The University of the State of New York

The State Education Department
State Review Officer
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No. 24-323

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 Peter G. Albert, 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 a decision of an impartial hearing officer (IHO) issued after remand, which denied in part her request that the district directly fund the costs of her son's tuition at the International Academy for the Brain (iBrain) and related expenses for the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision that ordered the district to directly fund a portion of the student's tuition at iBrain for the 2023-24 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

This appeal arises from an IHO's decision issued after a remand by the undersigned for the IHO to make factual findings with regard to whether iBrain was an appropriate unilateral placement for the student for the 2023-24 school year and whether equitable considerations favor

the parent's requested relief (see Application of a Student with a Disability, Appeal Nos. 24-009).[1] As the parties' familiarity with this matter is presumed, the student's educational history and the procedural history of this matter will not be recited here in detail except as relevant to the instant appeal.

Briefly, the student was found eligible by an October 2022 CSE for special education as a student with a traumatic brain injury and attended iBrain for the 2023-24 school year (Parent Exs.; M; Q-R; S ¶ 11; Dist. Ex. 1 at p. 1).[2, 3, 4, 5]

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 (see Parent Ex. A). Relevant to the instant appeal, the parent requested as relief direct funding of the cost of the student's tuition at iBrain, including the cost of related services and a 1:1 paraprofessional, and direct funding of the cost of private transportation services for the 2023-24 school year (id.).

A. December 2, 2023 Impartial Hearing Officer Decision and Appeal

An impartial hearing convened on September 26, 2023 and concluded on November 6, 2023 after four days of proceedings (Tr. pp. 12-299).[6]

In a decision dated December 2, 2023, the IHO determined that the district offered the student a FAPE for the 2023-24 school year and denied the parent's requested relief (see Dec. 2, 2023 IHO Decision). Accordingly, the IHO did not address the appropriateness of the parent's unilateral placement of the student at iBrain or whether equitable considerations supported the parent's requested relief (id. at p. 20). The parent appealed and asserted that the IHO erred in finding the district offered the student a FAPE for the 2023-24 school year, and further asserted

[1] In addition, the student was the subject of a prior State-level appeal involving a unilateral placement at iBrain for the 2022-23 school year (Application of a Student with a Disability, Appeal No. 22-165).

[2] The Commissioner of Education has not approved iBrain as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

[3] According to the hearing record, the parent also executed an agreement for transportation of the student to and from iBrain for the 2023-24 school year with Sisters Travel and Transportation Services, LLC (Sisters Travel); however, the agreement was not dated (see Parent Ex. I).

[4] During the May 22, 2024 impartial hearing, the parent introduced an updated affidavit of the iBrain deputy director of special education that was different from the affidavit introduced during the impartial hearings before remand (compare Parent Ex. L, with Parent Ex. S). For purposes of this decision, the updated affidavit will be the only one cited to (see Parent Ex. S).

[5] Both the parent and the district submitted a copy of the student's October 2022 IEP (compare Parent Ex. C, with Dist. Ex. 1). For purposes of this decision only the district exhibit will be cited.

[6] The parties also convened for a prehearing conference on August 10, 2023 and a status conference on September 13, 2023 (Tr. pp. 1-11).

that iBrain was an appropriate unilateral placement for the student and that equities favored the parent's requested relief (see Application of a Student with a Disability, Appeal No. 24-009).

In a decision dated March 1, 2024, the undersigned concluded that the student had unique vision needs that were not properly supported or addressed by the October 2022 IEP and, therefore, the IHO's finding that the district offered the student a FAPE for the 2023-24 school year was overturned and the matter was remanded to the IHO to determine the appropriateness of the parent's unilateral placement of the student at iBrain and whether equitable considerations supported the parent's requested relief (see Application of a Student with a Disability, Appeal No. 24-009).

B. Impartial Hearing Officer Decision on Remand

After remand, the IHO held a prehearing conference on April 17, 2024, and then the parties proceeded to an impartial hearing on May 22, 2024 which concluded on the same day (Tr. pp. 300-314, 319-411).[7] At the prehearing conference, the parties consented to re-admitting the evidence from the prior impartial hearing and the parent's attorney indicated that he would like to submit additional evidence consisting of the student's more recent progress reports (Tr. pp. 300-03). The district objected to the parent introducing additional evidence arguing that to allow the parent a second opportunity to present evidence that could not have existed at the time of the first hearing was inappropriate (Tr. p. 304). The IHO explained that he was going to err on the side of having the most amount of information on the issues before him and thus he was going to allow additional evidence but only to the extent that it was related to the student's progress during the 2023-24 school year that had taken place since the December 2, 2023 decision (Tr. pp. 308-09).

By decision after remand dated June 25, 2024, the IHO determined that there was little to no information in the hearing record that iBrain provided an academic program specifically tailored to meet the needs of the student, that the student had any identifiable academic goals, or that the student made academic progress throughout the 2023-24 school year (IHO Decision at p. 24). However, the IHO also noted that the district did not contest that the paraprofessional provided by iBrain and the related services it offered were appropriate (id. at p. 25). The IHO further found that the progress reports reflected that the student made progress with regard to his related services (id.). Considering all of these facts, the IHO found it appropriate to reduce the parent's request for tuition reimbursement to $111,712.00 (id. at p. 25). The IHO also determined that equities did not weigh in favor of the parent and, therefore, further reduced the tuition award to $50,000 (id. at pp. 26-29). Additionally, the IHO addressed the parent's claims for reimbursement of the cost of private transportation and determined that the parent failed to explain why she did not request transportation from the district or accept the district transportation that was offered (id. at pp. 25, 29). As such, the IHO denied the parent's request for reimbursement for private transportation costs because the parent did not offer evidence to support her claims that the student required air-conditioning and a limited travel time or that the student ever utilized the private transportation during the 2023-24 school year (id.).

[7] A hearing was initially scheduled for May 14, 2024 but was adjourned by the IHO due to technical problems (see Tr. pp. 315-18).

IV. Appeal for State-Level Review

The parent appeals, alleging the IHO erred by reducing the awarded tuition reimbursement costs and denying full reimbursement for private transportation costs.

In its answer, the district alleges that the IHO correctly determined that the parent failed to prove that the private transportation provided by Sisters Transportation was appropriate for the student. The district also cross-appeals, alleging the IHO erred in finding that iBrain was an appropriate unilateral placement and argues the IHO should have denied tuition reimbursement entirely. The district further asserts that the IHO should have denied the parent's requested relief in its entirety on equitable grounds.

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]).[8]

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-

[8] 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).

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

A. Preliminary Matters – Mootness

The parent in this case is seeking direct payment relief related to the student's unilateral placement at iBrain and funding for the costs of transportation from Sisters Travel for the 2023-24 school year, however, such issues are moot as the parent has received all of the relief that she requested in this proceeding by virtue of the stay-put requirement.

A dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

However, there are limited circumstances in which cases that have been mooted by the passage of time must nevertheless be decided if certain exceptions apply. A claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Scheff v. Banks, 2024 WL 3982986, at *4 [2d Cir. Aug. 29, 2024]; Toth, 720 Fed.

App'x at 51; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). It must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88). Many IEP disputes escape a finding of mootness due to the short duration of the school year facing the comparatively long litigation process (see Lillbask, 397 F.3d at 85). Controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; Toth, 720 Fed. App'x at 51; see Hearst Corp., 50 N.Y.2d at 714-15). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ. of Enlarged City Sch. Dist. of City of Watervliet, 260 F.3d 114, 120 [2d Cir. 2001]). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; Scheff, 2024 WL 3982986, at *4; but see A.A., 2017 WL 2591906, at *7-*9 [finding that the controversy as to "whether and to what extent the [s]tudent can be mainstreamed" constituted a "recurring controversy [that] will evade review during the effective period of each IEP for the [s]tudent"]; see also Toth, 720 Fed. App'x at 51 [finding that a new IEP that did not include the service requested by the parent established that the parent's concern that the prior IEP would be repeated was not speculative and the "capable of repetition, yet evading review" exception to the mootness doctrine applied]).

A pendency implementation form, signed by a district reviewer on July 18, 2023, indicated that the student's pendency placement lay in a prior SRO decision and consisted of a 12-month program at iBrain and 12-month specialized transportation between the student's home and iBrain (Parent Ex. G; see generally Tr. pp. 3, 37-54; Parent Ex. B). Thus, pursuant to the district's agreement, the district is responsible for paying the student's tuition at iBrain for the 12-month 2023-24 school year including special transportation. The student's first day at iBrain for the 2023-24 school year was July 5, 2023 (Parent Ex. H at p. 1) and pendency came into effect as of July 5, 2023, when the parent filed the due process complaint notice (Parent Ex. A; see Parent Ex. G). The impartial hearing, combined with the period of time it took an SRO to remand the decision to the IHO and for the IHO to render a decision has encompassed the entire 2023-24 school year. Accordingly, the parent has received the relief sought and the case has been rendered moot.

However, some courts have taken a dim view of dismissing a Burlington/Carter reimbursement case as moot because all of the relief has been obtained through pendency (New York City Dep't of Educ. v. S.A., 2012 WL 6028938, at *2 [S.D.N.Y. Dec. 4, 2012]; New York City Dep't of Educ. v. V.S., 2011 WL 3273922, at *9-*10 [E.D.N.Y. Jul. 29, 2011]), while others have found it an acceptable manner of addressing matters in which the relief has already been realized through pendency (see V.M., 954 F. Supp. 2d at 119-20 [explaining that claims seeking changes to the student's IEP/educational programing for school years that have since expired are moot, especially if updated evaluations may alter the scrutiny of the issue]; Thomas W. v. Hawaii, 2012 WL 6651884, at *1, *3 [D. Haw. Dec. 20, 2012] [holding that once a requested tuition reimbursement remedy has been funded pursuant to pendency, substantive issues regarding reimbursement become moot, without discussing the exception to the mootness doctrine]; F.O., 899 F. Supp. 2d at 254-55; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *9 [S.D.N.Y. Dec. 16, 2011]; M.S., 734 F. Supp. 2d at 280-81 [finding that the exception to the

mootness doctrine did not apply to a tuition reimbursement case and that the issue of reimbursement for a particular school year "is not capable of repetition because each year a new determination is made based on [the student]'s continuing development, requiring a new assessment under the IDEA"]).

The capable of repetition yet evading review exception to mootness would not apply here because the conduct complained of—the district's failure to offer the student a FAPE for the 2023-24 school year—is no longer at issue in this proceeding. As the FAPE determination has already been addressed, any parental concern that the district would continue to recommend the same program is not addressable at this level of the proceeding and cannot be used to justify a finding that the matter is "capable of repetition, yet evading review." Accordingly, as the issues regarding the appropriateness of the parent's unilateral placement of the student at iBrain and the private transportation secured by the parent are moot and there is no further relief that may be granted, the necessary inquiry is at an end and no further analysis of such issue is required. Accordingly, the parties' appeals are dismissed as moot because the district is required to fund the entirety of the student's programming for the 2023-24 school year.[9]

However, at the risk of remand from a court that broadly applies the "capable of repetition" exception in IDEA disputes in which all of the relief has been obtained by virtue of the stay-put provision, the undersigned will address the appropriateness of iBrain as an alternative finding.

B. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 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 (id. 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

[9] The factfinding for a subsequent school year would also be, necessarily, decided upon different evidence, and a merits ruling in this proceeding would not affect that analysis at this point. Generally, the courts have been clear that for purposes of a tuition reimbursement claim, the student's needs and the specially designed instruction that is offered each school year must be analyzed separately (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]).

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., 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). 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).

Before turning to the parties' respective arguments, an initial discussion of the IHO's decision is warranted. The IHO did not evaluate iBrain using the Second Circuit's standard of review, namely the totality of the circumstances test, and instead improperly fractionalized the student's educational program at iBrain into two segments—an academic program segment and supplemental services segment, including but not limited to paraprofessional services and related services—granting some, and denying some in his analysis; the IHO determined that the parent did not meet her burden that iBrain created an academic program specifically tailored to meet the needs of the student but also that the district did not contest the supplemental services provided by iBrain (see IHO Decision at pp. 24-25). Accordingly, the IHO improperly reduced the parent's total request for tuition reimbursement to $111,712, the amount the IHO determined was charged by iBrain for the supplemental services (IHO Decision at p. 25; see Parent Ex. H). However, "[t]he first two prongs of the test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any" (A.P. v. New York City Dep't of Educ., 2024 WL 763386, at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral

placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). For purposes of achieving the level of thoroughness necessary for the analysis, it was appropriate to discuss each element of the student's educational program at iBrain in a logical sequence when analyzing the evidence; however, the IHO was then required to assess as a whole whether the academic program with paraprofessional and related services were, under the totality of the circumstances, "'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; Gagliardo, 489 F.3d at 112). Turning now to a review of the appropriateness of iBrain, the unilateral placement will be examined under taking into account the totality of the circumstances.

1. Student's Needs

Although the student's needs are not in dispute as the October 2022 CSE adopted many of the recommendations from the iBrain education plan dated October 6, 2022, a brief description thereof provides context to determine whether the iBrain was appropriate to address those needs.

According to the October 2022 IEP, the student has been found eligible for special education as a student with a traumatic brain injury and, as per the student's medical records, the student's official medical diagnoses included: hypoxic ischemic encephalopathy, spastic/dystonic quadriplegia, cortical visual impairment, and developmental delays (Dist. Ex. 1 at pp. 1, 3).

With regard to cognition, the October 2022 IEP stated the student demonstrated the ability to orient to sound and recognized his name and the names of familiar people (Dist. Ex. 1 at p. 6). The student appeared to have an understanding of cause and effect and used American Sign Language (ASL) to request "more'" or to indicate when he was "'all done'" with an activity (id. at p. 13). The IEP indicated that the student "shows[ed] understanding" of object permanence and noted that at times he reached out to find item/object he wanted/heard (id. at p. 14). In addition, the student responded to common gestures, showed understanding of the use of common objects, and understood symbolic representations (objects, pictures) of common items (id. at p. 12). According to the IEP, the student liked to explore by touching items or objects (id. at p. 13). The student usually followed one-step direction with moderate to maximum assistance (id.). The IEP noted the student was able to attend for up to a minute but generally attended for about 15 seconds (id.).

In the area of literacy, the October 2022 IEP stated that the student "at times" could answer "WH" questions about a story or daily activity (Dist. Ex. at p. 3). It also reported that the student enjoyed being read to and taking time to look at pictures and would vocalize and smile during books he seemed to enjoy more (id.). The IEP indicated that the student did not demonstrate an understanding of letters but enjoyed "seeing and feeling different textured versions of the letter 'V'" (id.).

Regarding math the October 2022 IEP stated that the student did not demonstrate understanding of numbers one through five (Dist. Ex. 1 at p. 14). However, the IEP indicated that the student had been introduced to the number one and was working on recognizing it and understanding its representation (id.).

In terms of social development, the October 2022 IEP stated the student "ha[d] shown himself to have good social skills" (Dist. Ex. 1 at p. 4). The IEP noted that family members reported the student played and took turns during games (id.). The IEP also stated that at times the student looked at the person speaking to him or at another student in the classroom when they were vocalizing (id.). The student also turned to look in the direction of music being played (id.). In order to communicate with his peers, the student required maximum support from an adult (id.). The student communicated using vocalizations, signs, a BIGmack switch, and a high-tech speech generating device (id. at p. 4).

Turning to the student's physical development, the October 2022 IEP indicated that the student required moderate to minimal assistance to help him with mobility, transfers, safety awareness, hygiene, and alternate activities of daily living (Parent Ex. I at p. 15). The student used a manual wheelchair and stroller for transport (id.). According to the IEP, the student was able assist with doffing some clothing, follow a daily toileting schedule, finger-feed himself, and use a spoon with assistance (id. at pp. 18-19). In addition, the student demonstrated active and volitional hand use but had difficulty with more precise fine motor skills (id. at pp. 19-20). The student demonstrated visual functioning consistent with cortical visual impairment (id. at p. 24).

Both the iBrain deputy director of special education's (deputy director's) and the parent's affidavits stated that the student was non-verbal, non-ambulatory, and had highly intensive management needs requiring a high degree of individualized attention and intervention throughout the school day as well as the assistance of a 1:1 paraprofessional (Parent Exs. K ¶ 4; S ¶ 10).

2. Adequacy of Instruction

The iBrain deputy director described the academy as "a private and highly specialized special education program . . . created for children who suffer from acquired brain injuries or brain-based disorders" (Parent Ex. S ¶ 5). He stated that many of the students who attended iBrain were nonverbal and non-ambulatory, every student required a 1:1 paraprofessional, and many students required a 1:1 nurse (id.). The deputy director indicated that iBrain offered extended school days from 8:30 to 5:00 and ran on a 12-month extended school year (id.). According to the deputy director, iBrain developed an individualized education plan for each student and provided instruction using "the most effective strategies with evidence-based practices" including but not limited to "direct instruction, cognitive strategies, and compensatory education (using diagnostic-prescriptive approaches), behavioral management, physical rehabilitation, therapeutic intervention, social interaction, and transition services" (id. at ¶ 7). The deputy director testified that, at iBrain, students are initially evaluated by all of the related services providers as well as the teacher, all of whom submit a post-evaluation report, engage in a post-evaluation meeting, and make recommendations for the student's program at which point the iBrain education plan is developed (Tr. p. 161). The deputy director confirmed that the student's iBrain education plan was created in October 2022 and explained that students are evaluated quarterly to assess their progress and make appropriate program modifications (Tr. pp. 161-62). He testified that the quarterly progress reports were essential to instruction at iBrain and reflected the student's performance and progress throughout the quarter as well as the quarterly assessments performed by staff (Tr. p. 164).

The October 2022 iBrain education plan for the student detailed the student's present levels of performance and rate of progress, evaluations administered to the student, annual goals, management needs, a summary of the student's special education program and services, and a summary of supplementary aids and services, program modifications, and accommodations (see generally Parent Ex. D). To address the student's identified needs described above, the iBrain education plan recommended that the student attend a nonpublic school 12-month program in a 6:1+1 special class and receive the support of 1:1 paraprofessional services throughout the day and access to assistive technology devices and services (id. at pp. 59-61).[10] In addition, the plan recommended related services of five 60-minute individual sessions per week of occupational therapy (OT), five 60-minute individual sessions per week of physical therapy (PT), four 60-minute individual sessions per week of speech-language therapy, one 60-minute group session per week of speech-language therapy, three 60-minute session per week of individual vision education services, two 60-minute individual and one 60-minute group session per week of music therapy, and one 60-minute session per month of parent counseling and training (id. at pp. 59-61). In addition, although the plan did not specifically recommend nursing services, it included an individual health plan (id. at pp. 30-34).

According to the iBrain class schedule submitted by the parent, the student received five 30-minute sessions weekly of 1:1 academics as well as ten 30-minute sessions per week of activities of daily living, two 60-minute sessions per week of sensory play, four 30-minute sessions of class meetings, and one 30-minute session per week of class activity (Parent Ex. M).[11]

In regard to academic progress the IHO stated that the parent gave little to no information on how the academic program was specifically tailored to meet the student's needs or that the student had any identifiable academic goals or that the student made academic progress throughout much of the 2023-24 school year (IHO Decision p. 24). The IHO determined that the reports submitted by the parent discussed academics for only a small percentage of the time the student was in school and most of the verbiage was about goals and/or benchmarks that the student had not been introduced to yet (id.). Additionally, the IHO found the deputy director and parent not entirely credible, stating they gave generalized statements regarding the student's progress, much of which was at odds with the progress reports submitted (id.). However, after closer examination of the student's quarterly progress reports, it is clear the academic goals included benchmarks and short-term objectives that were successive and built upon one another and the hearing record does not support the IHO's determination regarding progress (see Parent Exs. N-P).[12] Moreover, a

[10] The iBrain education plan included a recommendation for individual, indirect assistive technology services one time per week for 60 minutes (Parent Ex. D at p. 6).

[11] The district also submitted a purported copy of the student's iBrain class schedule into evidence; the schedule did not have vision therapy listed but did have five 30-minute sessions weekly of 1:1 academics as well as five 60-minute sessions weekly of literacy/math (compare Parent Ex. M, with Dist. Ex. 16). Both schedules reflected an effective date of July 5, 2023 (Parent Ex. M; Dist. Ex. 16). It is unclear from the hearing record which class schedule was accurate for the 2023-24 school year as the deputy director testified the student attended classes pursuant to the district's exhibit 16 (Tr. pp. 181-82). Moreover, the parties do not address this discrepancy in the hearing record nor indicate which schedule should be used.

[12] The Office of Special Education describes benchmarks as "the major milestones that the student will demonstrate that will lead to the annual goal. Benchmarks usually designate a target time period for a behavior to

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., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). 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]).

The record shows that the student made progress at iBrain during the 2023-24 school year. According to the student's quarterly progress report dated October 6, 2023, the student's original annual literacy goal and short-term benchmarks were discontinued and replaced with a new "Brigance Aligned" goal which was not yet introduced ("NI") at the time the plan was modified (Parent Ex. P at pp. 1-2). While the original annual goal targeted the student's alphabetic knowledge, phonological awareness and concepts of print, the new annual goal targeted the student's ability to point to or touch pictures in a book to convey literal meaning (compare Parent Ex. P at p. 1, with Parent Ex. P at p. 2). The first benchmark related to the annual goal required the student to perform this skill "[b]y mid-year" with "moderate (6-8 tactile cues)" (Parent Ex. P at p. 2). iBrain progress reports indicated that the student was performing the first benchmark with 56 percent accuracy in January 2024 and "an average of 65 [percent] accuracy" in April 2024 (Parent Exs. O at p. 1; N at p. 1). The second benchmark, which required the student to perform the skill "[i]n one year" with "minimal (1-5 tactile cues)"was not yet introduced (id.). The iBrain deputy director testified that the student was able to "point and touch pictures in a book … with moderate assistance … no more than eight tactile cues, meaning hand over hand assistance and things of that nature" which was in alignment with the above progress report note (Tr. pp. 155-56).

Similar to the student's literacy goal, the student's math goal was also modified at the time of the October 2023 quarterly progress report (Parent Ex. P at pp. 3-4). The original annual math goal, which targeted the student's development of beginning math concepts was replaced with "a new Brigance Aligned goal" which targeted his ability to identify numbers up to two to demonstrate one-to-one correspondence (id.). The first corresponding benchmark required the student "[b]y mid-year" to identify numbers up to one with "moderate (6-8) cues" (id. at p. 4).

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occur (i.e., the amount of progress the student is expected to make within specified segments of the year). Generally, benchmarks establish expected performance levels that allow for regular checks of progress that coincide with the reporting periods for informing parents of their child's progress toward the annual goals. F " ("Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. at. p. 34 [Revised Sept. 2023], available at https://www.nysed.gov/sites/default/files/programs/special-education/guide-to-quality-iep-development-and-implementation.pdf). For example, if an annual goal is for the student to remain in class without disruptions for 45 minutes, benchmarks might include remaining in class without disruptions for 15 minutes by November, 25 minutes by February, 35 minutes by April and 45 minutes by June.

iBrain progress reports indicated that "[n]o progress [was] demonstrated" toward this benchmark by January 2024 but that by April 2024 the student had achieved the benchmark with 80 percent accuracy (Parent Exs. P at p. 2; N at p. 2). The April progress report indicated that the student would begin working on benchmark three, which required him to identify up to two numbers "[i]n one year" (Parent Ex. N at p. 2). During the hearing the deputy director testified "we have seen the student progressing, specifically in math is his ability to count manipulatives, whether that be objects or visuals or number cards, and he's able to identify numbers up to one … he's doing with moderate assistance, but we are hopeful that he's able to move towards minimal assistance" (Tr. p. 155).

The student's annual goal related to social skills was also discontinued and replaced. While the original goal for social skills targeted development of the student's social understanding, the modified goal targeted the student's ability to "maintain attention without distraction with an adult while doing an activity in math and literacy" for five minutes (Parent Ex. P at pp. 5-6). The corresponding benchmarks targeted the student's ability to maintain attention for three minutes in both math and literacy "[b]y mid-year" with "moderate (6-8) verbal and tactile cues" and maintain attention for five minutes "[i]n one year" with "moderate (6-8) verbal and tactile cues" in math and "minimal support (1-5) verbal and tactile cues" in literacy (id. at p. 6). According to the January 2024 iBrain progress report, on the first benchmark, the student "maintained his previous present level of function related to [the] goal" and was able to maintain attention with and adult during a math session for 120 seconds with moderate verbal cues (Parent Ex. O at p. 3). The other three benchmarks were not yet initiated (id.). The April 2024 iBrain progress report indicated that the student had achieved the first benchmark of maintaining attention in a math session for three minutes with moderate verbal cues and was performing the second benchmark of maintaining attention in a literacy session for three minutes with 67 percent accuracy with moderate cues (id.). According to the deputy director's testimony with respect to the social skills goal the student "made great progress … , but he's able to do that with, … moderate assistance … we're anticipating that he [will] also do that with minimal assistance" (Tr. p. 156).

While the IHO found that the deputy director gave generalized descriptions regarding the student's progress these statements did not contradict or oppose what the quarterly progress reports documented (see IHO Decision at p. 24). Moreover, the iBrain progress reports show that the student achieved benchmarks related to standing from mid-squat, kicking a ball independently, walking 150 feet with the least restrictive device, localizing to sound, engaging in instrument play, reaching toward an instrument and intentionally touching it to make a sounds, activating his device to choose the appropriate word from a field of two, and initiating conversation via switch activation high-tech AAC device, and achieved goals related to transitioning from sitting to standing and back, and oral intake with the use of safe swallowing strategies (Parent Exs. P at pp. 16, 17, 20; O at pp. 6, 8; N at pp. 7, 12, 18-19, 20). The IHO's speculation that most of the school day at iBrain was focused on related services and not on academics ignores the fact that the student is, in many respects, appropriately working on basic developmental and preacademic skills in virtually all of his special education programming. Some of the student's skill deficits in his activities of daily living are appropriately addressed by a licensed related services provider such as a physical therapist or occupational therapist, but in many other instances in this case, such as literacy and social goals, either a related service provider, assistive technology service provider, or a special education teacher could implement the student's goals.

Accordingly, contrary to the IHO's finding that the parent provided little to no meaningful information regarding the student's academic progress, as indicated above, the additional evidence introduced by the parent on remand showed that the student was making academic progress during the 2023-24 school year in light of his circumstances. On remand, the parent also offered an iBrain education plan developed on January 17, 2024 and updated on April 30, 2024 which showed that the student was making progress, albeit very slow, gradual progress, toward his annual goals and on his academic abilities (Parent Ex. R at pp. 13-14). Accordingly, the student's quarterly progress reports and the updated April 2024 iBrain education plan show that the student was making academic progress at iBrain during the 2023-24 school year consistent with his abilities and severe deficits.

3. Adequacy of Related Services

According to the iBrain class schedule submitted by the parent, the student received related services at iBrain during the 2023-24 school year consisting of PT, OT, speech-language therapy, and assistive technology services in the same frequencies as recommended in the student's October 2022 IEP, as well as three 60-minute sessions weekly of vision therapy, and four 60-minute sessions weekly of music therapy (compare Parent Ex. M, with Dist. Ex. 1 at pp. 52-53). The deputy director indicated that iBrain provided related services usually in 60-minute sessions using a "push-in and pull-out model" (Parent Ex. S ¶ 8).

The student was also recommended for a 1:1 paraprofessional, which the IHO determined was not contested by the district as a necessary service (IHO Decision at p. 25; see Parent Ex. D at p. 60; Dist. Ex. 1 at p. 53). The IHO also determined that the district did not contest that the related services offered by iBrain were appropriate (IHO Decision at p. 25). The district in its answer does not argue that the related services alone were inappropriate or that the student did not require 1:1 paraprofessional services, but instead alleges that the IHO erred by not finding the totality of the program was inappropriate to address the student's needs; however, the hearing record shows that the student had needs that were addressed through his academics and during his related services and the student was benefiting from the totality of the program being offered by iBrain during the 2023-24 school year (compare Parent Ex. D, with Parent Ex. R; see Parent Exs. N-P). Thus, the hearing record supports a finding that iBrain provided an academic program tailored to meet the unique needs of the student.[13]

[13] The IHO in his decision seems to also find that music therapy was a service that was in excess of FAPE and not necessary to address the student's needs; thus, the awarded tuition should be reduced (IHO Decision at p. 28). While potentially relevant to an examination of equitable considerations, under the totality of the circumstances test applicable to assessing the appropriateness of the unilateral placement, the evidence in the hearing record shows the student benefited from music therapy and that music therapy was addressing some of the student's needs (Parent Ex. R at pp. 30-32; see A.P., 2024 WL 763386, at *2). According to the April 2024 iBrain education plan, the student had a localizing to music goal and a sensorimotor goal of playing instruments which the student made progress towards (Parent Ex. R at p. 30). The education plan indicated that the student was also working on his communication skills in music therapy during "co-treatment session with [s]peech [t]herapy" (id. at pp. 30-31). As such, the IHO erred by not finding that music therapy coupled with the rest of the student's academic programming at iBrain was appropriate to meet the student's academic needs under the totality of the circumstances.

C. Equitable Considerations

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

The IHO in this matter found that equities did not favor the parent and reduced the tuition reimbursement award to $50,000 (IHO Decision at p. 26-29).

The parent argues that the IHO erroneously found that equitable considerations did not favor the parent's request for direct payment of the full cost of the student's tuition at iBrain and full payment of the cost of private transportation provided by Sister's Transportation for the 2023-24 school year because of the parent's financial status. The parent argues her ability to pay for iBrain is irrelevant and should not have been considered when fashioning relief under the equities because a parent does not need to show a financial hardship to be eligible for direct payment; she also claimed that she complied with the 10-day notice requirement and that the rates charged by iBrain for tuition and related services, and the cost of transportation for the 2023-24 school year were reasonable.

The district argues that the parent did not appeal from the IHO's credibility finding that the parent acted with an overall lack of good faith and on that basis alone, tuition reimbursement and transportation funding should be denied in full, or at least, the SRO should affirm the IHO's equitable reduction of relief. The IHO determined that the parent's two-page affidavit was "extremely short on detail and bespeaks an overall lack of good faith on part of the [p]arent" (IHO Decision at p. 27).

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]; Application of a Student with a Disability, Appeal No. 12-076). However, even if the particular testimony that the IHO cites was not credible, the substance of that testimony if not the sort that would weigh against the parent. (IHO Decision at pp. 25-29).

On June 20, 2023, the parent properly provided the district a 10-day notice of her disagreement with the October 2022 IEP and of her intent to place the student at iBrain for the 2023-24 school year (Parent Ex. E). While the IHO took issues with the parent's rationale for disagreeing with the district's program or sincerity with respect to her willingness to accept a district placement, there is also nothing in the hearing record to suggest the parent was uncooperative or obstructed the district's efforts to provide the student a FAPE. The Second Circuit Court of Appeals has explained that, so long as the parents cooperate with the district and do not impede the district's efforts to offer a FAPE, even if the parents had no intention of placing the student in the district's recommended program, it is well-settled that their plan to unilaterally place a student, by itself, is not a basis to deny their request for tuition reimbursement (see E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]). The IHO in his decision also determined that the parent had no intention of sharing requested documentation from the student's ophthalmologist with the district and weighed such in his determination of equities (see IHO Decision at p. 28). This was improper as the prior SRO decision determined that the CSE was aware of the student's specific vision needs and it was not the parent's obligation to provide the information to the district (see Application of a Student with a Disability, Appeal Nos. 24-009, at pp. 8-13). Finally, the IHO's observations regarding the parent's financial means compared to the cost of the program may be appropriate to consider in examining whether the parent's actions were unreasonable or the costs of the unilateral placement were excessive; however, here, the hearing record was not developed regarding the availability of other lower cost programs and, therefore, it is not clear that the parent's actions were so unreasonable under the circumstances.

For these reasons that follow, I find that the evidence in the hearing record does not support the IHO's determination that equitable considerations warranted a reduction in the district's funding of the tuition and transportation costs for the student's attendance at iBrain for the 2023-24 school year.

1. Transportation Funding

Regarding the parent's request for direct payment for the cost of the student's private transportation during the 2023-24 school year, it is uncontested that the student required special transportation, including a transportation paraprofessional, in order to attend school (see Dist. Ex. 1 at p. 58). The IHO denied transportation funding because the parent signed a contract obligating her to pay $128,620 for transportation without attempting to secure transportation from the district first (IHO Decision at p. 27). The IHO also found that there was no evidence as to whether the transportation service provided by Sisters Travel was either necessary or appropriate for the student (id.).

The parent testified that the student required transportation from the closest safe curb, a one-to-one paraprofessional, a lift bus, a bus that could accommodate a wheelchair, air conditioning and limited travel time (Tr. p. 288). The parent indicated that it took the student approximately 30 to 60 minutes to travel to from home to school (Tr. p. 288).

The parent testified she signed a transportation contract but did not remember the specifics of the contract noting she signs many documents (Tr. p. 259). The evidence shows that the parent entered a contract with Sisters Travel for the provision of transportation to and from iBrain for the 12-month 2023-24 school year (Parent Ex. I). The parent testified she considered other transportation options—transporting the student herself—but could not recall if she looked into other private transportation companies prior to signing the transportation contract (Tr. p. 263).

The parent on cross-exam also testified that she believed the student gets to school utilizing transportation services from Sisters Travel (Tr. p. 282). The parent could not recall if she ever received an invoice from Sisters Travel (Tr. p. 286). The parent testified she received daily communication specifically regarding the student's transportation, that the communication came from different numbers, including some that she did not recognize, but that a lot of the messages were from his travel paraprofessional (Tr. pp. 283-84).

In support of the parent's contention that the award should include the full cost of the transportation contract with Sisters Travel, the parent relies on a recent district court case, which reviewed similar contracts with the same transportation company and determined that the terms of the contracts required parents "to pay fees irrespective of whether the students use[d] the services" (Abrams v. New York City Dep't of Educ., 2022 WL 523455 at p. *5 [S.D.N.Y. Feb. 22, 2022]). In its answer and cross-appeal, the district relies on another holding from the same district court, Araujo v. New York City Department of Education, 2023 WL 5097982 (S.D.N.Y. Aug. 9, 2023), to support its position that the IHO was correct to deny transportation funding on the basis that it was unclear if the student ever used transportation provided by Sisters Travel (see IHO Decision at p. 25). In further support, the district points to a similar holding in Davis v. Banks, 2023 WL 5917659 (S.D.N.Y. Sept. 11, 2023). It is worth noting that none of the cases cited by the parties are directly relevant to the issue being addressed on appeal, i.e. whether the award of funding for transportation should be reduced, as all of the matters cited by the parties involved implementation of either unappealed pendency orders or an unappealed final IHO decision and, therefore, the cases focused on enforcement and the language included in the orders that were being enforced rather than a direct review of the merits of 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"]).

Generally, an excessive cost argument focuses on whether the rate charged for services were reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services or, in this case, evidence of providers who would only charge for the services delivered. Here, the district cites no evidentiary basis, and an independent review of the evidence reveals no such basis, for a finding that the award of direct funding should be limited to only those transportation services that were

actually provided to the student during the 2023-24 school year.[14] Accordingly, there in insufficient grounds upon which to find that an award of services should include only those transportation services actually delivered to the student instead of the full amount of the parent's financial obligation pursuant to the terms of the contracts.

Based on the above, it is clear that both parties agreed the student required specialized transportation services and that Sisters Transportation provided appropriate transportation services to the student thus it was improper for the IHO to deny transportation funding in full. However, as indicated above, this issue is moot as the district agreed to fund private transportation services as part of the student's pendency program (see Parent Ex. G).

VII. Conclusion

In summary, the parent should have received all her requested relief through the parties' pendency agreement and thus the parent's remaining allegations are moot.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 19, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[14] The district offered into evidence an email exchange between the district and iBrain in which the former iBrain director of special education stated in June 2023 that she was unaware of any students that would be seeking transportation from the district (Dist. Ex. 22); however, on appeal, the district does not contend that the email exchange demonstrated that there was an option for transportation that the parent unreasonably did not take advantage of. In any event, there is no evidence that the district communicated such an offer to the parent in this matter.