The University of the State of New York

The State Education Department
State Review Officer
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No. 23-272

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by Zack Zylstra, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from those portions of a decision of an impartial hearing officer (IHO) which denied, in part, their 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 parents' unilateral placement of their 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, as well as the cost of an independent educational evaluation (IEE). The appeal must be sustained in part. The cross-appeal must be sustained in part.

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 detailed facts and procedural history of the case and the IHO's decision will not be recited here.[1] Briefly, a CSE

[1] In addition, as the student was the subject of prior State-level administrative proceedings, the parties' familiarity with the facts and procedural history preceding this case is presumed (see Application of a Student with a Disability, Appeal No. 20-063; Application of the Dep't of Educ., Appeal No. 19-107; Application of a Student

convened on March 17, 2023, and formulated an IEP for the student with a projected implementation date of March 17, 2023 (see generally Parent Ex. D). The parents disagreed with the recommendations contained in the March 2023 IEP, as well as with the district's failure to notify the parents of the particular public school site to which the district assigned the student to attend for the 2023-24 school year, and, as a result, in a letter dated June 20, 2023, they notified the district of their intent to unilaterally place the student at iBrain and seek funding from the district for the costs of the student's tuition (see Parent Ex. B).

On June 27, 2023, the parents signed an enrollment contract for the student to attend iBrain for the 2023-24 12-month school year (Parent Ex. F). The parents also entered into a transportation service agreement with Sisters Travel and Transportation Services, LLC (Sisters Travel) which indicated Sisters Travel would provide transportation services for the student to and from iBrain from July 1, 2023 through June 30, 2024; the transportation agreement was not dated (Parent Ex. G).

In a due process complaint notice, dated July 5, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year and requested funding for tuition and other costs (see Parent Ex. A).

An impartial hearing convened on August 14, 2023 and concluded on October 23, 2023 after six days of proceedings (Tr. pp. 1-112). 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, and that equitable considerations generally weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 1-15).[2] As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition, related services and 1:1 paraprofessional at iBrain for the 2023-24 school year (id. at p. 15).[3] Additionally, the IHO ordered the district to fund the cost of the student's special

with a Disability, Appeal No. 18-027).

[2] With the request for review, the parents submit a copy of an amended decision signed by the IHO on October 26, 2023, as well as an email exchange with the IHO in which the parents, through their attorney, requested a clarification of the IHO's order regarding transportation. The October 26, 2023 amended IHO decision was not included as part of the hearing record on appeal filed by the district. The district contends that the amended decision was not made a part of the hearing record because it was "never filed by the IHO or the Impartial Hearing Office." State regulations require an IHO to "render and mail a copy of written decision, or at the option of the parents, electronic findings of fact and the decision to the parents and to the board of education" (8 NYCRR 200.5[j][5]; see 34 CFR 300.515[a]). The regulations are silent regarding the district's ministerial "filing" processes that may take place after the decision is so rendered. While the district may dispute that the amended decision was a correction to a typographical error and instead view the changes as substantive, the district was still required to include the amended decision as a part of the impartial hearing record, which was very clearly rendered and, rightly or wrongly, transmitted to the parties by the IHO. State regulation provides that "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record (8 NYCRR 200.5[j][5][vi][c]; 279[a]). As the parents timely appealed taking into account the date of the IHO's original decision and as I agree that the IHO's order relating to funding of special transportation services set forth in the original decision should be modified, it is unnecessary to consider whether it was permissible for the IHO to issue a corrected or amended decision in this instance.

[3] A request for funding for nursing services was withdrawn during the impartial hearing (see Tr. p. 51; Parent Ex.

transportation services with accommodations "to and from" the parents' home and iBrain (id.). The IHO also ordered the district to reconvene the CSE "to address changes if necessary" and to directly fund an IEE of the student (id.)

IV. Appeal for State-Level Review

The parents appeal, and the district cross-appeals. The parties' familiarity with the particular issues for review on appeal in the parents' request for review, the district's answer and cross-appeal, and the parents' answer to the cross-appeal is also presumed and, therefore, the allegations and arguments will not be recited here in detail. The gravamen of the parents' appeal is that the IHO's order for transportation funding and reimbursement must be clarified. The crux of the district's cross-appeal asserts that the IHO erred in finding that the unilateral placement at iBrain was appropriate, erred in ordering funding for special transportation services, and erred in ordering the district to fund an IEE.

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.,

A at p. 7).

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]).[4]

[4] 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

At the outset, the district has not cross-appealed from the IHO's determination that the district failed to offer the student a FAPE for the 2023-24 school year.[5] As a result, 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]).

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. Because the parents' requested relief is contingent upon a determination that the parents' unilateral placement was appropriate, I will first address the district's cross-appeal.

A. Unilateral Placement

The district appeals from the IHO's finding that the parents sustained their burden to show that iBrain was an appropriate unilateral placement for the student during the 2023-24 school year. Specifically, the district alleges there was little evidence that iBrain provided instruction "specially designed" to meet the student's current physical and educational needs as the March 2022 iBrain IEP only described programming designed to address the student's deficits and needs as they existed in school years prior to the school year at issue. Further, the district contends that the parents did not submit any records or information regarding the student's attendance at iBrain during the school year in question (id. ¶ 7). The district also contends that the parents failed to demonstrate that the private special transportation services they obtained were appropriately provided or that the providers of the transportation services were qualified, such that the IHO

[5] The district did not present evidence in support of its IEP recommendations, and the IHO determined that the district failed to sustain its burden to prove that it offered the student a FAPE (IHO Decision at pp. 3, 10).

should have determined that the parents failed to meet their burden to establish the appropriateness of the private special transportation services (id. ¶ 8).

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).

With regard to the parties' dispute over whether the student's iBrain programming was appropriate to meet her needs during the 2023-24 school year, my independent review of the evidence in the hearing record supports the IHO's finding regarding the services provided by iBrain. Regarding the private special transportation services obtained by the parents, the ultimate determination made by the IHO is supported by the evidence, albeit on somewhat different grounds than those relied upon by the IHO in reaching the same conclusion.

1. Program, Services, and Progress at iBrain

Although not in dispute on appeal, a brief discussion of the student's needs is necessary to resolve the issue of whether iBrain was an appropriate unilateral placement during the 2023-24 school year. The March 2023 IEP indicated that the student was attending iBrain at the time of the CSE meeting and that "[u]nless otherwise noted the following information [wa]s taken from the draft IEP shared by the current school team" (Parent Ex. D at p. 3). Review of the March 2023 district IEP reflects results of assessments administered to the student in February and March 2023 that measured skills such as communication/language, gross motor, range of motion, and ability to use assistive technology (id. at pp. 1-3).[6]

According to the March 2023 IEP, the student was nonverbal and communicated using facial expressions, gestures, vocalizations, and her augmentative and alternative (AAC) device (Parent Ex. D at pp. 3, 4, 10, 13). The student was non-ambulatory and required adult assistance to navigate her environment including transferring in and out of and using a wheelchair and with activities of daily living such as dressing, hygiene, and grooming (id. at pp. 24-25, 27, 36). Additionally, the student had visual impairments, wore glasses, and was able to visually scan for words and shapes on her communication device (id. at pp. 32-33). The IEP indicated that the student was very aware of her environment, regimented in her routine, and could become dysregulated and exhibit aggressive and/or self-injurious behaviors when her routine was disrupted, she was challenged or frustrated, or something did not go her way (id. at pp. 4, 6, 13).

Cognitively, the March 2023 IEP indicated that the student demonstrated skills such as identifying herself, responding to her name, understanding print concepts, identifying colors and numbers, matching objects, and understanding cause/effect and same/different (Parent Ex. D at p. 4). The student made choices using vocalizations or her AAC device, and was able to follow multistep directions when motivated to do so (id. at p. 4). The student benefitted from verbal prompts, tactile prompts, breaks, and moderate to minimal assistance during academic activities (id. at p. 5). The March 2023 IEP indicated that in the area of reading, the student was working on demonstrating knowledge of letters in the alphabet and their corresponding sounds on her AAC device when verbally prompted, identifying and saying a consonant vowel consonant (CVC) word when shown a picture/word card, identifying common, high frequency sight words, and answering

[6] The February and March 2023 evaluation results included the Pediatric Evaluation of Disability Inventory (PEDI), the Communication Function Classification System (CFCS), the Gross Motor Function Measure (GMFM), and the Dynamic AAC Goals Grid 2 (DAGG-2) (Parent Ex. D at p. 1). In addition, the March 2023 IEP reflected results from the January 2022 administration of the Spinal Alignment and Range of Motion Measure (SAROMM) (Parent Ex. D at pp. 1-3).

'wh' questions "after a read along" using her AAC device (id. at pp. 5-6). In math, the IEP indicated that the student was working towards improving her ability to count quantities up to 20, and add and subtract single digit numbers using her preferred method of communication with support (id. at p. 6). In the area of social/emotional skills, the student needed to improve her ability to regulate her behavior by communicating her needs to appropriately participate in class and decrease negative behaviors by identifying and expressing her feelings, use self-regulating/coping strategies when upset, and request a break when needed (id. at pp. 6-7). She initiated conversation and social interaction with familiar communication partners and showed interest in others by looking at peers in the classroom (id. at p. 18).

Turning to the iBrain programming, in his affidavit testimony, iBrain's deputy director of special education (deputy director) described iBrain as a "private and highly specialized special education program" for students with acquired brain injuries or brain-based disorders (Parent Ex. J ¶¶ 1, 5). The iBrain program consisted of 12-month services provided during an extended school day, which included direct instruction and related services outlined in an individual education program (id. ¶¶ 5, 7, 8). Regarding the student's iBrain programming during the 2023-24 school year, the deputy director testified that the student attended an 8:1+1 special class that provided direct and small group instruction, together with individual paraprofessional services, four individual sessions per week of OT, five individual sessions per week of PT, four individual sessions and one group session per week of speech-language therapy, two sessions per week of individual vision education services, one session per week of assistive technology services, and two individual sessions and one group session per week of music therapy, all delivered in 60-minute sessions (id. ¶¶ 13, 14). In addition to the student's numerous therapies, her schedule also featured 30 minutes per day of individual academic instruction, "sensory time" when the student received different types of sensory stimulation and the opportunity to become regulated, "morning meetings" that targeted social/emotional and group social skills, "mat time," which provided the opportunity to generalize skills learned in PT and OT, and time to complete activities of daily living (Tr. pp. 81-84). According to the deputy director, the student's teacher was certified in special education and all of the related services providers were certified in their respective disciplines and possessed professional degrees (Tr. pp. 60, 69).

The deputy director testified that each of the student's service providers conducted evaluations or assessments of the student at least once per year (Tr. pp. 77-78). He further testified that iBrain staff revised student IEPs quarterly based on their progress towards their goals (Tr. p. 75). According to the deputy director, the student had made progress during the 2022-23 school year, and therefore he believed that the student's goals had been updated in early July 2023 (Tr. pp. 75-76; Parent Ex. J ¶ 15).[7]

The district correctly points out that the iBrain education plan offered into evidence by the parents is dated March 22, 2022 and the "[d]ate of [r]eport [u]pdate" is March 23, 2022, just one day later and during the 2021-22 school year (see Parent Ex. C at p. 1). Accordingly, the private plan does not relate to the school year for which the parents seek funding for their unilateral placement. However, as discussed above, the hearing record contains a March 2023 district IEP which provided more recent information about the student's needs and skills including input from

[7] The parents also testified that the student had made progress at iBrain (Parent Ex. H at ¶ 11).

the student's providers at iBrain (see Parent Ex. D). Although the hearing record does not include an iBrain education plan detailing the student's programming during the 2023-24 school year (see Parent Exs. A-K; Dist. Ex. 1), as noted above, a private school need not develop its own IEP for the student (Carter, 510 U.S. at 13-14).[8] Additionally, affidavit and hearing testimony from the deputy director provided evidence with respect to the special education programming and services the student received during the 2023-24 school year, and indicated that the student made progress at iBrain (see Parent Exs. H; J).[9] Given the totality of the circumstances, the evidence in the hearing record shows that iBrain provided instruction specially designed to meet the student's special education needs during the 2023-24 school year.

In light of the above, the IHO correctly concluded that the parents met their burden to prove that iBrain was an appropriate unilateral placement for the student during the 2023-24 school year.

2. Private Special Transportation Services

In a cross-appeal, the district asserts that the IHO erred in granting any relief to the parents with respect to funding for the unilaterally obtained special transportation services because in the district's view the parents failed to show the student's need for special transportation services, that the transportation services provided were appropriate, or that the transportation providers were "appropriately qualified." The district also asserts that the cost of the private transportation services was unreasonable, which will be addressed below.

Initially, the IHO determined that the student was "entitled" to transportation services as a student with a handicapping condition who lives within 50 miles of a nonpublic school, citing New York State Education Law § 4402(4)(d) (IHO Decision at pp. 14-15). However, that statute refers to transportation services provided by a district to a student attending a nonpublic school "for the purpose of receiving services or programs similar to special educational programs recommended for such child by the local [CSE]" (Educ. Law § 4402[4][d]).[10] In contrast, here, the parents have

[8] A private education plan is one way for a private school to show how its special education programming is designed to address a student's needs during a stated period of time, but it is not the only way for a parent to sufficiently establish that the private programming was appropriate under the substantive standard set forth in Rowley and Endrew F.

[9] To the extent the district argues that the parents failed to provide evidence that the student made progress, 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]).

[10] Even if the parents were seeking transportation from district personnel or mechanisms to a nonpublic school,

not sought transportation from the district and, instead, engaged in the self-help remedy of rejecting the public program, including any option of publicly provided transportation services, and unilaterally placing the student. The parents opted to take the financial risk and unilaterally arrange for the student's special transportation services for the student and are seeking district reimbursement and funding for the cost of the private transportation services. The parents can obtain funding from the school district for the unilateral placement and special transportation 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]).

Nevertheless, the parents have met their burden to prove that the private transportation services were specially designed to meet the student's needs. The student's need for special transportation services cannot reasonably be assailed by the district. The March 2023 IEP developed for the student by the CSE notes that the student required special transportation services due to ambulatory and medical needs and recommended accommodations in the form of transportation from the closes safe curb location to school, adult supervision 1:1 paraprofessional, and a lift bus that could accommodate a regular size wheelchair (Parent Ex. D at pp. 72-73).

The district's claim that there is no evidence that the transportation services were appropriate, or that the transportation providers were "appropriately qualified" is belied by the hearing record. In the due process complaint notice, the parents 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). The district did not defend against these allegations during the impartial hearing. According to the agreement the parents entered into with Sisters Travel, 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. at p. 1). The transportation contract also called for Sisters Travel to "use safe and clean equipment and properly trained and licensed drivers" (id. at p. 2). Accordingly, it appears that the parents identified an issue with the district's recommendations for special transportation services and remedied the district's failures by implementing transportation services privately by contracting with Sisters Travel.

Accordingly, I find that the parents established the student's need for special transportation services and that the unilaterally obtained special transportation services were appropriate.

B. Equitable Considerations – Relief

The IHO's order directed the district to "directly pay/prospectively fund/reimburse" special education transportation services with a list of accommodations "to and from" the parents' home

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the IHO did not engage in the similarity of programs analysis called for by the statute, and usually parents unilaterally place their students at nonpublic schools because they believe the public and private programming are different in some substantial way.

address and iBrain for the 2023-24 school year (IHO Decision at p. 15).[11] To the extent that the IHO's order could be interpreted as requiring the district to fund only the transportation services provided to the student, it would effectively constitute a reduction of the relief awarded to the parents when compared to the contract terms for the privately obtained transportation services for the 2023-24 school year on an equitable basis. The parents challenge this language from the IHO's order. The district asserts that, in the event the appropriateness of the unilateral transportation services is upheld, the IHO's order reducing the transportation funding should be affirmed as written because the cost of the transportation services was excessive.[12]

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"]).

Thus, among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private 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

[11] The IHO issued an "amended" decision, dated October 26, 2023, the validity of which is disputed by the parties. However, as noted above, it is unnecessary to determine whether the IHO's attempt to amend the decision was valid since the parents have appealed from the original October 23, 2023 IHO decision, and I agree that the language of the October 23, 2023 IHO decision relating to the funding for special transportation services should be modified.

[12] Additionally, the district asserts that there is a question as to whether the parents had "incurred a financial obligation" by the iBrain enrollment contract and the Sisters Travel contract due to the manner in which the parents signed the contracts. The district vaguely asserts that the signatures appear to be in print fonts rather than handwritten and that there was "no indication that any of these signatures [we]re authorized e-signatures." The district has not described what law or regulation may have been violated and has elicited no evidence or testimony on the topic from any party, hence I decline to disturb the IHO's decision on the basis asserted by the district.

100). Generally, an excessive cost argument focuses on whether the rate charged for the service was reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services.

Here, the parents entered into a contract with Sisters Travel for the provision of the student's transportation to and from iBrain for the 12-month 2023-24 school year (Parent Ex. G). The contract set forth an annual rate for the services and noted that fees were based on school days even if the services were not used (id. at p. 2). Although in its pleading the district contends that the cost for the transportation services Sisters Travel provided was "exorbitant," comparing the fee charged with the cost of iBrain's tuition and noting the distance from the student's home to the school, during the impartial hearing, it offered no evidence against which to compare the cost, such as evidence of reasonable market rates for the same or similar services. Ultimately, the evidence in the hearing record is not sufficiently developed to conclude that the transportation contract was excessive. Therefore, the hearing record fails to contain any evidence upon which base a finding that the costs of the transportation services were so excessive as to warrant an equitable reduction to the amount awarded, and, to the extent the IHO's order could be read to apply such a reduction, it must be modified.

C. Independent Educational Evaluation

As part of its cross-appeal, the district contends that the IHO erred in ordering it to fund a neuropsychological IEE.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the

child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

In the due process complaint notice, the parents stated that they disagreed with "the {district's] evaluations, or lack thereof" and requested an "independent neuropsychological evaluation" (Parent Ex. A at p. 5).

In past decisions SROs have permitted a parent to request a district-funded IEE in a due process complaint notice in the first instance (see, e.g. Application of the Dep't of Educ., Appeal No. 21-135); however, SROs have also expressed reservations that this is not the process contemplated by the IDEA and its implementing regulations (Application of the Dep't of Educ., Appeal No. 23-034; Application of a Student with a Disability, Appeal No. 22-150) and observed that the approach has caused more problems than it resolves (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). The statute clearly indicates that a district is required to either grant the IEE at public expense or initiate due process to defend its own evaluation of the student, but a district need only do so "without unnecessary delay" (34 CFR 502[b][2]). The process envisions that a district has an opportunity to engage with the parent on the request for an IEE at public expense outside of due process litigation, and if a delay should occur as a result, one of the fact-specific inquiries to be addressed is whether the IEE at public expense should be granted because the district's delay in filing for due process was unnecessary under the circumstances (see Cruz v. Alta Loma Sch. Dist., 849 F. App'x 678, 679-80 [9th Cir. 2021] [discussing the reasons for the delay and degree to which there was an impasse and finding that the 84-day delay was not an unnecessary delay under the fact specific circumstances]; Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289, at *2 [N.D. Cal. Dec. 15, 2006] [finding that an unexplained 82-day delay for commencing due process was unnecessary]; Alex W. v. Poudre Sch. Dist. R-1, 2022 WL 2763464, at *14 [D. Colo. July 15, 2022] [holding that simply refusing a parent's request for an IEE at public expense is not among the district's permissible options]; MP v. Parkland School District, 2021 WL 3771814, at *18 [E.D. Pa. Aug. 25, 2021] [finding that the school district failed to file a due process complaint altogether and granting IEE at public expense];[13] Jefferson Cnty. Bd. of Educ. v. Lolita S., 581 F. App'x 760, 765-66 [11th Cir. 2014]; Evans v. Dist. No. 17 of Douglas Cnty., Neb., 841 F.2d 824, 830 [8th Cir. 1988]). As the Second Circuit observed, at no point does a parent need to file a due process complaint notice to obtain an IEE at public expense (Trumbull, 975 F.3d 152, 168-69 [2d Cir. 2020]).[14] Accordingly, based on the continued study of the judicial and administrative guidance on the topic, other SROs have changed the previous approach of allowing the parent to initially disagree with a district evaluation and request an IEE in a due process complaint notice without attempting to raise such disagreement with the district first (see, e.g., Application of a Student with

[13] The Parkland case also discussed caselaw with different factual circumstances in which the district's failure to file for due process had been excused such as incomplete district evaluations or agreements between the district and parent that the district would conduct further evaluations.

[14] The Second Circuit, in Trumbull, speculated that a "hypothetical scenario in which a parent might need to file a due process complaint for a hearing to seek an IEE at public expense is if the school unnecessarily withheld a requested IEE or failed to file its own due process complaint to defend its challenged evaluation as appropriate" (975 F.3d at 169).

a Disability, Appeal No. 23-260; Application of a Student with a Disability, Appeal No. 23-081). I see no reason to depart from this trend.

There is no contention on appeal that the parents raised any disagreement with a district evaluation prior to the due process complaint notice or followed the process set forth above. Accordingly, I will sustain the district's cross-appeal on this point and reverse the IHO's order for the district to fund a neuropsychological IEE as set forth below.

VII. Conclusion

In summary, the evidence in the hearing record supports the IHO's finding that iBrain was an appropriate unilateral placement for the student. The evidence in the hearing record does not support an equitable reduction to the amount awarded for the costs of the student's special transportation services. Finally, the hearing record does not support the IHO's award requiring the district to fund an IEE.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

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 special transportation services for the 2023-24 school year, and which awarded the parents an independent neuropsychological evaluation at district expense; and

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

Dated: **Albany, New York**
February 21, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER