The University of the State of New York

The State Education Department
State Review Officer
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No. 23-293

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Zach Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Jared B. Arader, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the International Academy for the Brain (iBrain) for the 2023-24 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). 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

Given the limited issues raised in this appeal, a full recitation of the student's educational history is unwarranted. Briefly, however, the evidence reflects that the student in this case initially began attending iBrain in or around September 2021 for the 2021-22 school year and remained at iBrain for the 2022-23 school year (see Parent Exs. B at p. 1; K ¶ 5; see generally Parent Ex. I).[1] In February 2023, a CSE convened to conduct the student's annual review and developed an IEP

[1] The student was the subject of a prior administrative proceeding related to the 2022-23 school year (see generally Parent Ex. I [constituting a copy of the decision issued in the prior administrative proceeding, Application of a Student with a Disability, Appeal No. 23-136]).

for the 2023-24 school year (February 2023 IEP) (see generally Parent Ex. H).[2] In a letter dated June 20, 2023, the parent notified the district of her intentions to unilaterally place the student at iBrain for the 2023-24 school year (12-month programming) and to seek public funding for the costs of the student's tuition (see Parent Ex. J at p. 1). The parent also briefly described her bases for rejecting the special education program recommended in the February 2023 IEP, as well as her reasons for rejecting the assigned public school site within the letter (id. at pp. 1-2). The parent further noted that she remained willing to consider an appropriate public school or State-approved nonpublic school that could provide the student with the "required intensive academic and related services program," and the parent requested that a CSE reconvene "for this purpose" (id. at p. 2).

On June 26, 2023, the parent executed an enrollment contract with iBrain for the student's attendance during the 2023-24 school year (12-month programming) (see Parent Ex. C at pp. 1, 6). In addition, the parent executed a transportation agreement with "Sisters Travel and Transportation Services" to provide roundtrip transportation between the student's home and iBrain during the 2023-24 school year ("effective from July 1, 2023, through June 30, 2024"), and she similarly executed a nursing services agreement with "B&H Health Care, Inc.," to provide the student with "1:1 Private Duty Nursing services" during the school day, as well as to provide the student with a "1:1 Transportation Nurse" (Parent Exs. E at pp. 1, 6; G at pp. 1, 8).[3]

A. Due Process Complaint Notice

By due process complaint notice dated July 5, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) based on various procedural and substantive violations for the 2023-24 school year (see Parent Ex. A at pp. 1, 4-8). The parent claimed that iBrain was an appropriate unilateral placement and that equitable considerations weighed in favor of her requested relief (id. at p. 8). As relief and as relevant to this appeal, the parent requested an order directing the district to directly or prospectively fund the following: the costs of the student's tuition at iBrain for the 2023-24 school year (12-month programming), which included the costs of related services, a 1:1 paraprofessional, and a 1:1 nurse; transportation, including the provision of a 1:1 nurse and accommodations; and independent educational evaluations (IEEs), consisting of a psychological evaluation, a neuropsychological evaluation, and an educational assessment (id. at pp. 8-9).

B. Impartial Hearing Officer Decision

On August 11, 2023, the parties proceeded to an impartial hearing, which concluded on October 5, 2023, after four days of proceedings (see Tr. pp. 1-271).[4] In a decision dated November

[2] At or around the same time the February 2023 CSE meeting convened to develop the student's IEP, iBrain had also developed an educational plan (iBrain plan) for the student (compare Parent Ex. B at p. 1, with Parent Ex. H at p. 65). A comparison of the February 2023 IEP and the iBrain plan demonstrates that the two documents are virtually identical with regard to the information and special education recommendations for the student (compare Parent Ex. B, with Parent Ex. H).

[3] Neither the transportation agreement nor the nursing agreement bore a date to identify when the parent executed each respective contract (see generally Parent Exs. E; G).

[4] On September 1, 2023—between the second and third impartial hearing dates—an SRO issued a decision

2, 2023, the IHO concluded that the district failed to offer the student a FAPE for the 2023-24 school year (see IHO Decision at pp. 10-12). With respect to the student's unilateral placement at iBrain, the IHO determined that the parent failed to sustain her burden to establish that iBrain was appropriate because the hearing record lacked sufficient evidence demonstrating that iBrain provided the student with "specific instruction to meet her extensive and unique special education needs" (id. at p. 12). The IHO noted that the sole witness from iBrain—the deputy director (iBrain witness)—had only been employed at iBrain since February 2023, the witness did not teach or provide any services to the student, and moreover, the "veracity of his testimony [wa]s called into question in that his own affidavit falsely claim[ed] that he [wa]s a New York State certified teacher" (id. at pp. 12-13).[5] In addition, the IHO found that the same iBrain witness falsely testified that the student's classroom teacher was a "certified special education teacher" (id. at p. 13). According to the IHO, the iBrain witness had the "opportunity on direct to change or correct anything in his affidavit, and he declined" to do so (id. at p. 13 n.14). Consequently, the IHO concluded that although iBrain need not employ certified staff, the iBrain witness's "inaccuracies" in his testimony "call[ed] into question the reliability of his testimony in total—falsus in uno, falsus in omnibus" (id. at p. 13).

Nonetheless, the IHO also noted that, "[a]side from the veracity of his testimony," the iBrain witness could not "answer many questions due to the subject-matter being 'beyond his scope,' particularly with regard to the delivery of related services," which, based on the student's school schedule, was where she spent the "vast majority of her day" (IHO Decision at p. 13). In

(September 2023 SRO decision) with respect to the parent's challenges to the special education and related services the district had recommended for the student for the 2022-23 school year, as well as regarding the appropriateness of the student's unilateral placement at iBrain for the 2022-23 school year (see Parent Ex. I at pp. 1, 13). In that proceeding, the SRO agreed with the IHO's findings that the parent had failed to sustain her burden to establish the appropriateness of the student's unilateral placement at iBrain, as well as her entitlement to reimbursement or direct funding for the costs of the student's nursing and transportation services (id. at pp. 6-13). More specifically, the SRO found that the hearing record lacked sufficient evidence demonstrating that the student received related services consistent with the iBrain plan in place for the 2022-23 school year due, in part, to a shortage of related service providers (id. at pp. 9-11). At that time, the evidence reflected that iBrain anticipated having a full complement of OT providers by May 2023, but the evidence did not otherwise indicate when, or if, iBrain anticipated filling shortages in other related services areas (id. at p. 10). In that proceeding, the hearing record lacked any evidence to establish the amount of related services the student had received, but reflected that, at best, the student received two or three sessions per week of related services without identifying what related services the student had received—and notably, that two to three sessions per week equated to approximately half of what had been recommended for the student in his iBrain plan for the 2022-23 school year (id. at pp. 9-10). In addition, the hearing record lacked evidence to support the parent's contention that the student had made substantial progress during the 2022-23 school year, which, under the circumstances of that proceeding, could have overcome iBrain's failure to deliver related services to the student (id. at p.11). The SRO noted that the hearing record lacked the quarterly progress reports referenced by the parent and the iBrain director at the impartial hearing, and moreover, the hearing record lacked any provider notes or other progress reports concerning the 2022-23 school year (id.). Notwithstanding that the hearing record included anecdotal evidence of the student's progress, the SRO found it was insufficient to overturn the IHO's determination that the evidence did not establish that the student made meaningful progress during the 2022-23 school year at iBrain (id. at p. 12).

[5] Within the IHO's findings of fact in the decision, the IHO noted that, although the iBrain witness testified that he held a State teacher's certification, he admitted upon cross-examination that the "certification had expired" (IHO Decision at p. 6).

addition, the IHO found that while the testimonial evidence revealed that iBrain conducted "data-tracking, daily reports/logs and quarterly progress reports, none of this information was entered into the [hearing] record" (id.). The IHO also indicated that the parent had "objected" to the district's attempt to enter the student's progress reports into the hearing record as evidence at the impartial hearing, and by the time of the impartial hearing, "surely progress notes or a quarterly progress report should have been produced by October 2023, or at the very least subsequent to the February 2023 private school plan in evidence" (id.). Moreover, the IHO pointed to the September 2023 SRO decision from the previous administrative proceeding involving the same student, wherein the "lack of progress records" was cited by the State Review Officer; as a result, the IHO found it "troubling" that the parent "still refused and/or failed to enter any evidence into the [hearing] record" in the instant proceeding (id.).

Next, while indicating that progress was but one factor to consider, the IHO found that there was a "complete dearth of testimony or evidence regarding how the related services [we]re being provided and how the [s]tudent's goals [we]re being tracked or delivered" during the 2023-24 school year, which, according to the IHO, was "even more troubling" (IHO Decision at p. 13). The IHO noted that the parent's sole witness from iBrain did not "personally deliver any services" to the student, and he was "unaware why this [s]tudent"—who was one of only 60 total students at iBrain—had been "absent for [two] weeks" (id.). In addition, the IHO found that the hearing record lacked "any information regarding the current instruction and techniques being utilized by his teacher, paraprofessional and numerous service providers" and that this information could have been "done through reliable testimony or documentary evidence, but neither was provided to demonstrate how educational instruction [wa]s specially designed to meet the [s]tudent's unique needs" during the 2023-24 school year (id.). Notably, the IHO opined that, "[s]urely, there must [have] be[en] some records to support the [iBrain witness's] claim of 'drastic progress'" (id.). In light of the foregoing, the IHO concluded that the parent did not sustain her burden to establish the appropriateness of the student's unilateral placement at iBrain for the 2023-24 school year and denied the parent's request for direct payment of the costs of the student's tuition and related services (id.).

Next, the IHO turned to the parent's request for payment of 1:1 nursing services for the student during the 2023-24 school year (see IHO Decision at pp. 13-14). Initially, the IHO found that the hearing record was "devoid of any reliable medical evidence necessitating the provision of a 1:1 nurse" at iBrain (id. at p. 13). As noted by the IHO, although it was undisputed that iBrain students had "complex physical needs," the iBrain campus the student attended consisted of 39 students and two school nurses; and relatedly, the evidence in the hearing record revealed that "40 [percent] of the students (or approximately 15 students) ha[d] 1:1 nurses," which, as found by the IHO, equated to "approximately 17 nurses in the school building" (id. at pp. 13-14). In addition, the IHO determined that the student's classroom at iBrain consisted of at "least [two] other students [who also] ha[d] 1:1 nurses," as thus as a whole, the classroom included one teacher, one teacher assistant, six paraprofessionals and three 1:1 nurses (id. at p. 14). The IHO further determined that "[a]ll staff [we]re trained in seizure protocols" (id.).

Additionally, the IHO found that the hearing record did not include any "medical documentation supporting the need for a 1:1 nurse" for the student (IHO Decision at p. 14). Instead, the evidence in the hearing record indicated that the student had attended iBrain "up until February of 2023 without a 1:1 nurse," and more generally, the IHO found it "difficult to

understand why [iBrain] ha[d] not managed to provide a level of nursing support and staffing in its classrooms to efficiently and effectively meet the needs of its students" (id.). The IHO also found it "troubling" that the parent's attorney "objected to the introduction of [iBrain's] own nursing form," and failed to "introduce medical documentation herself" (id.). In addition, the IHO noted that the iBrain witness was "not familiar with [the student's] medical needs and was not aware of the frequency of any seizures or the need for medical intervention" (id.).

Turning, next, to the parent's request for the services of a 1:1 nurse on the bus during transportation to and from school, the IHO similarly found that the hearing record lacked any "medical documentation" supporting the student's need for this service (IHO Decision at p. 14). In addition, the IHO pointed to the parent's testimony indicating that a "1:1 nurse" already rode the student's bus "with her other daughter, along with the two paraprofessionals" (id.). As a final point, the IHO indicated that the parent failed to indicate in her 10-day notice of unilateral placement to the district that she "unilateral[ly] arrange[d] for 1:1 nursing services and [her] intent to seek payment" for such services from the district (id.). Consequently, the IHO denied the parent's request for payment of 1:1 nursing services for school and transportation (id.).

After addressing the parent's request for 1:1 nursing services, the IHO turned to the parent's request for transportation services (see IHO Decision at p. 14). The IHO initially indicated that the parent had not sought transportation services from the district, and the parent's 10-day notice of unilateral placement did not reference her intention to "unilaterally arrange for transportation services and seek payment" from the district (id.). The IHO noted that the parent testified that she "entered into an undated contract for transportation with Sisters Travel and Transportation services," which included an annual rate for services (id.). In addition, the parent testified that a "route to and from the [s]tudent's home to [iBrain]" already existed as the student's sibling also received transportation services to iBrain (id.). Citing equitable considerations, the IHO found that the hearing record lacked evidence that the parent provided the district with prior notice and that the district "should not be billed twice for the same route or run" (id.). Thus, the IHO concluded that the district was obligated to "pay for transportation to the extent that it [wa]s not already paying for a route to and from the [s]tudent's home" (id.). Additionally, the IHO noted that if the district was not already paying to transport the student's sister to and from iBrain, the district "shall be responsible for paying Sisters Travel for days that the [s]tudent actually [wa]s physically in attendance at [iBrain] and utilizing the transportation services" (id.).[6]

Finally, the IHO addressed the parent's request for an IEE (see IHO Decision at p. 15). The IHO found that the hearing record did not include any evidence that the parent had requested an IEE from the district "prior to the filing" of the due process complaint notice (id.). Based on previous SRO decisions, the IHO found that the parent could not "circumvent the IEE process and request for the first time an IEE" in the due process complaint notice; as a result, the IHO denied the parent's request for an IEE at district expense (id.).

[6] The IHO's ordering clause reads as follows: "the [d]istrict shall pay directly to Sisters Travel and Transportation for the 2023-24 school year for transportation on days the [s]tudent [wa]s physically in attendance at [iBrain] and the [d]istrict [wa]s already not paying for transportation for her sister for the same route, upon submission of invoices and attendance records" (IHO Decision at p. 15).

In closing, the IHO opined that it was "unconscionable" that the parent of "this severely disabled student" had been "saddled" with "financial obligations" as a result of the "exorbitant cost of [iBrain's] program and her contractual obligations with agencies recommended by [iBrain]" (IHO Decision at p. 15). The IHO further opined that it was "even more egregious" that the hearing record, as indicated, did not "support the services provided" to the student (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by finding that iBrain was not an appropriate unilateral placement, that the student did not require 1:1 nursing services, and that the parent was not entitled to be fully reimbursed for the costs of the student's transportation services, per the contract language. The parent also contends that the IHO erred by denying her request for an IEE at public expense. As a final point, the parent asserts that the IHO properly concluded that the district failed to offer the student a FAPE for the 2023-24 school year and seeks to affirm this finding. As relief, the parent seeks an order directing the district to fully reimburse or directly fund the costs of the following: the student's tuition at iBrain; the costs of the 1:1 nursing services, consistent with the contractual terms; the costs of the student's transportation services, consistent with the contractual terms; and to fund an IEE of the student.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.[7]

The parent submits a reply to the district's answer, responding to the district's arguments.[8]

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

[7] To the extent that the district does not appeal or challenge the IHO's finding that the district failed to offer the student a FAPE for the 2023-24 school year, the IHO's 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]).

[8] Although the parent prepared, served, and filed a reply to the district's answer in this case, State regulation limits the scope of the parent's reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent triggering the parent's right to compose a reply. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

[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 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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).

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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

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

VI. Discussion

A. Preliminary Matters—Credibility Determination

In support of her argument that the IHO erred by finding iBrain was not an appropriate unilateral placement, the parent argues, in part, that the IHO improperly found the iBrain witness's testimony was not credible and that the evidence in the hearing record did not support this credibility determination. The parent also argues that the iBrain witness's knowledge about the status of his teaching certification was simply a "mistake." In response, the district argues that the IHO properly exercised her discretion by finding that the iBrain witness's testimony lacked credibility, especially given that the IHO cited to evidence in the hearing record to support her finding with respect to the witness's overall lack of knowledge of the student, his short tenure at iBrain, his inability to explain the student's absences, and his inability to answer questions about the student's program.

Generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). Here, the parent does not point to any non-testimonial evidence in the hearing record that would justify a conclusion contrary to the IHO's credibility determination, or that the hearing record, when read as a whole, compelled a contrary conclusion (see generally Req. for Rev.; Tr. pp. 1-271; Parent Exs. A-L; Dist. Exs. 11-12; 14-15). Instead, the parent attempts to explain away the false testimony by asserting that the

iBrain witness was simply mistaken about the status of his teaching certification. However, when directly asked by the IHO whether his teaching certification was current or expired, the iBrain witness testified that it was expired and "currently under review" because he was "renewing it for the professional license" (Tr. pp. 188-89). After the IHO then stated, "So you don't currently hold a New York State teacher certification," the iBrain witness testified: "No, I'm sorry. I'll have to correct that for the record" (Tr. p. 189). Yet, as reflected in the transcript, when the iBrain witness was sworn in as a witness, he was specifically asked to confirm that the affidavit constituted his direct testimony and whether he wanted to "change or correct" any information therein (Tr. p. 89). In response, the iBrain witness testified: "No" (Tr. p. 89). The iBrain witness's affidavit was neither signed nor notarized, but bore "September 2023" as the anticipated notary date (Parent Ex. L at p. 5). In addition, the iBrain witness attested in his affidavit that he held a "N.Y.S. teacher's certification" (id. ¶ 3).

Based on the foregoing, and as the parent has not pointed to any non-testimonial evidence to justify a contrary conclusion, there is no basis upon which to disturb the IHO's finding that the iBrain witness's testimony was not credible.

B. Unilateral Placement at iBrain

The parent contends that, in finding that iBrain was not an appropriate unilateral placement, the IHO ignored the student's iBrain plan, which set forth the services the student received, as well as the student's goals and progress.[9] The district argues that while the hearing record is replete with evidence of the student's need for a high degree of intense related services, the hearing record fails to include evidence regarding the implementation of those related services other than one sentence of the iBrain witness's testimony.

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed

[9] In further support of the argument that the IHO erred by finding that iBrain was not an appropriate unilateral placement, the parent revives an argument rejected in her previous administrative appeal, namely, that "[t]he necessary inquiry regarding the appropriateness of a unilateral placement is whether the program reasonably could have been expected, at the time of placement, to offer meaningful educational benefit to a student" (Req. for Rev. ¶ 15, citing B.R. v. New York City Dep't of Educ., 910 F. Supp. 2d 670, 677 [S.D.N.Y. 2012] [emphasis in original]; see Parent Ex. I at pp. 6-7). In rejecting that argument, it was noted in the previous administrative appeal that, contrary to the parent's theory of the case, B.R. concerned the adequacy of a program recommended by a CSE and 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]). Moreover, if a unilateral placement is only assessed at the time of the placement decision, then it would obviate well-settled judicial standards 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 consideration of the student's progress in attendance at the unilateral placement as a relevant factor in determining the appropriateness of the unilateral placement. For these reasons, the parent's argument continues to be inapplicable to the analysis of whether iBrain, in the instant appeal, constituted an appropriate unilateral placement and is rejected.

instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

Related to the implementation of the unilaterally obtained services during the 2023-24 school year, is the student's progress. Generally, 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).[10] 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]).[11]

In this case, a review of the IHO's decision demonstrates that the IHO did not appear to consider evidence of the student's February 2023 iBrain plan in reaching her determination that the parent failed to sustain her burden to establish that iBrain provided the student with "specific instruction to meet her extensive and unique special education needs"—or, specially designed instruction—or ultimately, whether iBrain was an appropriate unilateral placement. As explained

[10] 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"]).

[11] However, neither the district, nor the IHO, can hold the parent to an outcome-based standard because the IDEA was not designed to ensure guaranteed outcomes for students with disabilities, even with the provision of specially designed instruction for their unique needs (see Walczak, 142 F.3d at 133 [stating that "IDEA requires states to provide a disabled child with meaningful access to an education, but it cannot guarantee totally successful results"]; M.H., 685 F.3d at 245 [noting that the "[t]he purpose of the Act was instead 'more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside' [citations omitted]]). Thus, to the extent that the district argues that the hearing record lacks objective evidence of the student's progress at iBrain during the 2023-24 school year, a finding of progress is not a per se requirement for a determination that a student's unilateral placement is adequate (R.C., 2013 WL 563377, at *9-*10 [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B., 523 Fed. App'x at 78; D.D-S., 506 Fed. App'x at 81; see also Frank G., 459 F.3d at 364). However, a finding of progress is, nevertheless, a relevant factor to be considered because, under the totality of the circumstances, it can lend support to other evidence adduced by parents who are attempting to satisfy the second Burlington/Carter criterion (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at26-27; see T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]).

below, the February 2023 iBrain plan appears to have been designed to provide the student with specially designed instruction to meet her unique needs. However, given the IHO's credibility determination regarding the iBrain witness's testimony, the hearing record lacks at the very least a statement that the February 2023 iBrain plan was the plan that the school was providing the student for the 2023-24 school year.

Overall, the student's needs are not in dispute and her needs related to the 2023-24 school year do not dramatically differ from a description of the same reported in the September 2023 SRO decision related to the 2022-23 school year. As reflected in the student's February 2023 iBrain plan, the student was diagnosed has having a "hearing loss," "infantile spasms," and "vision challenges"; in addition, the student was non-ambulatory and nonverbal, but used an "activity chair" and "communicate[d] using body language" and was learning to use augmentative and alternative communication (AAC) devices (Parent Ex. B at p. 1). The student was also learning to feed herself (id.). The iBrain plan indicated that the student "now ha[d] a 1:1 nurse due to increase in seizure/spasm activities" (id.). Cognitively, the iBrain plan indicated that the student was "often self-directed and require[d] significant support and repetition in order [to] follow directions" and that she "display[ed] increased curiosity during academic and therapy sessions, demonstrated by her keeping her eyes open more often and using her hands to engage with materials presented to her" (id. at p. 2). In addition, the iBrain plan noted that the student did "not yet recognize her name in print, letters, colors, numbers, or shapes" (id.). The student could "maintain attention and participation best when given multisensory supports" (id.).

In the area of the student's social needs, the iBrain plan reflected that the student was "currently working on producing a social greeting (e.g., hello) and closure (e.g., goodbye) with her peers by utilizing a single button voice output switch with a pre-recorded phrase or by her producing a vocalization with moderate to maximal verbal, visual, auditory and tactile cues" (Parent Ex. B at p. 3). The iBrain plan also indicated that the student was "observed to show interest in familiar providers and her interest in peers [wa]s emerging" as evidenced by the student turning her "gaze" or her "head to localize the sound of a familiar voice" and by the student "smiling and vocalizing" during morning meeting with her classmates (id.). The plan further noted that, at that time, the student "communicate[d] her wants and needs by crying, gestures (e.g., reaching) and vocalizing when she [wa]s happy" (id.). According to the iBrain plan, the student required the "full assistance of a familiar person to observe her emotional state, body movements and behaviors to determine her wants and needs" (id.).

With respect to the student's physical needs, the iBrain plan described her self-care skills in the following areas: dressing her upper and lower body, managing fasteners, toileting, grooming, feeding, and her ability to transfer (see Parent Ex. B at pp. 4-7). The iBrain plan also described the student's fine motor skills with regard to grasping objects ("MACS: Level II"), hand dominance, reaching, grasp pattern, pinch pattern, finger isolation, release, manipulation, and bilateral coordination (id. at pp. 7-10). Next, the iBrain plan noted the equipment and supports the student required, including, for example, the use of a "small Rifton activity chair"; a "travel stroller for all transportation needs within the school, home and community environments"; and the use of "consistent verbal and tactile cues to address visual and hearing deficits" (id. at p. 10). In addition, the iBrain plan described the student's physical presentation; her classroom participation skills; the student's strengths and needs; parent concerns and priorities; the results of the "Quality of Upper Extremity Skills Test (QUEST)" administered to the student; the student's quality of movement;

her body function and structures; the student's gross motor needs; and the results of the "Gross Motor Function Measure (GMFM-88)" administered to the student (id. at pp. 10-15).

In the area of visual performance, the iBrain plan noted that the student had received a diagnosis of cortical visual impairment and legal blindness; however, since the student began attending iBrain, it was observed that "several characteristics of cortical visual impairment ha[d] begun to resolve" (Parent Ex. B at p. 15). Additionally, it was noted that the student was "making considerable progress in being able to visually fix [her] gaze and demonstrate[d] highly developed visually guided reach without the benefit of backlighting" (id.). With regard to the student's needs in the area of vision, the iBrain plan reported the results of a March 2022 updated optometric exam, which indicated that the student had received diagnoses of cerebral visual impairment and hyperopia (id. at p. 17). Reportedly, the student could not "view people or objects in focus at distances exceeding 10 to 12[inches] from her eyes" and iBrain implemented the use of the "MATT-Connect [closed circuit television (CCTV)] in all educational settings" (id.).

Academically, the iBrain plan indicated that the student benefitted from the use of "multisensory books with tactile support," and she attended to and listened to stories read to her (Parent Ex. B at p. 16). The student could "use her bigMACK switch to respond to questions and participate in the read aloud by directing the teacher to turn the page" (id.). It was reported that the student demonstrated an "improved attention span to attend to tasks and focus" with the use of multisensory supports (id.). It was further reported that the student made progress since beginning at iBrain, "although her performance continue[d] to show some inconsistency on a day-to-day basis" (id.). According to the iBrain plan, the student received "1:1 direct instruction support for 30 minutes daily," which provided her with the "time to focus on highly individualized work with modified materials to meet her needs, given specific corrective feedback to ensure the pairing of correct information, and scaffolded supports to maximize independence" (id.). The student's 1:1 academic sessions took place in areas of the classroom, "which minimize[d] environmental distractors such as visual and auditory stimulation" (id.). iBrain further provided "[a]dditional academic support" to the student in "paired and small group activities including math, literacy, science, and morning meeting," which the student participated in with the "support of her 1:1 paraprofessional and through push-in sessions with her therapists" (id.). The student's paraprofessional ensured the student's ability to "fully participate" by encouraging her, managing the student's materials, and carrying over skills and strategies "across therapy sessions" (id. at pp. 16-17).

With respect to the student's needs in the area of speech and language, the iBrain plan noted that she required a "variety of accommodations and supports to actively participate within a session"; the plan also noted, however, that "her needs fluctuated depending on her medical status, arousal level, regulation, mood and interest" (Parent Ex. B at pp. 24, 27). Further, the iBrain plan reported the student's receptive and expressive language scores from the administration of the "Dynamic AAC Goals Grid 2 (DAAG-2)," which yielded results indicating the student was an emergent communicator at ability level one (id. at pp. 22-23). The plan also indicated that the student was learning to communicate using an AAC device and thereafter, provided a description of a typical speech session with the student (id. at pp. 1, 25). The iBrain plan reported that the student's speech sessions were "primarily focused on attending to motivating items and engaging in emerging joint attention skills, following one-step directions, communicating behaviorally by reaching towards preferred items, shifting her gaze and vocalizing as well as cause-and effect-

based activities" (id. at p. 25). At that time, the student had "demonstrated a preference for a light-up textured ball" and had "started to demonstrate object permanence" (id.). With respect to oral motor skills, the student had "started consuming soft solids as well as crunchy snacks," and when drinking, the student benefitted from "pacing, support to reduce[] anterior spillage of the liquids and suck or close her lips" (id. at p. 29).

In the area of assistive technology, the student had been recommended for a "specific mid-tech AAC device" ("LoganTech ProxPAD"), which had not been procured at the time that the iBrain plan was developed (i.e., February 2023) (see Parent Ex. B at p. 21). The iBrain plan indicated that, during a typical assistive technology session, the student worked on her "ability to access to the switches, with voice output capabilities, to communicate greetings, simple requests (e.g., 'more,' 'all done/finished,' 'turn the page,', 'that's my choice') or to comment or direct action during preferred activities, such as online games, book reading, or music tasks and activities with predominant auditory and accommodated visual sensory input" (id. at pp. 19-20).

The iBrain plan also included a description of the student's occupational therapy (OT) needs, as well as a typical OT session with the student (see Parent Ex. B at pp. 37-39). It was reported that the student was working on "increasing independence in switch activation to engage in academic tasks, grasp and targeted release, and self-care skills including upper and lower body dressing as well as self-feeding utilizing a utensil, finger feeding and drinking from a sippy cup" (id. at p. 38). Similarly, the iBrain plan reported on the student's physical therapy (PT) sessions, noting that she was working on her ability to perform "sit to stand transitions"; "ambulating 15 feet in the least restrictive device with minimal assistance to increase independence within the school setting"; and using a variety of equipment, such as a "gait trainer, cube chairs, benches, bolsters, and therapy balls" (id. at pp. 41-43).

To address the student's needs, the February 2023 iBrain plan included recommendations for 12-month programming, which consisted of a 6:1+1 special class placement along with the following related services: five 60- minute sessions per week of individual OT, PT, and speech-language therapy; three 60-minute sessions per week of individual vision education services; two 60-minute sessions per week of individual hearing education services; one 60-minute session per week of individual orientation and mobility services; one 60-minute session per week of assistive technology services; and one 60-minute session per month of parent counseling and training (see Parent Ex. B at pp. 87-89). Further, the iBrain plan included recommendations for the services of a 1:1 paraprofessional throughout the school day, transportation services, assistive technology devices, and training for school personnel in the areas of seizure safety, use of adaptive equipment, assistive technology, and vision-based adaptations (id. at pp. 89-90).[12]

[12] Based on the student's schedule at iBrain for the 2023-24 school year, her related services comprised approximately five hours of the school day, which began at 8:30 a.m. and ended between 4:30 and 5:00 p.m. (i.e., eight and one-half hour day) and which included one hour devoted to lunch, approximately one hour devoted to activities of daily living (ADLs) (combined morning and afternoon), 30 minutes devoted to 1:1 academics, and 30 minutes devoted to a group activity or read aloud period (see Dist. Exs. 12; 15). The parent testified that the student was picked up daily at approximately 8:00 a.m. for school and she was home each day from school before 5:00 p.m. (see Tr. pp. 256-57).

The iBrain plan included annual goals to address the student's needs in the areas of academics (literacy, mathematics, cognition, and social skills), vision, hearing, assistive technology, speech-language (receptive and expressive language, oral motor skills), PT, OT (including self-care), music therapy (cognition, communication, sensorimotor), parent counseling and training, and paraprofessional support (see Parent Ex. B at pp. 56-83). An individualized health plan (IHP), included within the iBrain plan, outlined the student's nursing diagnosis, goals, nursing interventions, and expected outcomes related to needs associated with the student's diagnoses and listed the 1:1 paraprofessional and 1:1 nurse as individuals responsible for coordination of intervention as needed (id. at pp. 50-54).

The iBrain plan also identified the student's management needs, including a class environment in a highly specialized program, the support of a 1:1 paraprofessional, access to a school nurse, adaptive equipment, access to an AAC device, sensory rest breaks, multisensory approach, adaptive feeding utensils, and verbal and tactile cueing (see Parent Ex. B at pp. 10-11, 55-83, 88-89).

The February 2023 iBrain plan does not state that it is intended to be implemented during the 2023-24 school year, which was, at that time, almost five months away.[13] Further, with respect to hearing education services, the February 2023 iBrain plan stated that the recommendations "remain[ed] in place with further updates pending a new in person evaluation later in February 2023" (Parent Ex. B at p. 27). There is no evidence in the hearing record that the February 2023 iBrain plan remained in place for the student with no changes as of the beginning of the 2023-24 school year. Further, as the IHO found the iBrain witness not credible, the hearing record lacks any credible evidence corroborating that the services described in the February 2023 IEP were delivered to the student during the 2023-24 school year. The parent did not offer any documentary evidence dated during the 2023-24 school year, which may have sufficiently made up for the evidentiary gaps resulting from the IHO's credibility finding, such as a progress report or service delivery records.[14] Accordingly, there is insufficient basis in the hearing record to disturb the IHO's determination that the parent failed to meet her burden to prove that iBrain was an appropriate unilateral placement.

[13] While likely a typographical error, the February 2023 iBrain plan stated a projected implementation date for the programing and services recommended as February 28, 2022 (Parent Ex. B at pp. 87-90).

[14] The IHO's determinations and the district's argument on appeal are understandable given that iBrain's inability to implement its own special education program for the student—and more specifically, the related services—during the 2022-23 school year weighed heavily in finding that iBrain was not appropriate to meet the student's unique needs for that school year. In some ways, the instant administrative proceeding is distinguishable. In the prior matter, evidence was elicited at the impartial hearing that the student was not receiving a full complement of related services, as mandated by her iBrain plan for the 2022-23 school year (see Parent Ex. I at pp. 9-11). Here, the hearing record did not contain such evidence. Nevertheless, while perhaps the parent was not required to prove the delivery of each session of the related services during the 2023-24 school year—i.e., absent any evidence or an argument from the district during the impartial hearing that there was a lapse in the delivery of services—in this instance, there is not sufficient credible evidence upon which to rely to find, even broadly speaking, that the February 2023 iBrain plan was provided to the student during the 2023-24 school year.

C. Independent Educational Evaluations

The parent argues that the IHO erred by denying her request for an IEE at public expense. The parent emphasizes that, consistent with State and federal regulations, when a parent disagrees with a district evaluation and requests an IEE, a district has two options: ensure that an IEE is provided at public expense or initiate an impartial hearing to establish the appropriateness of its own evaluations. The parent further notes that the IHO's reliance on a recent SRO decision to support her conclusion was improper, as SRO decisions have no binding authority. In response, the district asserts that the parent did not express any disagreement with a district evaluation prior to filing the due process complaint notice, nor did the parent identify a specific evaluation with which she disagreed.

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]; 200.16[d][3]), 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]).[15]

As asserted by the parent, 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]).

[15] Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that, if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

In the due process complaint notice, the parent alleged that the district failed to thoroughly assess the student in all areas of her suspected disability and failed to follow its own procedures when considering a State-approved nonpublic school placement (see Parent Ex. A at pp. 6-7).[16] In addition, the parent "restate[d] her disagreement with the [district's] evaluations and request[ed] an [IEE]" in the form of funding for an "independent psychological assessment, educational needs assessment, and a neuropsychological evaluation" by providers selected by the parent (id. at p. 7). Yet, other than this statement in the due process complaint notice, the hearing record does not include any evidence to establish that the parent previously disagreed with district evaluations (see generally Tr. pp. 1-271; Parent Exs. A-L; Dist. Exs. 11-12; 14-15). Thus, the evidence in the hearing record convinces me that the parent did not make her request in a way that the district should have expected the parent was disagreeing with an evaluation conducted by the district or that they were seeking an IEE at district expense (see Application of a Student with a Disability, Appeal No. 19-018 [where the parent did not seek an evaluation by an independent evaluator, appropriate relief was to order the district to conduct the evaluation rather than award an IEE]). As a result, there is no reason to disturb the IHO's decision denying the parent's request for an IEE at district expense.

VII. Conclusion

Having found no basis in the hearing record to disturb the IHO's determination that the parent has not carried her burden of demonstrating the appropriateness of the unilateral placement at iBrain for the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations weighed in favor of the parent's request for relief.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 5, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[16] To be clear, the student's February 2023 IEP developed for the 2023-24 school year included a recommendation for a 12:1+(3:1) special class placement in a district specialized school—not a State-approved nonpublic school, as alleged at one point in the due process complaint notice (compare Parent Ex. H at p. 58, with Parent Ex. A at pp. 4, 6-7).