The University of the State of New York

The State Education Department
State Review Officer
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No. 23-161

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Sarah M. Pourhosseini, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondents, by Zack Zylstra, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to fund the costs of the student's tuition and transportation for the student's attendance at the International Academy for the Brain (iBrain) for the 2022-23 school year. The parents cross-appeal from the IHO's determination which denied their request for funding for nursing services. 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. Briefly, the CSE convened on March 3, 2022, to formulate the student's IEP for the 2022-23 school year (see generally Dist. Ex. 5). The parents disagreed with the recommendations contained in the March 2022 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2022-23 school year and, as a result, on June 17, 2022, notified the district of their intent to unilaterally place the student at iBrain (see Parent Ex. G). In a due process complaint

notice, dated July 6, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). More specifically, the parents' challenge included allegations related to the 12:1+(3:1) special class recommended in the March 2022 IEP, the lack of a recommendation for a 1:1 private nurse, the lack of a recommendation for music therapy, as well as assertions that the parents were unable to visit the assigned public school site and that the responses the parents received from the assigned public school site in response to their list of questions were vague and not specific enough to let the parents know if the school could address the student's needs (Parent Ex. A at pp. 3-4). In addition, the parents presented challenges to the district's evaluations and the evaluation process, as well as to the March 2022 IEP present levels of performance, the parents' participation in the CSE process, and predetermination of the student's programming (id. at pp. 5-7).

After a prehearing conference on August 1, 2022, a hearing related to pendency on August 8, 2022, and status conferences on October 6, 2022, November 10, 2022, and December 12, 2022, an impartial hearing convened on December 30, 2022 and concluded on May 25, 2023 after 12 total days of proceedings (Tr. pp. 1-317).[1] In a decision dated June 26, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year, that iBrain was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition funding (IHO Decision at pp. 11-15). In finding that the district failed to offer the student a FAPE, the IHO determined that the recommended class size was not appropriate, that the CSE relied on information provided by iBrain, and that the parents raised valid concerns related to the class size, the duration of the recommended related services, and the absence of a dedicated nurse for the student (id. at pp. 12-13). As relief, the IHO ordered the district to fund the costs of the student's tuition and transportation for the student's attendance at iBrain for the 2022-23 school year (IHO Decision at p. 15).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parents' answer with cross-appeal thereto is also presumed and, therefore, the allegations and arguments will not be repeated. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether the IHO erred in determining that the March 2022 IEP failed to offer the student a FAPE;

2. Whether the IHO erred in determining that the unilateral placement at iBrain was appropriate; and

3. Whether the IHO erred in failing to order the district to fund nursing services at iBrain or otherwise erred in rendering a remedy.

[1] In an August 8, 2022 interim decision, the IHO found that the student's placement for the pendency of this proceeding consisted of direct funding for the student's placement at iBrain, nursing services, and special transportation (Interim IHO Decision at pp. 4-5).

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]).[2]

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

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

[2] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

VI. Discussion

A. FAPE

Turning first to the issue of whether the March 2022 IEP offered the student a FAPE, the evidence in the hearing record shows that the IHO correctly determined that the IEP did not offer the student a FAPE for the 2022-23 school year. On appeal, the district argues that the IHO erred in finding that the district failed to offer the student a FAPE during the 2022-23 school year, raising challenges to multiple IEP deficits identified by the IHO. However, in this decision, I need not delve into a lengthier discussion because there is a significant substantive defect in the district's written plan that provides an independent basis to affirm the IHO's finding that the district failed to offer the student a FAPE in the 2022-23 school year as set forth below.

The student presents with severe global developmental delays and is non-verbal, non-ambulatory, and dependent for all activities of daily living (ADLs) (Parent Ex. C at p. 35). She has received the following diagnoses, among others: cerebral palsy, cerebral encephalopathy, Lennox-Gastaut syndrome with intractable epilepsy, microcephaly, feeding difficulties, and hypertonia; additionally, due to cortical visual impairment (CVI) she is considered legally blind (Parent Ex. C at p. 1; K at p. 14; Dist. Ex. 2 at p. 10).

The CSE met on March 3, 2022, for the student's annual review and to develop her IEP to be implemented in March 2022 with an anticipated CSE reconvene in March 2023 (Parent Ex. D at pp. 1, 63). The March 2022 CSE recommended that the student attend a 12:1+(3:1) special class in a specialized school and receive the related services of individual OT five times per week for 60 minutes per session, individual PT five times per week for 60 minutes per session, individual speech-language therapy four times per week for 60 minutes per session and group speech-language therapy once per week for 60 minutes per session, vision education services twice per week for 60 minutes per session, individual school nurse services as needed, and group parent counseling and training once per month for 60 minutes per session (id. at pp. 57-58). To further support the student, the CSE recommended the student receive the services of a full-time individual health paraprofessional and be provided with assistive technology devices (switches with voice output) and assistive technology services once per week for 60 minutes per session (id. at p. 58).

The March 2022 IEP was the IEP that remained in effect at the start of the 2022-23 school year and was the IEP that the district asserted offered the student a FAPE for the 2022-23 school year (Parent Ex. D). The March 2022 IEP is a lengthy document that in many ways parallels the description of the student and recommendations for educational services set forth in a March 2022 iBrain report and education plan (see Parent Exs. D at pp. 1-67; C at pp. 1-57). The iBrain report and education plan contained environmental modifications to address the student's management needs that included one-on-one instruction and a small class size of no more than six students (Parent Ex. C at pp. 30-31).

The March 2022 IEP, apparently copying from the iBrain plan, indicated that in order to benefit from instruction the student required human and material resources and environmental modifications that included, among other things, a highly structured classroom or corner room with less stimulus from visual and auditory distractions; direct instruction; multisensory supports, sensory breaks during instruction, and repeated directions; a quiet and non-distracting environment

for successful comprehension and communication; one-on-one instruction using a direct instruction model; a small class size of no more than six students; and a quiet dim room to limit distractions (Parent Ex. D at pp. 33-34; see id. at pp. 3, 4). However, while the March 2022 IEP stated that the student required a small class size of no more than six students, the IEP itself did not recommend such a class placement; rather it recommended placing the student in a special class "of 12:1+(3:1)" (Parent Ex. D at p. 41). An internal incongruity of this magnitude, wherein a CSE identifies a specific class placement as a need for the student in the IEP but then fails to recommend that specific setting, requires finding that the IEP did not offer the student a FAPE.[3] Accordingly, on this basis, I decline to overturn the IHO's finding that the district failed to offer the student a FAPE for the 2022-23 school year.[4] Therefore, the portion of the district's appeal that asserts that the IHO erred in finding a denial of FAPE during the 2022-23 school year is dismissed.

B. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the

[3] One basis for the IHO's determination that the March 2022 IEP did not offer the student a FAPE was that the parents had "raised doubt as to whether the 12:1:4 class was too large for the student" (IHO Decision at p. 13). It may be that a larger class placement, such as a 12:1+(3:1) class setting, would have been appropriate for the student, but the IEP itself indicated that it was not an appropriate setting.

[4] Briefly addressing the three other bases for the IHO's FAPE determination that the district raised on appeal, first, the IHO's finding as to related services appears to have been inaccurate as the IHO found that the student may not benefit from related services delivered in increments of less than 60-minutes, while the district correctly points out that the March 2022 IEP recommended related services with durations of 60 minutes (see IHO Decision at p. 13; Dist. Ex. 5 at pp. 41-42). Second, the IHO noted that the March 2022 IEP was "not informed by evaluative assessments conducted by the [district]," while the district points out that there was sufficient evaluative information to develop the IEP, and as with the first point, review of the hearing record is in conflict with the IHO's finding as the district conducted several evaluations in January 2022, including a social history update, a classroom observation, and a psychoeducational evaluation, which were reviewed by the March 2022 CSE (see IHO Decision at p. 13; Dist. Exs. 1-4). Third, the IHO noted that the lack of a dedicated 1:1 nurse in the March 2022 IEP "would raise health and safety concerns" while the district points out that there are discrepancies in the paperwork submitted by the parents to the district regarding the need for a 1:1 nurse, which are discussed in more detail below (see IHO Decision at p. 13; Req. for Rev. ¶ 19). On the question of the need for 1:1 nursing services, it is worth noting that where a CSE fails to consider the need for medical services itself, and instead allows some other body or agency to do so absent the CSE, a denial of FAPE may result (see J.L. on behalf of J.P. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 464–65 [S.D.N.Y. 2018]; see, e.g. Application of a Student with a Disability, Appeal No. 23-102).

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 IHO found that "the evidence supports that the [s]tudent is obtaining educational benefits arising from an educational program that focuses on her specific educational needs," and that both "school reports and the [p]arents confirm the student's progress since entering [iBrain]" (IHO Decision at p. 14).

The district does not contend that the program laid out for the student in iBrain's March 2022 report and education plan was flawed or insufficient for the student, as drafted. However, the district argues that the IHO's finding that iBrain was an appropriate placement for the student should be reversed because of iBrain's inability and failure to implement the program as set forth in iBrain's education plan for the student, as demonstrated by staff shortages revealed during the impartial hearing as well as a lack of objective evidence of progress in the hearing record (Answer at ¶¶ 23-24).The parents counter that the IHO correctly found that iBrain was an appropriate

unilateral placement, contending that, at the time the student was placed at iBrain, the placement was likely to produce progress and not regression.

The parents cite to the case B.R. v. New York City Dep't of Educ. (910 F. Supp. 2d 670, 677 [S.D.N.Y. 2012]) for the theory that "[t]he necessary inquiry regarding the appropriateness of a unilateral placement is whether the program reasonably could have been expected, at the time of placement, to offer meaningful educational benefit to a student" (Answer ¶23 emphasis in original). However, that case concerns the adequacy of a program recommended by a CSE, noting that "retrospective testimony that the school district would have provided additional services beyond those listed in the IEP may not be considered in a Burlington–Carter proceeding" (B.R., 910 F.Supp. 2d at 766 quoting R.E. v New York City Dept. of Educ., 694 F.3d 167, 186 [2d Cir. 2012]). The parent's view that a unilateral placement is only assessed at the time of the placement decision also elides the portion of the standards above potentially requiring proof of educational and related services being implemented in a unilateral placement (Gagliardo, 489 F.3d at 112 [holding that parents must "demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction"]) as well as the fact that consideration of the student's progress in attendance at the unilateral placement is a relevant factor to determining the appropriateness of the unilateral placement.

Related to the implementation of the unilaterally obtained services during the 2022-23 school year, is the student's progress. A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).[5] However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).[6]

[5] Conversely, the Second Circuit has also noted that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

[6] Although a student's progress is a relevant inquiry, it does not follow that the district, or the IHO could hold the parents to an outcome-based standard, because the IDEA was not designed to ensure guaranteed outcomes for

Because the district does not assert, on appeal, that the program laid out for the student in iBrain's March 2022 report and education plan was flawed or insufficient for the student, as drafted, and the parents contend that the iBrain education plan would meet the student's special education needs, the student's needs are not reasonably in dispute.

For the 2022-23 school year the March 2022 iBrain education plan offered the student a 12-month program consisting of a 6:1+1 special class placement along with related services consisting of five 60-minute sessions per week of individual OT and PT; four 60-minute sessions per week of individual speech-language therapy; one 60-minute session per week of group speech-language therapy; two 60-minute sessions per week of individual vision education services; and one 60-minute session per month of parent counseling and training (Parent Ex. C at pp. 55-56).[7] In addition, the March 2022 iBrain education plan called for the support of a 1:1 paraprofessional as well as a 1:1 nurse throughout the school day, special transportation services, assistive technology services and devices, and training for school personnel in the areas of two-person transfers, vision adaptations, seizure safety, feeding and G-tube safety, and assistive technology (id. at pp. 54-57). The March 2022 iBrain education plan included annual goals that targeted the student's needs related to cognition, academics, social skills, vision, the use of assistive technology, receptive language, pragmatic language, expressive language, oral motor skills, fine motor and gross motor skills, motor planning, and self-care, as well as goals related to parent counseling and training, and paraprofessional support (id. at pp. 36-52). An individualized health plan outlined the student's assessment data, nursing diagnosis, goals, nursing interventions, and expected outcomes related to needs associated with the student's diagnoses (id. at pp. 32-36).

In testimony iBrain's director of special education services (director) stated that she first met the student during the 2015-16 school year and that the student had attended iBrain since its opening in July 2018 (Tr. pp. 154, 167). The director stated that, during the 2022-23 school year, the student attended a 6:1+1 special class at iBrain and that the student and all her classmates received PT, OT, speech, vision services, music therapy, and assistive technology, that they all

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students with disabilities, even with the provision of specially designed instruction for their unique needs (see Walczak, 142 F.3d at 133 [stating that "IDEA requires states to provide a disabled child with meaningful access to an education, but it cannot guarantee totally successful results"]; M.H., 685 F.3d at 245 [noting that the "[t]he purpose of the Act was instead 'more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside' [citations omitted]]). Thus, to the extent that the district argues that the hearing record lacks objective evidence of the student's progress at iBrain during the 2022-23 school year, a finding of progress is not a per se requirement for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; see also Frank G., 459 F.3d at 364). However, a finding of progress is, nevertheless, a relevant factor to be considered because, under the totality of the circumstances, it can lend support to other evidence presented by parents who are attempting to satisfy the second Burlington/Carter criterion (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; see T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]).

[7] While within the annual goals section, the iBrain plan included music therapy annual goals and a recommendation for music therapy services, the plan's summary of recommended special education programs and services did not indicate a recommendation for music therapy (Parent Ex. C at pp. 48-50).

had 1:1 paraprofessional support, and half of the students in her class had a 1:1 nurse (Tr. pp. 178, 182). However, during the impartial hearing, evidence emerged that potentially significant portions of the related services recommended in the iBrain education plan for the student for the 2022-23 school year were not being provided to the student.

With respect to the delivery of related services during the 2022-23 school year, the iBrain director of special education testified that the school was short of providers in each department and that the student was receiving related services but not at the full mandates set forth in the iBrain education plan (Tr. pp. 197-200, 218, 230).

When asked if the student received OT for 60 minutes daily during the 2022-23 school year, the iBrain director responded that iBrain was "a little bit short staffed with OTs, but that is the mandate, and we are making up the sessions that - - any sessions that are missed" (Tr. p. 197). With regard to PT, the director testified that iBrain was "a little short-staffed with PT as well" and indicated that therapists might make up a session if another student is absent, and that they also "have some makeup sessions that we offer…to whoever has missed the most sessions over the break, based on [how] many providers we can have come in" (Tr. p. 198-99). The director further testified that iBrain was also short staffed for speech-language therapy, stating that "[the student] is not receiving, I would say, speech at this time five days a week" and that the sessions the student attended varied week by week as iBrain worked on "getting as many sessions in as well as doing makeup sessions from previous -- any previous weeks that things were missed" (Tr. p. 199). She further indicated that the school location the student attended may have lost a music therapist as well during the 2022-23 school year (Tr. p. 230-31). The director clarified that make up sessions are "fit into anytime where [a student] do[es]n't have a therapy scheduled, or they may do a push-in cotreat with another therapy" or that "sometimes the push-in sessions will be in collaboration with another discipline" indicating that the student may receive therapy from two different disciplines at the same time (Tr. pp. 199-200). The director testified that "the beginning of the year was fine" but that the staffing shortages began "around the holiday break" and possibly earlier for PT "around the start of the new school year" or "around Thanksgiving/Christmas" (Tr. p. 218, 227).

The director was unsure how many sessions of speech-language therapy had been missed and indicated students had been invited to make up sessions during both the February and April breaks; however, she did not know if the student attended any of those makeup sessions nor how many sessions had been offered (Tr. pp. 218-19, 221). The director was also unsure of how many OT and PT sessions the student had missed, or how many sessions, if any, had been made up, but believed there were records kept at iBrain that would have this information (see Tr. pp. 224-28). Additionally, the director described iBrain's remediation plan for speech-language therapy which included: intentionally over-hiring in order to be able to provide consistent additional speech therapy sessions; providing make up sessions over the break; and offering transportation and staffing to provide make up sessions either earlier or later in the day (Tr. p. 220). She indicated that makeup sessions were provided during the February and April breaks, and there were plans to provide additional makeup sessions during the break between June and July and again between August and September (Tr. pp. 220-21). The director further testified that this pattern was similar for OT and PT with a similar remediation plan for making up missed sessions (Tr. p. 225-28). She was asked if iBrain maintained records of therapy sessions the student received during the 2022-

23 school year, to which the director affirmatively responded; however, these records do not appear in the hearing record (Tr. pp. 219, 227-28).

Thus, there is enough evidence of unimplemented related services at iBrain during the 2022-23 school year to justify the district's assertion that the parents have not demonstrated that iBrain provided education instruction specially designed to meet the unique needs of the student during the 2022-23 school year. The failure to implement portions of the student's related services is of heightened concern since the iBrain plan highlighted the necessity of the consistency of daily, five days a week, therapy sessions for the student to make gains and progress (Parent Ex. C at pp. 24, 26, 28, 44-45, 46, 48). Therefore, while the March 2022 iBrain education plan was adequate to meet the student's needs in terms of its recommendations for the student's program, the director acknowledged that the student had missed an uncertain but potentially substantial amount of the related services recommended for the student, which were described in the iBrain plan as necessary for the student. Given that a large part of the iBrain education plan for the student for the 2022-23 school year consisted of related services, and further considering the statements included in the iBrain education plan indicating the student required five sessions per week in each of speech-language therapy, OT, and PT (Parent Ex. C at pp. 44-45, 46, 48), the failure of iBrain to adhere to its education plan for the student and deliver the recommended related services could support a finding that the parents failed to prove that iBrain provided educational instruction specially designed to meet the unique needs of the student supported by such services as are necessary to permit the student to benefit from instruction. However, there is not sufficient evidence in the hearing record to determine the number of related service sessions that were missed, the number of related service sessions subsequently made up by iBrain, or whether the make-up services rectified the failure to deliver related services on a consistent basis during the school year. The evidence in the hearing record is simply not specific enough to make these determinations and without additional information it is not possible to render a determination with regard to the district's appeal of the IHO's decision.

There is also a dispute between the parties with respect to the student's progress at iBrain during the 2022-23 school year. In considering the evidence of progress made by the student at iBrain during the 2022-23 school year, I note again that no one factor, including progress, is necessarily dispositive in determining whether a parent's unilateral placement is reasonably calculated to enable the child to receive educational benefits; rather it is the totality of the circumstances that must be considered in assessing the appropriateness of a unilateral placement. Additionally, a unilateral placement is not mandated by the IDEA or State law to provide services in compliance with a plan such as an IEP. Rather, it is well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of the student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). "The test for the private placement 'is that it is appropriate, and not that it is perfect'" (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877–78 [2d Cir. 2016] [citations omitted]). Accordingly, while a finding of progress would not in itself be dispositive, it could be sufficient to overcome the evidence noted above regarding the failure to deliver the student's related services on a consistent basis.

When asked if there were concerns regarding the student not achieving her annual goals, the director indirectly responded to the question by explaining that the student's annual goals could be adjusted during quarterly progress reports; however, she did not recall if those adjustments had been necessary for the student (Tr. p. 229). She further explained that it would be left to the discretion of the therapists to determine if changes were necessary, and if changes would be appropriate (Tr. p. 228-30). The iBrain director testified regarding the student's progress at iBrain during the 2022-23 school year (see Tr. pp. 178-81, 255-57). She made references to weekly and quarterly progress reports developed by iBrain; however, those reports were not entered into evidence (Tr. pp. 229, 300). In light of the above, the hearing record does not include sufficient objective evidence of the student's progress at iBrain during the 2022-23 school year to overcome any failure in the delivery of related services.

Considering the above, there is insufficient information in the hearing record to render a decision as to the appropriateness of the parents' unilateral placement of the student at iBrain. As the hearing record was not properly developed as to this issue, rather than denying the parents' request for funding of iBrain due to a failure to present sufficient evidence as to the delivery of the student's related services, the matter is remanded for a determination as to whether the program delivered to the student at iBrain for the 2022-23 school year was appropriate. Additionally, upon remand, the IHO may consider additional evidence as to the student's progress during the 2022-23 school year as that will be a relevant factor as discussed above.

C. Remand

Based on the above, the IHO's decision must be reversed in part, and the matter remanded to the IHO for further proceedings relating to relief sought by the parents in the July 6, 2022 due process complaint notice, including whether iBrain was an appropriate unilateral placement for the student. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

Additionally, the student's need for and funding of 1:1 nursing services at iBrain may be considered and any relief ordered by the IHO upon remand should address the question of direct funding or reimbursement as requested by the parents in their answer and cross-appeal (see Answer ¶¶ 29-44).

Upon remand, the IHO shall fully develop the hearing record on each issue that must be ruled upon. On the issue of delivery of related services at iBrain, this should include, for example, testimony and/or progress reports from iBrain related services providers and related services delivery reports from iBrain; if the parents do not offer this information, the district may wish to request subpoenas, which the IHO has the authority to issue if necessary (see 8 NYCRR 200.5[j][3][iv]). The IHO's finding of a denial of FAPE for the 2022-23 school year has been affirmed and the IHO's ruling that equitable considerations favored the parents' request for tuition

funding has not been appealed, therefore those determinations are final and binding upon the parties and need not be reconsidered during the remand (see 34 CFR 300.514[a]; 8 NYCRR200.5[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]).

As one final matter that may be addressed upon remand, in their cross-appeal the parents contend that the IHO erred in failing to award funding for the 1:1 nursing services the student received at iBrain during the 2022-23 school year. The parents requested an order for funding of nursing services in their due process complaint notice, there is a description of the need for 1:1 nursing services in the iBrain education plan, and a contract for 1:1 nursing services in the hearing record (Parent Exs. A at p. 8; C at pp. 6-8; M). However, there is also some conflicting evidence in the hearing record suggesting that the student may not have required a 1:1 nurse in the school setting.[8] In any event, the IHO, in her decision, did not make any findings with respect to the need for or funding of a 1:1 nurse for the student (see IHO Decision at pp. 11-15). It may be that the omission of a finding was an oversight, or it may be that the IHO intended to deny or grant the request for funding for a 1:1 nurse. In any event the IHO is directed to address the question along with other clarification of any order the IHO makes upon remand.

VII. Conclusion

The evidence in the hearing record demonstrates that the district failed to offer the student a FAPE for the 2022-23 school year. However, the IHO erred in failing to address the district's assertions regarding the appropriateness of iBrain and the hearing record is insufficiently developed on the issue of iBrain's delivery of related services during the 2022-23 school year, therefore this matter is remanded to the IHO to make determinations on these issues after further development of the hearing record. Additionally, in the event that the IHO after further consideration determines that iBrain was appropriate, the IHO is directed to consider the student's need for 1:1 nursing services at iBrain and develop a remedy to the extent required that addresses the cost of tuition, related services, 1:1 nursing services, and transportation at iBrain as well as the question of reimbursement or direct funding.

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 June 26, 2023 is modified by reversing those portions which found that the unilateral placement at iBrain was appropriate for the 2022-23

[8] Related to the parents' argument that the student required 1:1 nursing services in school and during transportation and that the IHO erred in failing to order district funding for the cost of 1:1 nursing services, review of the hearing record shows several discrepancies as to the extent of the student's need for 1:1 nursing services in school (see Parent Exs. K; L; N).

school year and ordered the district to directly pay the cost of the student's tuition at iBrain for the 2022-23 school year; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings regarding the appropriateness of iBrain for the 2022-23 school year and consideration of the appropriate remedy if any.

Dated: **Albany, New York**
October 10, 2023

STEVEN KROLAK
STATE REVIEW OFFICER