The University of the State of New York

The State Education Department
State Review Officer
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No. 23-303

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from those portions of a decision of an impartial hearing officer (IHO) which denied, in part, her request for direct funding for special transportation services for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's determination that the parent's unilateral placement of her son at the International Academy for the Brain (iBrain) was an appropriate placement and ordered it to fund the student's tuition costs at iBrain for the 2023-24 school year. The district also cross-appeals the IHO's order to fund the cost of an independent educational evaluation (IEE). The appeal must be sustained. 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 facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, the student in this matter has a brain-based injury, as a result of contracting meningitis as an infant (Parent Ex. C at p. 1; Dist. Ex. 1 at p. 1). He has received diagnoses of global developmental delays, microcephaly, cortical blindness, optic nerve atrophy, nystagmus,

exotropia, amblyopia, and epilepsy (Parent Ex. C at p. 1; Dist. Ex. 1 at p. 1).[1] The student began attending iBrain in 2018 (Parent Exs. A at p. 3; G ¶ 7; H ¶ 11; IHO Ex. II at p. 3; see Tr. p. 44).[2, 3]

A CSE convened on June 14, 2023, and finding the student eligible for special education as a student with a traumatic brain injury developed an IEP for him with an implementation date of July 1, 2023 (see generally Dist. Ex. 1). On June 20, 2023, the parent disagreed with the recommendations contained in the June 2023 IEP, as well as with the public school site to which she anticipated the district would assign the student to attend for the 2023-24 school year and, as a result, notified the district of her intent to unilaterally place the student at iBrain (Parent Ex. D; see generally Parent Ex. G ¶ 9).

On June 28, 2023, the parent signed an enrollment contract for the student to attend iBrain for the 2023-24 12-month school year (Parent Ex. E). The parent also entered into a transportation service agreement with Sisters Travel and Transportation Services, LLC (Sisters Travel) which indicated Sisters Travel would provide transportation services for the student to and from iBrain from July 1, 2023 through June 30, 2024; the transportation agreement was not dated (Parent Ex. F).

In a due process complaint notice dated July 5, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year, raising issues related to the recommended 6:1+1 special class, nursing services, music therapy, assistive technology, and transportation services—noting the lack of a recommendation for a 1:1 travel paraprofessional, an air conditioned bus and limited travel time (Parent Ex. A). The parent also requested an award directing the district to publicly fund an independent neuropsychological evaluation (id. at pp. 6-7).[4]

The parties convened for two pre-hearing conferences before the Office of Administrative Trials and Hearings (OATH) on August 15, 2023 and September 8, 2023 (Tr. pp. 1-25). The parties reconvened for an impartial hearing on October 12, 2023 which concluded the same day (Tr. pp. 13-164). Both parties submitted written closing summations to the IHO for consideration on October 10, 2023 (IHO Exs. I-II).

In a decision dated November 6, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year, that iBrain was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for direct

[1] The hearing record does not include a primary source for these diagnoses.

[2] The Commissioner of Education has not approved iBrain as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200,1[d], 200.7).

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

[4] The parent clarified during the September 8, 2023 pre-hearing conference that she was requesting the IEE as part of the final relief awarded and was not seeking an interim order directing the district to fund the independent neuropsychological evaluation prior to the parties convening for the impartial hearing (see Tr. p. 23).

tuition payment for the student's full tuition cost at iBrain, but did not favor the parent's request for direct funding of the full cost of the private transportation service (IHO Decision at pp. 10-14). The IHO also determined that the parent's request for funding of an independent neuropsychological evaluation was "unripe" (id. at p. 13). However, the IHO found that the parent requested the district conduct an assistive technology evaluation of the student during the June 2023 CSE meeting, but that the district did not conduct such evaluation, despite evidence that the student required an assistive technology device for his communication needs (id.). As relief, the IHO ordered the district to: (1) directly pay the cost of the student's total tuition at iBrain for the 2023-24 school year, including the supplemental tuition fees; (2) directly pay the cost of the student's private transportation services upon receipt of appropriate documentation showing the student's utilization of such private transportation services to and from iBrain; (3) directly fund an independent assistive technology evaluation of the student by a provider of the parent's choosing at the market rate; (4) provide the assistive technology device recommended by the assistive technology evaluator for the student to use at home and at school; (5) directly fund assistive technology training of the student's academic team, including the parent, as recommended by the assistive technology evaluator; and (6) reconvene the CSE within 35-days of receipt of the assistive technology evaluation if requested by the parent (id. at p. 14).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer and cross-appeal, and the parent's reply and answer thereto are also presumed and, therefore, the allegations and arguments will not be recited in detail. The gravamen of the parent's appeal is that the IHO erred in limiting the funding for private transportation sought by her as relief. The district cross-appeals from the portions of the IHO decision which found that the parent's unilateral placement of the student at iBrain was appropriate for the 2023-24 school year and ordered the district to fund an assistive technology IEE.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley,

458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 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]).[5]

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

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

VI. Discussion

At the outset, the district has not appealed the IHO's determinations that the district failed to offer the student a FAPE for the 2023-24 school year.[6] As a result, such 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]).

A. Scope of Impartial Hearing

Turning first to the district's allegation that the IHO's award of an independent assistive technology evaluation was beyond the scope of the parent's July 2023 due process complaint notice, it does not appear that the parent requested an independent assistive technology evaluation, but rather, for the first time in her due process complaint notice, indicated her disagreement with the district's evaluations and requested an independent neuropsychological evaluation (Parent Ex. A at pp. 5-6). Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise

[5] 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).

[6] The district conceded the issue of FAPE on the record during the impartial hearing (Tr. pp 41-42, 48).

issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Beyond alleging that the district failed to conduct appropriate evaluations, the parent's due process complaint notice cannot be reasonably read to include a request for an independent assistive technology evaluation (see Parent Ex. A at pp. 5-6). Moreover, the IHO relied on one statement included in the student's June 2023 IEP in determining that the parent previously requested an independent assistive technology evaluation and the district failed in its obligation to either fund such evaluation or file a due process complaint notice to defend its decision not to fund the evaluation (IHO Decision at p. 13). The June 2023 CSE noted under the section entitled "Parent Concerns" that "[iBrain] reported that they would recommend that a formal [assistive technology] evaluation to be completed through the [district] to determine a more appropriate communication device to support [the student's] needs" (Dist. Ex. 1 at p. 56). Review of the hearing record reflects that the district representative at the June 2023 CSE meeting informed the parent she could submit a written request to the CSE for an assistive technology evaluation for the student to determine the most appropriate communication device for him (Dist. Ex. 1 at p. 56); however, the hearing record did not establish that the parent ever submitted a written request to the district seeking an assistive technology evaluation or asserted in writing any disagreement with any prior district assistive technology evaluation that may have been conducted as part of the district's evaluation or reevaluation of the student (see Tr. pp. 1-164; Parent Exs. A-H; Dist. Exs. 1-7; IHO Exs. I-III).

Here, review of the due process complaint notice demonstrates that the parent did not request that the district fund an independent assistive technology evaluation (see Parent Ex. A). Additionally, it does not appear that the parent thereafter sought the district's agreement to expand the scope of issues or the IHO's permission to amend the due process complaint notice (see generally Tr. pp. 1-164). The parent in her due process complaint notice generally stated that the district failed to recommend an assistive technology device or services (see Parent Ex. A at p. 6); however, a review of the June 2023 IEP indicates that the CSE did recommend an assistive technology device in the form of a "single & multi-message programmatic communication device" and assistive technology services once weekly for 60-minutes (Dist. Ex. 1 at pp. 27, 48). As such, it does not appear that the student's need for assistive technology was in dispute in this matter as both parties agree that the student required assistive technology support as made evident by the fact that both the CSE and iBrain staff recommended assistive technology devices and services for the student, and the parent did not object specifically to the assistive technology device and services recommended by the district(see Parent Ex. C at p. 66; Dist. Ex. 1 at p. 48).

The next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y.

2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

In this case, assistive technology was brought up by the IHO when questioning the parent and the deputy director of iBrain with respect to the type of device used by the student at iBrain and whether the parent had received training regarding assistive technology (see Tr. pp. 90, 152). The IHO also asked if an assistive technology evaluation of the student was conducted for the student to which the parent stated "I am not sure"; the deputy director of special education at iBrain (deputy director) represented that the student had an initial assistive technology evaluation in 2018 when he first began attending iBrain (id.). The hearing record indicates that no district witnesses testified regarding the student's need for assistive technology or its related recommendations and, therefore, the district did not open the door with respect to any assistive technology claims by the parent (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9).[7] Moreover, the parent's testimony indicated that she did not consider the assistive technology recommendation by the district to be a disputed issue at the impartial hearing and was not generally aware that she was seeking any IEEs as relief (see generally Tr. pp. 89-91).[8] As such, I agree with the district that the IHO's award of an independent assistive technology evaluation was beyond the scope of the hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"). Therefore, the IHO's awards related to an independent assistive technology evaluation at public expense, assistive technology training and requiring the district to provide the recommended assistive technology device to the student are reversed.

B. Unilateral Placement

The district appeals from the IHO's finding that the parent sustained her burden to show that iBrain was an appropriate unilateral placement for the student during the 2023-24 school year. Specifically, the district alleges that "the hearing record does not convincingly or objectively show that iBrain provided the [s]tudent with specifically designed instruction to address his unique needs" nor does it include any evidence of progress with respect to the school year at issue (Answer ¶¶ 16-17).

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).

[7] It should be noted that the district did not introduce any live witness testimony during the impartial hearing (Tr. pp. 26-164).

[8] The parent in her due process complaint notice did request an IEE in the form of a neuropsychological evaluation, however when questioned by the IHO if the parent wanted an independent neuropsychological evaluation the parent responded, "I don't know" (Tr. p. 89).

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

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

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

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

The hearing record shows that iBrain developed an education plan for the student on June 13, 2023, with recommended programs and services projected to begin on July 5, 2023 (Parent Ex. C). According to an iBrain attendance report, the student was marked as "Y" from July 5, 2023 to September 19, 2023 meaning that he was present or had an excused absence or received home services on those days (Dist. Ex. 7).

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

The June 2023 iBrain education plan described the student as nonverbal and non-ambulatory and noted that he received nutrition via a gastrostomy (g) tube (Parent Ex. C at p. 1. The education plan stated that due to the student's medical condition and its impact on his educational growth the student required a small class size and extensive adult support, while benefitting from the psychosocial and educational experience of being with other students (id.).

The education plan indicated that the student was aware of his environment, as well as his daily routines and schedule, but did not consistently respond to his name (Parent Ex. C at p. 2). According to the plan, the student was able to identify numbers 1-10, match colors and shapes in fields of 2-4, and answer yes/no questions and "'Wh'" questions when given choices (id.). The education plan described the student as an "extremely auditory leaner" with good auditory memory (id. at pp. 2-3). The plan noted that the student "s[at] well in small groups," participated in all social activities with the help of his paraprofessional and had no problem taking turns or listening to others (id. at p. 3).

With regard to his speech and language development, the education plan indicated that the student exhibited significant delays in his receptive and expressive language skills and that he presented with difficulty in the coordination of movements needed for speech and verbal productions (Parent Ex. C at pp. 20, 23-25). The student communicated using facial expressions, gestures, vocalizations, and body movements, as well as with "low tech" tactile symbols (Standardized Tactile Augmentative Communication Symbols [STACS]) and a "high tech" augmentative and alternative communication (AAC) device (iPad Pro) (Parent Ex. C at pp. 14, 19, 20, 27). With regard to receptive language, the plan indicated that the student was able to orient to sounds, respond to "'no,' at times "recognize his name or that of familiar people," and understand more than 10 words (id. at p. 24). With regard to expressive language, the education plan stated that the student intentionally used conventional gestures for "'more'" and "'give me'" when expressing his wants and needs (id. at p. 25). In terms of peer interactions, the plan indicated that the student noticed the presence of other students when provided with minimal cues, demonstrated the ability to vocalize and gesture towards his peers, and interacted with other students in simple and brief episodes (id. at p. 26). The education plan indicated that the student understood approximately five signs, that his most thoughtful responses to story questions were provided using sign language and that when most agitated he used sign language to get his point across (id at p.

30). According to the education plan, the student presented with "grossly low tone" in his lips, tongue and cheeks (id. at p. 28).[9]

According to the iBrain education plan, the student demonstrated full bilateral upper extremity passive and active range of motion of the shoulders, elbows, wrists, and fingers (Parent Ex. C at p. 7). In addition, the student demonstrated a right-hand preference but was able to use both hands during functional tasks (id.). The education plan noted that the student was able to reach for items with both hands and demonstrated good grasping patterns as well as demonstrating the purposeful release of items and in-hand manipulation skills (id. at pp. 7-8). The student was also able to don/doff some clothing items with minimal assistance but required minimal-maximal assistance with self-feeding, maximal assistance with hand washing, and was dependent for all toileting needs (id. at pp. 6-7). In addition, the student demonstrated a low tolerance for some grooming skills (id. at p. 6). In terms of gross motor skills, the education plan indicated that the student was able to achieve quadruped from prone and assume a sitting position from prone and supine independently (id. at p. 12). In addition, the student was able to assume short kneeling from a prone position independently but lacked the muscle strength in his lower extremities to maintain tall kneeling independently (id.). The student could also transfer from tall kneeling to standing with moderate assistance and stand upright for brief periods of 15 seconds with minimal assistance (id.). The plan described the student as presenting with muscle weakness in his lower extremities, poorly dissociated movement at the pelvis, and a scissored gait pattern during ambulation (id. at pp. 11-12). According to the education plan, the student used a custom manual wheelchair and demonstrated the motor planning needed to self-propel it, however, he required cueing/assistance for safety awareness, self-regulation, continuation, and to visually attend to activities (id. at p. 9).

The June 2023 iBrain plan indicated that the student's vision was profoundly impacted by his condition and also severely impaired as a result of his light-gazing behaviors (Parent Ex. C at p. 13). The education plan indicated that the student's best viewing occurred at eye-level in his right central view as he was left eye dominant (id.). In addition, the education plan noted that the student typically preferred to view materials within a distance of six inches and responded best with backlit materials and task lighting (id.). According to the education plan, when materials were presented to the student in a light and sound-controlled space he would visually and tactually attend to preferred visual materials for 10 seconds (id. at p. 14). The student was working on increasing the duration of his gaze and generalizing minimal engagement to non-preferred visual materials (id. at p. 14). Accommodations used to support the student's visual functioning included extended time for processing, reduced visual complexity materials, highly contrasted displays, and repetition of materials (id. at pp. 13-15).

With regard to assistive technology, the iBrain education plan indicated that the student was previously evaluated for use of an eye-gaze device but it was determined that eye-gaze as an access modality might be too complex for the student due to his cortical visual impairment and level of visual functioning (Parent Ex. C at p. 16).[10] The plan noted that the student had mastered

[9] As noted above, the student has a g-tube and does not receive any oral feeds throughout his daily routine at school; however, the parent reports that at home, he receives sustenance by mouth (Parent Ex. C at p. 28).

[10] However, the June 2023 iBrain plan noted that at times, the student "unintentionally" gazed towards objects when he required increased stimulation to regulate himself (Parent Ex. C at p. 18).

the use of a 4-panel switch with voice output capabilities and had moved on to using an iPad to assist with his visual needs and give him more access to vocabulary throughout the day (id. at pp. 16, 20).[11] The iPad he uses has a grid of four cells, which includes accommodations such as high contrast colors with a black background, (id. at p. 15). The student accesses the device using direct selection via finger isolation or knuckle, most often via his right hand (id. at p. 15). According to the education plan, at times the student presented with low motivation, arousal, or interest in activities presented while utilizing AAC and when this occurred, he benefitted from maximal verbal, visual, and tactile assistance to attend (id. at p. 17). The plan noted that when highly motivated the student needed less cueing to locate targeted icons but also noted that the student might present with aggressive behaviors when he did not want to engage in more structured tasks (id. at pp. 16-17).[12]

Next, the June 2023 iBrain plan indicated that the student benefited from music therapy to improve his fine and gross motor skills, communication skills, social skills, and self-regulation skills (Parent Ex. C at pp. 36-37). During therapy sessions, the student responded to musical cues of fast/slow and usually moved his head or clapped to the beat (id.). In addition, the student actively engaged in sessions by vocalizing on pitch during breaks in the music or simultaneously with the music therapist, strumming the guitar or playing the drum, and communicating his wants and needs (id. at p. 37).[13]

To address the student's identified needs, the iBrain education plan recommended that the student attend a 12-month program in a 6:1+1 special class with 1:1 paraprofessional services throughout the day and individual access to a school nurse as needed (Parent Ex. C at pp. 66-67). The plan also recommended that the student be provided with assistive technology devices and one, 60-minute session per week of individual assistive technology services (Parent Ex. C at pp. 65-67; H ¶ 14). The related services recommended by iBrain included five 60-minute individual sessions per week each of OT, PT, and speech-language therapy, and two 60-minute individual sessions per week of vision education services, (Parent Exs. C at pp. 65-66; H ¶ 13). While the body of the iBrain education plan recommended that the student receive two 60-minute sessions per week of individual hearing education services and five 60-minute individual and one 60-minute group sessions per week of music therapy, these were not included in the summary of recommended special education programs and services (compare Parent Ex. C at pp. 49, 60, with id. at pp. 65-67). To further support the student, the education plan recommended one 60-minute session per month of parent counseling and training (id. at p. 66). The plan detailed the student's human, environmental, and material management needs and included annual goals with

[11] A different section of the iBrain education plan indicated that the student communicated using a two panel "yes/no voice recorded switch" but was completing a trial to use a four-panel voice output switch (Parent Ex. C at p. 9).

[12] The education plan indicated that the student may present with seizure-like activity when using his AAC device in which case the environment needed to be adapted and the student needed to be monitored by a familiar provider or school nurse (Parent Ex. C at p. 16).

[13] The education plan indicated that on some days the student spent most of the music therapy session engaging in self-stimulatory behaviors such as clapping, spinning the instruments, or vocalizing and that at times, when the student was done or over stimulated, he would throw instruments (Parent Ex. C at p. 37).

corresponding objectives and benchmarks that targeted the student's identified needs (id. at pp. 38-63).

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

Turning to the district's argument that the parent failed to present evidence of the student's progress during the school year at issue, it is noted that the final date of the impartial hearing occurred on October 12, 2023, less than fourth months into the 12-month 2023-24 school year. Accordingly, it is not clear that a great deal of evidence was available to the parent at the time of the hearing specific to the 2023-24 school year. In any event, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

While there is not a great deal of evidence of the student's progress during the totality of the 2023-24 school year given the timing of the hearing, the hearing record shows had made some progress during the 2022-23 school year and was anticipated to continue to do so under the similar program developed for the student in student's education plan for the 2023-24 school year. In his October 2023 affidavit, the iBrain deputy director reported that over the past school year the student made progress across academic and related service domains and he anticipated that the student would continue to build on that progress so long as he was provided with continuity in regard to his educational program (Parent Ex. H ¶ 15). Review of the June 2023 iBrain education plan shows that it included updated information from March 2022, January 2023, March 2023, April 2023, and May 2023, (see Parent Ex. C at pp. 3-4, 12-13, 18, 23). According to the plan, the student made progress in his ability to sit at a table or desk to learn; to participate in unpreferred activities; and to match colors and identify shapes (Parent Ex. C at pp. 1, 3, 10).

Regarding his speech-language development, the June 2023 iBrain education plan indicated that the student demonstrated "positive gains" toward his receptive and expressive language goals including his ability to follow one step directions, identify common objects, and identify single core words such as "'yes/no'" and "'more/finished'" (Parent Ex. C at p. 22).

Additionally, the plan indicated that the student had mastered the ability to accurately request actions, objects, or activities, by selecting "'yes/no'" on his high-tech AAC device (id. at p. 22).[14]

As related to fine motor skills, the June 2023 iBrain education plan noted that the student demonstrated progress zippering his jacket, donning his socks, and, at that time, self-feeding (Parent Ex. C at p. 32). The education plan also indicated that the student demonstrated improvements in self-regulation, transitioning between activities, maintaining his grasp on a writing utensil, and participating in table-top activities (id.). 2 Additionally, the June 2023 education plan noted that the student demonstrated "slow and steady progress" towards a gross motor goal to participate in "static standing" for three minutes during a classroom activity (Parent id. at p. 34). Further, the student had shown progress in his ability to tolerate wearing his ankle foot orthotics (AFOs) for at least 30 minutes and to maintain an upright position in a gait trainer; however, the plan noted that the student had a slower rate of progress during the 2022-23 school year "due to increased seizures and lethargy" (Parent Ex. C at pp. 34-36).[15]

In the area of vision functioning, the education plan noted that the student's ability to visually attend had "expanded considerably" and he demonstrated increased visual attention toward novel information (Parent Ex. C at p. 14). Additionally, the plan indicated that the student demonstrated "great gains in his use of finger isolation and using visually guided reach to explore tactile raised lines with verbal descriptions" and demonstrated an increased understanding of use of his device by activating his icons accurately during a variety of activities (id. at pp. 15, 17). With regard to progress noted in assistive technology, the education plan indicated that the student was making steady progress toward his assistive technology goals, related to activating his AAC device (id. at p. 17).[16]

With regard to progress in music therapy, the education plan indicated that the student had mastered the goals in his previous March 2022 iBrain plan and that new goals, which better aligned with his then-current ability level, were established for the student (see generally Parent Ex. C at p. 37; Dist. Ex. 6). Specifically, the June 2023 plan indicated that the student demonstrated increased engagement in musical activities and was reported to show a decrease in his vocalizations and stimulatory behaviors (Parent Ex. C at pp. 36-37).

Consistent with the student's progress reported in the June 2023 iBrain plan, the testimony of the deputy director indicated that the student made significant progress since attending iBrain,

[14] The iBrain plan also noted that the student's accuracy level was highly dependent upon his level of motivation, engagement, and arousal at the time of instruction (Parent Ex. C at p. 22).

[15] The June 2023 iBrain plan also reflected the results of the Gross Motor Function Measure, administered to the student in February 2021, March 2022, and May 2023 (Parent Ex. C at p. 12). Notably, the student's score for "standing" decreased from 21/39 to 8/39 over that time period (id.). The student's scores for "crawling and kneeling" and for "walking running and jumping" fluctuated during the same time period but were both lower in May 2023 than in February 2021 (id.). The student's scores for "lying and rolling" and "sitting" remained the same (id.).

[16] Additionally, the plan noted that the student mastered the use of his four panel voice output switches to communicate which prompted his assistive technology clinician and speech therapist to introduce him to an iPad for use as a communication device (Parent Ex. C at p. 16).

and had continued to demonstrate progress during the 2023-24 school year (Tr. p. 98). According to the deputy director's testimony, the student increased his attentiveness, literacy comprehension, math ability, fine motor skills, and gross motor skills during the 2023-24 school year (Tr. pp. 98-103). For example, the deputy director noted that the student was able to attend during nonpreferred activities, could answer "yes-or-no" and "wh" comprehension questions based on a narrative story, was able to identify different people and providers, increased his prewriting skills, improved in his ability to isolate his finger more consistently to use his SGD, was able to assist with putting his AFOs on and off, was able to don and doff his clothing with less support, and made significant progress in his mobility and ambulation (Tr. pp. 98, 100-102). Additionally, the deputy director explained that the student progressed in his ability to transfer with minimal assistance during the 2023-24 school compared to the prior school year when the student required "total assistance" prior (Tr. pp. 98-99). Finally, the deputy director testified that the student significantly increased the duration of minutes that he was able to tolerate wearing his AFOs for from five minutes up to 45-minutes (an 800 percent increase) (Tr. p. 99).

Based on the foregoing evidence in the hearing record concerning the student's needs, iBrain's educational programming for the 2023-24 school year and his progress while attending iBrain during the beginning portion of the 2023-24 school year, there is an insufficient basis to disturb the IHO's determination that iBrain offered the student programming to meet his unique special education needs for the 2023-24 school year.

C. Equitable Considerations – Relief

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

The final criterion for a reimbursement award– or in this case direct funding of the student's private transportation costs for the 2023-24 school year is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

There is no allegation that the parent failed to provide timely notice of her intention to unilaterally place the student for the 2023-24 school year or that the parent failed to cooperate with the CSE (see Parent Exs. D; G ¶ 12). Accordingly, the only equitable ground at issue relates to the costs of the privately obtained transportation services.

The IHO ordered the district to fund the student's private transportation only for the days the student actually utilized the private transportation (IHO Decision a pp. 12-14). The transportation contract with Sisters Travel set forth an annual rate of $192,930 for the transportation services and noted that fees would be based on school days even if the services were not used (Parent Ex. F at p. 2). The IHO relied on a recent holding from the district, Araujo v. New York City Department of Education, 2023 WL 5097982 (S.D.N.Y. Aug. 9, 2023), to support her determination that it was proper to limit the award of transportation costs to those actually used by the student, as opposed to the amount the parent contracted to pay in the transportation agreement.

However, the IHO's reliance on the Araujo case was misplaced. The district also relies on Araujo in support of its cross-appeal, as well as Davis v. Banks, 2023 WL 5917659 (S.D.N.Y. Sept. 11, 2023), while the parent relies on Abrams v. New York City Dep't of Educ., 2022 WL 523455 at p. *5 [S.D.N.Y. Feb. 22, 2022]). However, it is worth noting that none of the cases cited by the parties, including Araujo which was also cited by the IHO as noted above, are directly relevant to the issue being addressed on appeal, i.e. whether the IHO erred in reducing the award of transportation funding, as all three of the matters cited by the parties involved implementation of either pendency orders or a final IHO decision and, therefore, the cases focused on enforcement and the language included in the orders that were being enforced rather than a review of the administrative decisions themselves (see Davis, 2023 WL 5917659 ["the sole source of the [district's] reimbursement obligations in each Plaintiff's case[s] is the applicable administrative order"]; Araujo, 2023 WL 5097982 ["[p]laintiffs have not met the IDEA's exhaustion requirement with respect to challenges to the [IHO's decision] itself, as opposed to [d]efendant's implementation of the [IHO's decision]]; Abrams, 2022 WL 523455 ["[t]he heart of this matter[] boils down to the [district's] legal obligations under the [p]endency [o]rders"]).

Here, the parties do not dispute that the student required special transportation services and, pursuant to the recommendations in the June 2023 IEP, he would have received special transportation through the district had it offered him a FAPE. The June 2023 CSE recommended that the student receive special transportation services, including the support of a 1:1 transportation paraprofessional, a lift bus and use of a regular size wheelchair (Dist. Ex. 1 at pp. 52-53). As noted above, in her due process complaint notice, the parent alleged that the district did not recommend proper transportation services, specifically noting the lack of a recommendation for an air-conditioned bus and limited travel time (Parent Ex. A at p. 6).[17] According to the agreement the parent entered into with Sisters Travel, the student was to be provided with air conditioning, regular sized wheelchair accessibility, and sitting space to accommodate someone to travel with the student (Parent Ex. F at p. 2). Additionally, the transportation company agreed to provide a

[17] In her July 2023 due process complaint notice the parent alleged that June 2023 CSE failed to recommend a 1:1 transportation paraprofessional, however, it should be noted that the June 2023 CSE does include a recommendation for a 1:1 transportation paraprofessional (compare Parent Ex. A at p. 6, with Dist. Ex. 1 at pp. 52-53).

1:1 transportation paraprofessional for the student, if necessary (id.). The transportation contract also noted that the student's morning and afternoon trips would be no more than 90 minutes each way (id. at p. 1). Accordingly, it appears that the parent identified an issue with the district's recommendations for special transportation and remedied the district's failures by implementing transportation privately by contracting with Sisters Travel. Pursuant to that contract, Sisters Travel charges an annual rate for the special transportation services to be provided to the student and its fees are based on the total number of school days even if the services are not used (id. at p. 2).

While there is some support in the hearing record for the district's contention that the parent did not appear to understand with whom she had contracted to provide the transportation services and that she believed that iBrain was the entity providing the student's transportation (Tr. 73, 77-79, 80), the totality of the evidence in the hearing record both supports a finding that the parent signed the contract with Sisters Travel, and is not otherwise sufficient to support the district's allegations that the contract was the result of fraud or collusion or that the costs of the transportation services were somehow inflated or excessive when compared to other special transportation options.

Accordingly, the IHO's reduction of the parent's award of direct funding for only those transportation services that were actually provided to the student during the 2023-24 school year relies on inadequate authority, by solely citing to the inapposite Araujo case without further analysis, while also giving the impression, by reducing the direct funding for the student's special transportation on equitable grounds, that the parent acted unreasonably by entering into the transportation contract for services that, as evidenced by the record (see generally Tr. 73-80), she relies on to have her son transported to iBrain, an appropriate unilateral placement, and which have provided benefit to the student. The IHO also did not engage in any analysis with respect to whether the hearing record supported a finding of inflated or excessive costs. Thus far, courts assessing unilateral placements arranged by parents have not required a parent to establish that they obtained the private placement and services at the lowest possible cost when assessing whether the unilateral placement is appropriate or that equitable considerations favor the parent. During the impartial hearing, the district did not offer any evidence that other transportation options were available to meet the student's needs, which would have resulted in a more reasonable cost, nor did it identify any other company with whom the parent could have contracted that would not have charged for the days when the student did not utilize the services. Accordingly, the evidence in the hearing record does not support the IHO's order to require the district to fund only those transportation services actually delivered notwithstanding the parent's financial obligation to fund the entire amount due under the contract.

If the IHO had explored the potential equitable issues raised by the district in its cross-appeal, which were not adequately developed by either the district or IHO during the impartial hearing, such as inflated or excessive costs, it would have been permissible for her to instruct the parties to further develop the evidentiary record with respect to that issue or other issues which would impact equitable considerations related to the student's special transportation. However, in the present matter, the IHO's determination that the district should not be required to fund the costs of the transportation services that were not delivered to the student despite the parent's contract with the provider is without support in the evidentiary record.

VII. Conclusion

The hearing record demonstrates that iBrain was an appropriate unilateral placement for the 2023-24 school year, but does not support the award by the IHO of an independent educational evaluation to the parent, and also does not support the IHO's finding that equitable considerations warrant a reduction or denial of direct funding for the parent's unilaterally-obtained special transportation costs.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that the IHO's decision, dated November 6, 2023, is modified by reversing those portions which reduced or denied the amount of funding to be paid by the district for special transportation services for the 2023-24 school year, and which awarded the parent an independent assistive technology evaluation and ordered the district to provide assistive technology, fund training for the student's parent and academic team and convene the CSE to consider the results of the assistive technology evaluation; and

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

Dated: **Albany, New York**
February 7, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER