, the deputy director of special education at iBrain described iBrain as a private, highly specialized school for children who suffer from acquired brain injuries or brain-based disorders (Parent Ex. I at ¶ 5). He further explained that iBrain has an extended 12-month school year calendar and offers an extended school day (8:30 am – 5:00 pm) and that every student who attends requires a 1:1 paraprofessional to assist with activities of daily living (ADLs) and to access and benefit from the educational program (id.). The deputy director testified that at the time of the hearing the student was attending a 6:1+1 special class with the related services of five sessions per week of individual occupational therapy (OT), physical therapy (PT), and speech-language therapy, three sessions per week of individual vision education services, two sessions per week of individual AT services, and two sessions of individual and one group session per week of music therapy, all delivered in 60-minute sessions (id. at ¶ 13).[5]

The iBrain education plan described the student as nonverbal and non-ambulatory and indicated that she has received diagnoses of microcephaly, quadriplegic cerebral palsy, hypotonia, chronic encephalopathy, global delays, sensorineural hearing loss, strabismus, myopia of both eyes, and skull anomaly (Parent Ex. C at pp. 1, 18; H at ¶ 3). The student has also been diagnosed as having a specific genetic mutation (Parent Ex. C at p. 1; H at ¶ 6).

With regard to speech and language development, the iBrain education plan indicated that the student exhibited delays in her receptive, expressive, and pragmatic language skills, and communicated primarily through body movements, facial expressions, vocalizations, and crying, as well as a variety of mid to high tech augmentative and alternative communication (AAC) devices (Parent Ex. C at pp. 3-6). Additionally, the student exhibited delays in her oral motor and feeding skills and presented with "grossly low tone" in labial, lingual, jaw and cheek musculature (id. at p. 7).[6]

The iBrain education plan noted that, physically, the student presented with a low tone base and fluctuating tone in her upper and lower extremities (Parent Ex. C at p. 14). Additionally, the education plan indicated that while the student used her tone and reflexive movement functionally to participate in fine and gross motor activities, she continued to present with limitations in active range of motion in her extremities, and her movements present as "quick and jerky" with poor coordination and poor grading of force secondary to limited eccentric control and strength (id.). The student was described as presenting with: spasticity in her extremities; athetoid movements in her feet; extension patterns aggravated in sitting and standing; and due to her fluctuating tone, difficulty holding her head and trunk in neutral (id. at pp. 18-19).

Classification System, and Pediatric Evaluation of Disability Inventory) and the Gross Motor Function Measure were administered in April 2022 and updated in November 2022 (Parent Ex. C at pp. 4, 21).

[5] The iBrain education plan indicated both that the student received five individual sessions of speech-language therapy per week and that the student received four individual and one group session of speech-language therapy per week (Parent Ex. C at pp 3, 43, 58).

[6] The student has a gastronomy tube (GT) and does not receive anything by mouth, with no oral feeds throughout her daily routine (Parent Ex. C at p. 7).

The iBrain education plan indicated that the student had a visual diagnosis of strabismus, which significantly impacted her use of vision, and that she wore corrective lenses at all times (Parent Ex. C at p. 22). The student demonstrated limited tracking abilities (id.). Accommodations provided to support the student's visual functioning included "use of an iPad for visual access, enlarged text, reduced complexity materials, extended time for processing, highly contrasted displays and use of audiobooks" (id.). The report indicated that the student was able to use her vision with increased function when materials were elevated into her preferred visual field and within her near distance viewing range (id.).

With regard to assistive technology the iBrain education plan indicated that the student understood spoken speech and language and was able to respond to her name (Parent Ex. C at p. 23). The plan indicated that the student was able to elevate and depress both arms or hands bilaterally, to activate a "Little Mack" switch when placed in front of her on her activity tray; however, this could become fatiguing for her depending on tone, mood, and positioning (id.). Additionally, the student was using an iPad with head tracking access and TouchChat communication software, which had proven to be more sustainable for the student as it only required minimal head movements to track between two and four icons on the device (id.). The iBrain education plan noted that head tracking appeared to be the preferred access point for the student because it was less fatiguing and because due to motoric impairments, the student could not isolate a finger in order to access the iPad through direct selection (id.).

The November 2022 iBrain education plan indicated that the student benefitted from music therapy to not only "improve her musicality but to expand in her creativity" (Parent Ex. C at p. 25). Turning to cognition, the iBrain education plan stated that the student was engaging and aware of her environment (id. at p. 26). The plan indicated that the student was beginning to understand cause and effect and was "very good" at following directions" (id.). With regard to classroom participation, the plan noted that the student needed to be in a secluded area with limited visual and auditory distractions in order to complete a task and be actively engaged (id.). The report indicated that due to the student's impairments in cognition; language; memory; attention; reasoning; abstract thinking; judgement; problem-solving; sensory, perceptual, and motor abilities; psycho-social behavior; physical functions; information processing; and speech, she required a high level of individualization of her curriculum (id.).

To address the student's identified needs, the iBrain education plan recommended a 12-month program in a 6:1+1 special class with both 1:1 nursing and paraprofessional services throughout the day, and assistive technology devices and services (Parent Exs. C at pp. 13, 30-33; H at ¶ 13). The recommended related services included five 60-minute individual sessions per week of OT and PT, four 60-minute individual sessions and one 60-minute group session per week of speech-language therapy, two 60-minute sessions per week of individual vision education services, two 60-minute sessions per week of individual assistive technology services, and two 60-minute individual sessions and one 60-minute group session per week of music therapy (Parent Exs. C at pp. 40-51; H at ¶13). To further support the student the iBrain education plan recommended one 60-minute session per month of parent counseling and training (Parent Ex. C at pp. 53-54). The education plan also included numerous goals and corresponding objectives or benchmarks that targeted the student's needs as identified by iBrain (Parent Ex. C at pp. 37-51).

iBrain's deputy director of special education testified that during the intake process for considering whether a particular student is a good candidate for admission to iBrain, the student's individual needs are assessed and the staff at iBrain determine if the student is appropriate for iBrain (Tr. pp. 74-76). After a determination is made, the student is "assigned a classroom, a paraprofessional" and the student's schedule is developed and their "intake IEP" is finalized (id.). As part of the intake process, once the student is evaluated by iBrain's related service providers and teachers there is a "post-evaluation meeting" wherein iBrain determines "how many services the student is to receive, as well as the duration of those services" (Tr. pp. 92-93).

In light of the above, I find that the hearing record contains sufficient evidence to conclude that iBrain's program was individualized for the student and provided the student with instruction specially designed to meet her unique needs. Accordingly, I decline to overturn the IHO's finding that iBrain was an appropriate unilateral placement.

Turning to the district's argument that the parent failed to present evidence of the student's progress during the school year at issue, it is noted that the final date of the impartial hearing occurred on October 10, 2023, less than fourth months into the 12-month 2023-24 school year. Accordingly, it is not clear that a great deal of evidence was available to the parent at the time of the hearing specific to the 2023-24 school year. In any event, it is well settled that 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). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (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]).

While there is not a great deal of evidence of the student's progress during the 2023-24 school year, and it is unclear which information provided in the report was from the most recent update, the evidence does demonstrate that the student made progress during the 2022-23 school year and was expected to continue to do so. Review of the iBrain education plan shows that although the report was originally drafted in May 2022, it included updated information from October 5, 2022, November 3, 2022, and July 7, 2023, and indicated that the student had made progress throughout the 2022-23 school year (see Parent Ex. C at pp. 1, 2, 8, 18, 21-24, 26). Specifically, the iBrain education plan indicated that the student had made progress since beginning at iBrain in April 2022, and noted that due to the progress she had made she moved into a more advanced 6:1+1 class in October 2022 (id. at p. 2). Additionally, the education plan indicated that the student had made progress in her ability to have a smooth transition with her new teacher and peers; had made progress in literacy comprehension and in math, recognizing shapes and numbers (id.). In speech and language, the iBrain education plan indicated that the student had made steady progress toward her expressive language goals and made requests using

her personal high-tech tablet with minimal to moderate cueing and would vocalize her wants and needs (id. at p. 8). The student had made slow, steady gains toward her receptive language goals and had "demonstrated quick progress in the area of turn taking," which indicated she was a good candidate for the introduction of pragmatic and social language goals (id.).

With regard to progress in the student's motor development, the iBrain education plan indicated that the self-care goal of rolling to assist with dressing had been mastered, and a new goal had been added with the objective of increasing and enhancing her participation in self-care skills (Parent Ex. C at p. 18). In contrast, the self-care goal addressing hair brushing had been "downgraded to minimal progression toward goal criteria" and an updated goal focusing on active range of motion to being her upper extremity to her head while utilizing adaptive equipment as needed to maintain grasp was added (id.). The iBrain education plan indicated the student had mastered the goal of rolling from supine lying to side lying with moderate assistance at the pelvis and noted that she was able to roll from supine to left and right sides given intermittent minimal assistance and minimal verbal and tactile curing (id. at p. 21). Additionally, the student had shown progress in gait training, and could ambulate 50 feet in a fully supported gait trainer with maximal tactile and verbal cueing and minimal assistance to transfer from classroom to attend activities (id. at p. 22).

The November 2022 iBrain education plan indicated that the student had made "slow but steady progress using her functional vision" (Parent Ex. C at p. 23). Specifically, the plan reported that the student had increased her ability to visually track, scan, and fixate on a variety of visual materials and could attend to familiar and novel materials with ease (id.). The education plan indicated that the student continued to benefit from the use of an iPad, enlarged images and text, and reduced visual complexity (id.). Additionally, the education plan indicated that the student had improved her visually guided reach and how she interacted with materials and noted that she continued to require verbal prompting and occasionally a model of the activity (id.).

With regard to progress noted using assistive technology, the iBrain education plan indicated that the student had made slow and steady progress and had "incrementally decreased her processing time in accessing and activating her two single voice output switches" and utilized them well in classroom meetings and specific tasks and activities (Parent Ex. C at p. 24). Additionally, the student was accessing the single icons on her dynamic display device with headtracking accessibility and was acclimating to having the devices mounted on her chair giving her consistent access to the device during therapeutic and academic sessions (id. at p. 24).

With regard to progress in music therapy the iBrain education plan indicated that the student "had shown major progress in her ability to self-regulate and adapt to a new environment" and that she was consistently reaching for instruments when prompted, responded to questions regarding music using facial expressions and reaching her arms toward preferences, and vocalizing independently (Parent Ex. C at p. 26). Additionally, the education plan stated that the student was able to appropriately answer questions regarding music and other academic concepts (id.).

Testimony by the deputy director of iBrain, written in September 2023, indicated that the student had made progress in her educational program at iBrain over the past school year across academic and related services domains (Parent Ex I at ¶ 15). The deputy director testified that he anticipated that the student would continue to build upon that progress "so long as she [wa]s

provided with continuity in regard to her educational program" (id.). During the hearing, the deputy director described procedures used at iBrain to track the student's educational progress and ADLs at iBrain and report information to parents including annual goal progress tracking, session notes, quarterly progress reports, "parent weekly reports," and daily "wellness reports" (Tr. pp. 86-89).[7] In light of the above, I find the district's argument that the hearing record contained no evidence concerning the student's progress at iBrain to be unpersuasive and I decline to reverse the IHO's determination that iBrain was an appropriate unilateral placement for the student on the ground asserted by the district.

The district has not identified any other grounds for reversing the IHO's decision regarding the appropriateness of iBrain. Based on the forgoing, there is insufficient basis to disturb the IHO's determination that iBrain offered the student educational programming to meet her unique special education needs for the 2023-24 school year.

B. Equitable Considerations - Relief

As set forth above, the IHO effectively reduced the relief awarded for district funding of privately obtained transportation for the student to and from iBrain for the 2023-24 school year on an equitable basis, which the parent challenges on appeal.

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 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"]).

There is no allegation that the parent failed to provide timely notice of her intention to unilaterally place the student for the 2023-24 school year or that the parent failed to cooperate with the CSE (see Parent Ex. E). Accordingly, the only equitable ground at issue relates to the costs of the privately obtained transportation services.

[7] The parent did not submit any documents related to this progress reporting into the hearing record.

Initially, it is undisputed that related services were part of the supplemental tuition calculated separately from the base tuition for iBrain and that iBrain did not deliver the transportation services to the student but that, instead, the services were delivered by a separate agency (see Parent Exs. F; G). The parent entered a contract with Sisters Travel and Transportation Services, LLC (Sisters Travel) for the provision of transportation to and from iBrain for the 12-month 2023-24 school year (Parent Ex. G).

The November 2022 CSE recommended that the student receive special transportation services, including 1:1 nursing services, a lift bus, use of a regular size wheelchair, and a route with fewer students (Dist. Ex. 1 at pp. 46-47). As noted above, in their due process complaint notice, the parent alleged that the district did not recommend proper transportation services, specifically noting the lack of a recommendation for an air-conditioned bus and limited travel time (Parent Ex. A at p. 6). According to the contract the parent entered into for transportation, the student was to be provided with air conditioning, regular sized wheelchair accessibility, and sitting space to accommodate someone to travel with the student (Parent Ex. G at p. 2). Additionally, the transportation company agreed to provide a 1:1 transportation paraprofessional for the student, if necessary (id.). The transportation contract also noted that the student's morning and afternoon trips would be no more than 90 minutes each way (id.). Accordingly, it appears that the parents identified an issue with the district's recommendations for special transportation and remedied the district's failures by implementing transportation privately.

The IHO found no requirement that would prevent the district from substituting its own providers for those transportation services unilaterally obtained by the parent, further noting that the "responsibility to provide transportation is the district's and the district may specify its provider, analogously to the responsibility to provide pendency" (IHO Decision at p. 26). However, the IHO's finding disregards authority that provides that a parent may structure a unilateral placement in this manner, for example, by obtaining outside services for a student in addition to a private school placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a '"private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). The parent did not seek prospective relief in the form of district delivery of specified services but instead rejected the programming offered by the district and engaged in the self-help remedy of rejecting the public program and unilaterally placing the student and obtaining private services. The parent opted to take the financial risk and unilaterally arrange for the student's enrollment and receipt of services. The parent can obtain funding from the school district for the unilateral placement and services, "if the three-part test that has come to be known as the Burlington-Carter test" is satisfied (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]). Under these circumstances, absent an agreement from the parties, the parent would not be required to accept district services a la carte in lieu of the chosen private unilaterally-obtained services. Accordingly, to the extent the IHO relied on the premise that the district could substitute its own services to replace those unilaterally obtained by the parent, the IHO erred. If it were permissible to allow the district to simply substitute its own related service of special transportation in lieu of the special transportation unilaterally obtained by the parent then, hypothetically speaking, there would be little reason to avoid allowing district to do so with the

other related services privately obtained by the parent such as speech language therapy, OT, PT or vision education services that were listed in the iBrain education plan and billed in accordance with the supplemental tuition cost provisions (see, e.g., Parent Exs. C at pp. 57-58; F at pp. 1-2), but it would have the similar impermissible effect of invalidating the parent's right to effectuate a unilateral placement of the student and seek recovery of the costs through an administrative due process proceeding. Instead, the most effective way for the district to evade theses costs of a unilateral placement altogether is to offer the student a FAPE in the first place.

Further, the IHO impliedly found that the transportation services were excessive in terms of their cost and that, therefore, equitable factors did not support the parent's request for relief. The IHO stated "the equities require that the amount to be reimbursed or paid by the district may be broadly informed by the market" and then capped the amount of funding for transportation to an amount determined by "three objective measures" rather than calculated by the contract between the parent and the private transportation agency she contracted with (IHO decision at pp. 25-26; see Parent Ex. G). Among the factors that may warrant a reduction in tuition based on equitable considerations is whether the frequency of the services or the cost for the services was excessive (M.C., 226 F.3d at 68; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K., 674 Fed. App'x at 101; E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private school or agency was unreasonable or regarding any segregable costs charged by the private school or agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

Initially, there was no argument presented and the IHO did not find that the amount of transportation provided to the student exceeded the level that the student required in order to receive a FAPE such that a reduction of the amounts charged for each of the segregable costs would be warranted, although the IHO did discuss the need for accommodations. Accordingly, the issue of excessiveness is specific to the cost of the services.

The transportation contract with Sisters Travel set forth an annual rate of $192,930 for the transportation services and noted that fees would be based on school days even if the services were not used (Parent Ex. G at p. 2).

The district did not argue that the costs of iBrain or the transportation services were unreasonable during the impartial hearing or in its closing brief (Tr. pp. 1-125; see Dist. Post-Hr'g Br. at pp. 8-10). Although, in its closing brief, the district asserted that the IHO had the legal authority to find the parent entitled to reimbursement only for days that the student actually used transportation or that funding could be limited by a "Medicaid rate" or a "fair market rate" (Dist. Pst-Hr'g Br. at pp. 8-9). Relatedly, the district did not present any evidence that the costs of iBrain or the transportation services were excessive, i.e., by reference to evidence of lower-cost programs and/or services that were comparable to and available in the same geographic areas. The district also did not attempt to show whether similar transportation services to those being provided to the student by the private agency could have been provided at significantly lower cost by some district

entity. Moreover, while it was within the IHO's authority to inquire of the parent witnesses about the cost of the private special transportation services (8 NYCRR 200.5[j][3][vii]), he did not do so.[8]

In the absence of any documentary or testimonial evidence regarding the reasonableness of the costs of the transportation services, the IHO's finding that "the district is obligated to reimburse or directly pay for the costs of these services, but this obligation is capped by the highest of three objective measures of market rates" has no support in the hearing record (see IHO decision at pp. 25-26).[9] In so finding, the IHO seemed to improperly rely on his own knowledge of the markets for special transportation services (i.e., judicial notice).[10]

Ultimately, the hearing record was not developed on the issue of the reasonableness of the costs of the transportation contract and the responsibility for this lies with the district for not presenting any evidence on the issue and with the district and the IHO for the not raising the concern during the impartial hearing so that the parent was on notice and could have presented appropriate evidence.

Finally, the IHO also reduced the transportation award by directing the district to fund only transportation services actually provided to the student during the 2023-24 school year (IHO Decision at p. 28), whereas the contract for services requires payment of an annual fee based on school days regardless of whether the student used the services (Parent Ex. G). At the impartial hearing, iBrain's deputy director testified that the student attended iBrain in person at the Manhattan campus for the entirety of the school year to the date of the hearing with "excellent attendance" and that iBrain kept attendance records (Tr. pp. 78, 85-86). Thus, there is no indication in the hearing record that the student attended remotely, was withheld from attending, or otherwise rarely utilized the special transportation provided by Sisters Travel such that it may have been unreasonable for the parent to enter into the contract. Additionally, the district does not dispute

[8] Notably, during the impartial hearing the parent attempted but failed to subpoena the district to obtain information about the district's special transportation contracts, and in the parent's closing arguments counsel for the parent asserted that the IHO should order funding for the privately obtained special transportation by the terms of the contact with Sisters Travel (see Tr. pp. 34-48, 119-21). Ultimately the IHO did not allow the subpoena, and the parent has not appealed the denial (Tr. pp. 44-48).

[9] The IHO may have considered the terms of the contract with Sisters Travel to be excessive or constitute price gauging, and it may be the IHO is correct in his assumption; however, without evidence in the hearing record to support the IHO's assumption of excessiveness of cost, it is just that and there is no basis for upholding it.

[10] Generally, an adjudicative fact may be judicially noticed when that fact "is not subject to reasonable dispute because it" is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" (Fed. R. Evid. 201[a], [b][1]-[b][2]). While a court is empowered with the discretion to "take judicial notice on its own," a court "must take judicial notice if a party requests it and the court is supplied with the necessary information" (Fed. R. Evid. 201[c][1]-[2]). In addition, while a court "may take judicial notice at any stage of the proceeding," a party—upon request—must be provided with the opportunity to be heard "on the propriety of taking judicial notice and the nature of the fact to be noticed" (Fed. R. Evid. 201[d]-[e]). However, if a court "takes judicial notice before notifying a party, the party, on request, is still entitled to be heard" (Fed. R. Evid. 201[e]). The IHO's use of judicial notice in this case also offends State regulation, which requires, in part, that an IHO's decision "shall be based solely upon the record of the proceeding before the [IHO]" (8 NYCRR 200.5[j][5][v]).

that this student required special transportation services and would have received such services through the district had it offered the student a FAPE. Further, during the impartial hearing, the district did not offer any evidence that other transportation options were available to meet the student's needs, which would have resulted in a more reasonable cost, nor did it identify any other company with whom the parent could have contracted that would not have charged for the days when the student did not utilize the services.[11] Accordingly, the evidence in the hearing record does not support the IHO's order to require the district to fund only transportation services actually delivered notwithstanding the parent's financial obligation to fund the entire amount due under the contract.

If the IHO was concerned with excessive costs, it would have been permissible for him to instruct the parties to further develop the evidentiary record with respect to that issue. However, in the present matter, the IHO's determination that the costs of the student's private transportation was excessive and thereby warranted a reduction or denial of relief is without support in the evidentiary record.[12]

VII. Conclusion

The hearing record demonstrates that iBrain was an appropriate unilateral placement for the 2023-24 school year and that no equitable considerations warrant a reduction or denial of the relief sought by the parent.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

[11] As the parent notes, in a recent case involving enforcement of pendency orders requiring the district to fund private transportations costs, a district court reviewed similar contracts with the same transportation company and noted that the terms of the contracts required parents "to pay fees irrespective of whether the students use[d] the services" (Abrams v. New York City Dep't. of Educ., 2022 WL 523455 at *5 [S.D.N.Y. Feb. 22, 2022]). However, another district court has recently noted that in assessing the reasonableness of the costs attendant to a transportation contract, an IHO may consider that "there are many services one might be required to pay for regardless of whether or how much they are used," but that contracted for costs are not "automatically reasonable because they are specified by the [c]ontract" (Araujo v. New York City Dep't. of Educ., 2023 WL 5097982 at *5).

[12] The district argues that this result would render an IHO's discretion to craft equitable relief "meaningless in that IHOs would seemingly be required to award one hundred percent of the requested relief, even when the record only supports awarding less relief." Yet, the district cites to no record evidence in support of its position that the IHO correctly reduced the funding award, and for that matter did not offer any documentary or testimonial evidence during the impartial hearing to develop the record. This outcome does not impede an IHO's discretion to fashion appropriate equitable relief based on the hearing record; it was the record evidence that was lacking in this instance.

IT IS ORDERED that the IHO's decision, dated October 23, 2023, is modified by reversing those portions which reduced or denied the amount of funding to be paid by the district for the private transportation services for the 2023-24 school year; and

IT IS FURTHER ORDERED that the district is directed to fully fund the student's special transportation from Sisters Travel for the 2023-24 school year as set forth in the relevant contract in the hearing record.

Dated: **Albany, New York**
January 4, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER