The University of the State of New York

The State Education Department
State Review Officer
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No. 24-370

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 Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) to the extent it did not order respondent (the district) to fund the full costs under the parent's contract with Sisters Travel and Transportation Services, LLC (Sisters Travel) for transportation services for her daughter for the 2022-23 school year. The district cross appeals from the IHO's interim decision on pendency, as well as from the IHO's determination that it failed to offer an appropriate educational program to the parent's daughter and ordered it to reimburse the parent for her daughter's tuition costs at the International Academy for the Brain (iBrain) for the 2022-23 school year. The appeal must be sustained in part. The cross-appeal must be sustained in part. The matter must be remanded for further administrative proceedings.

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 this case will not be recited in detail. Briefly, the student has received diagnoses of cerebral palsy, periventricular leukomalacia (PVL), hypotonia, epilepsy, scoliosis, microcephaly, and visual impairment, among others (Tr. pp. 229-30; Parent Ex. J at p. 2; Dist. Ex.

10 at p. 1).[1] The student is nonverbal, nonambulatory, and presents with global cognitive impairment and developmental delays (Parent Ex. J at p. 2; Dist. Ex. 10 at p. 1). The CSE convened on March 29, 2022, determined the student was eligible for special education as a student with a traumatic brain injury, and formulated the student's IEP for the 2022-23 school year (see generally Parent Ex. C; Dist. Exs. 1-3).[2]

By letter dated June 17, 2022, the parent informed the district that she disagreed with the recommendations in the March 2022 IEP, and raised issue with the public school to which the district assigned the student to attend (see generally Parent Ex. G). The parent noted that, on June 7, 2022, she received a prior written notice and school location letter, but that there was a discrepancy, as within the body of the email transmitting the documents, the district identified a different assigned school location than that listed in the letter attached to the email (id. at pp. 1-2; compare Dist. Ex. 5, and Parent Ex. E at p. 5, with Parent Ex. D). In her letter, the parent indicated that she contacted the individual who sent the email to the parent, in order to receive a new letter clarifying the assigned school location for the student, but that she had not received any response (Parent Ex. G at p. 1; see Parent Ex. D).[3] Based on the foregoing, the parent notified the district of her intent to unilaterally place the student at iBrain for the 2022-23 school year at public expense (Parent Ex. G).

A. Due Process Complaint Notice

In a due process complaint notice dated July 6, 2022, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A). The parent alleged that the March 2022 CSE failed to recommend hearing education services, sign language instruction, music therapy, and appropriate transportation services for the student, including limited travel time and air conditioning (id. at pp. 3-5). In addition, the parent alleged that the recommendation for a district specialized school was predetermined and not appropriate and that no district specialized public school would have the capacity to implement the student's IEP (id. at pp. 3-4). The parent noted, again, the discrepancies in the school location letter and body of the email notifying the parent with the letter, and alleged that, despite her contacting the district, she was unable to resolve the inconsistency and unable to investigate the physical location of the school (id. at p. 4). The parent sought an order directing the district to fund the full cost of the student's tuition at iBrain for the 2022-23 school year, including related services, as well as special education transportation services (id. at p. 6). The parent also sought

[1] During the impartial hearing, the parties offered certain exhibits into evidence to support their positions relating to the student's pendency placement, and, subsequently, offered exhibits to support their positions related to the merits using duplicative number and letter designations as those used for the pendency exhibits. For purposes of this decision, exhibits entered into evidence during the portion of the impartial hearing devoted to pendency will be cited as "Pendency" exhibits (e.g., Parent Pendency Exs. A-B; Dist. Pendency Exs. 1-9).

[2] 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]).

[3] The transcript pagination in this record has an error. There are two consecutive pages in the transcript that bear the number "152." Thus, when cited individually, the first occurrence of page 152 will be cited as "152-1," and the second occurrence will be cited at "152-2."

to reconvene the IEP if necessary (id.). The parent further sought district funding of iBrain as the student's stay put placement during the pendency of the proceedings (id. at p. 2).

B. Impartial Hearing and Intervening Events

After a prehearing conference on August 11, 2022 (see Tr. pp. 1-13), an impartial hearing initially proceeded with appearances over the course of seven dates between September 7, 2022, and January 26, 2023 (Tr. pp. 14-357).[4]

While the impartial hearing was pending, the parent and the district exchanged a series of emails during February 2023. On February 8, 2023, the parent emailed a representative of the district (Dist. Ex. 17 at p. 1). She stated that the circumstances at iBrain had deteriorated due to staffing issues, and that children were not receiving their mandated services (id.). The parent claimed that the student had only received occupational therapy (OT) that day, as opposed to her full roster of daily mandated services that also included physical therapy (PT) and speech language therapy (id.). The parent further indicated that the student had not received a full week of PT since September 2022, and that she was receiving her related services on a "rotation basis" (id.). She expressed that staff at iBrain was not asking parents if makeup sessions were desired, and she found it difficult to believe that the sessions could be made up (id.). She further shared that iBrain "kept parents in the dark about their children missing their related services," and she was reaching out to the district for help as she was "at a loss" (id.).

On February 10, 2023, the parent sent an additional email to the district representative, resending the email discussed above because she was "still at a loss since [she did] not know whom to contact about the current situation" (Dist. Ex. 18 at p. 1). The parent, in this correspondence, added a detail to her previous communication, sharing that the student had missed over 70 PT sessions (id.; see Tr. p. 516).

After some discussion with the district about exploring the potential for the student to re-enroll in public school (Dist. Ex. 19 at pp. 1-4), the parent emailed the district representative to state that she had since met with staff at iBrain and "realized that the number of PT sessions [the student] missed [was] 23 and not 70, and that [iBrain was] working on a plan to make up missed sessions" (Dist. Ex. 19 at p.1). The parent indicated that she was overall happy with the progress the student was making, and that her concerns were being addressed (id.).

In the course of discussions between the parent and the district, the district apparently sent the parent another email with another school location letter dated February 10, 2023 (Dist. Ex. 19 at pp. 1-3). In an email to the district, the parent indicated that the attachment listed two separate locations, which she "had mentioned last year and requested a new letter which was never received" (id.). She further stated that one location had an incorrect telephone number listed, and one of the locations had "3 separate schools" (id. at p. 2).

Despite the parties resting and providing closing statements (Tr. pp. 341-42, 346), the IHO ordered the record to be remain open (see generally IHO Ex. III). This was apparently pursuant to a motion by the district, to which the parent filed a written response and opposition thereto (see

[4] The parties filed a joint statement of uncontested facts and issues to be adjudicated, which was entered into evidence as IHO Exhibit I.

IHO Ex. III p. 1; see Tr. pp. 359-60).[5] The parties appeared before the IHO on February 27, 2023 for an interim hearing to discuss the motion (Tr. pp. 358-88). Evidently the parent had contacted the district regarding concerns about the student missing sessions of related services while attending iBrain, and the district wanted to reopen the hearing to explore evidence regarding this as it was relevant to whether the parent established her burden of proof regarding the appropriateness of the unilateral placement (Tr. pp. 359-61; see IHO Ex. III at p. 2). The IHO noted that the hearing record had not yet been closed (Tr. p. 378; see also IHO Ex. III at p. 3). The IHO ordered a continuance of the hearing for the purpose of re-calling two witnesses, as well as, if warranted, issuing subpoenas regarding related services delivered to the student at iBrain (IHO Ex. III at pp. 2-3).

The impartial hearing continued with proceedings taking place on six more dates between April 17, 2023 and August 3, 2023 (Tr. pp. 389-599).

C. IHO Decisions

The IHO issued an interim decision on pendency dated July 23, 2024 (see generally July 2024 Interim IHO Decision). The IHO noted that a decision was issued by an IHO in a previous matter between the parties, which found, in relevant part, that the student's unilateral placement at iBrain during the 2020-21 and 2021-22 school years was appropriate and ordered the district to fund the student's expenses related to her attendance (id. at p. 2). The IHO indicated that the remaining dispute between the parties was whether the subsequent decision of an SRO in Appeal No. 23-105, issued on July 26, 2023, which upheld those portions of the underlying IHO's decision, applied retroactively (id.). The IHO found that the SRO's decision in Appeal No. 23-105 became the student's pendency placement effective upon the issuance of the IHO's underlying decision in that matter, which was dated May 4, 2023, and that the student was automatically entitled to receive funding for the same level/type of educational placement and services, comprising of the student's placement at iBrain and funding of special transportation services (id. at p. 6). The IHO stated that to find differently "would be akin to leaving the Student bereft of any pendency placement, which is antithetical to the seminal purpose of FAPE and the IDEA" (id.). The IHO ordered that the student's pendency program, consisting of funding and placement at iBrain, including special education transportation services, should be effective nunc pro tunc as of the filing date of the due process complaint notice to May 4, 2023, continuing until such time as a final decision would be issued, or settlement would be reached, in this matter (id. at p. 7).

In a final decision dated July 23, 2024, the IHO found, among other things, that the district failed to offer the student a FAPE for the 2022-23 school year, that iBrain was an appropriate unilateral placement, and equitable considerations did not warrant a reduction or denial of relief (see IHO Decision at pp. 20-28). The IHO found that the district did not predetermine the

[5] The parties' motion papers and briefs on the pendency issues were not included in the record on appeal as required by State regulation (see 8 NYCRR 200.5[j][5][vi]; 279.9[a]). The Office of State Review endeavors to identify any deficiencies in the hearing record; however, the district is reminded that it carries the responsibility to file a complete copy of the hearing record with the Office of State Review and that failure to do so could result in remedial actions such as striking an answer, dismissing a cross-appeal, or making a finding that the district violated the parent's right to due process (8 NYCRR 279.9[a]-[b]). Here, as no party is contesting the IHO's interim order to have a continuation of the hearing, I decline to exercise my discretion to take remedial action against the district for the outstanding record deficiency (8 NYCRR 279.9[b]).

programming recommended for the student and that that the lack of hearing education services and music therapy did not deny the student a FAPE; however, the IHO found that the CSE failed to recommend adequate transportation accommodations, in that the IEP did not provide for limited travel time and air conditioning, the district did not provide sufficient notice of the assigned school location, and the assigned public school site did not have the capacity to implement the IEP (id. at pp. 14-20). With respect to the unilateral placement, the IHO found that iBrain offered the student specially designed instruction to address her needs and that the student demonstrated some progress (id. at pp. 23-24). As for equitable considerations, although the IHO did not identify a basis to reduce or deny tuition funding, as for the private transportation services, the IHO found that the record was devoid of any specifics regarding actual expenditures of transportation services, and, as such, felt that she was unable to determine a specific amount to award (id. at pp. 26, 28). The IHO ordered the district to "remit a payment representing full renumeration to the Transportation Provider, subsequent to reaching an agreement with the Parent as to calculated total amount due the Transportation Provider for the roundtrip Special Transportation services provided to the Student during the 2022/2023 school year" (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging, among other things, that the IHO erred in mandating the parties to negotiate the costs of the student's special education transportation services to be limited by what was actually utilized by the student, as opposed to following the terms of the contract between the parent and provider, which provided for a term of 219 days per year.

The district, in an answer and cross-appeal, contends that the limit on transportation funding was reasonable, as the parent should only be entitled to services that were actually provided. As for a cross-appeal, the district contends, among other things, that the IHO erred in finding that the student was entitled to pendency at iBrain, that it did not offer the student a FAPE, that iBrain was an appropriate unilateral placement, and that equitable considerations weighed in the parent's favor. Specifically, the district alleges that the IHO's interim pendency award was not warranted, as it was improper to have the pendency award be retroactive to the filing of the due process complaint notice. The district asserts that the IHO should have found that iBrain was not the student's pendency placement until July 26, 2023, the date of the SRO decision affirming an award of tuition funding for iBrain for prior school years. Regarding its offer of a FAPE to the student, the district contends that it was not informed of the limited travel times and air conditioning accommodations until well after the IEP was created for the student, and after the district had sent a prior written notice and school location letter to the parent. With respect to the school location, the district contends that the student was assigned to a specific school, but for "unknown reasons," there was a discrepancy in the notices provided to the parent. The district contends that the parent could have contacted either of the schools directly with questions, and that the parent's efforts were not well documented, despite the IHO's assertion otherwise. Regarding the unilateral placement, the district argues that the IHO failed to take into account evidence in the record regarding the missed sessions of related services, and merely placed undue weight on the deputy director's testimony, which did not address missing services outside of PT. The district also contends that, the equities do not favor any award of relief, as the deputy director provided misleading testimony regarding related services.

In a reply and answer to the cross appeal, the parent contends that the IHO's determination on pendency was proper. Regarding the district's offer of a FAPE, the parent contends that, with

respect to transportation, that the district failed to reconvene the CSE after receiving the student's medical accommodation forms, and that the CSE could have had a representative from the Office of School Health attend the CSE meeting. With respect to the assigned school location, the parent contends that the discrepancy in providing two differing locations was that of the district's, and that the district in its arguments attempts to place the burden on the parent to correct that discrepancy. As for the unilateral placement, the parent contends that she met her burden to demonstrate iBrain was appropriate. Additionally, the parent asserts that the deputy director testified that missed PT sessions at iBrain were being made up and "were completely made up by the end of the 2022-2023 school year." The parent contends that the IHO's credibility determination on the deputy director was proper.

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]).[6]

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

[6] 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).

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. Pendency

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[7] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

[7] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

As noted above, the pendency inquiry focuses on identifying the student's then-current educational placement, which "typically refers to the child's last agreed-upon educational program before the parent requested a due process hearing to challenge the child's IEP" (Ventura de Paulino, 959 F.3d at 532 [emphasis added]). There is no question that the filing of a due process complaint notice triggers pendency (see E. Lyme, 790 F.3d at 456). However, as of the date of the parent's July 6, 2022 due process complaint notice, notwithstanding that the student was attending the unilateral placement, this was without the district's consent and there was no agreement by the parties and no unappealed IHO or SRO decision that iBrain was appropriate (Ventura de Paulino, 959 F.3d at 532 [noting that "implicit in the concept of 'educational placement' in the stay-put provision (i.e., a pendency placement) is the idea that the parents and the school district must agree either expressly or as impliedly by law to a child's educational program"]). Accordingly, as of that date, the student's pendency placement may have been some other placement, perhaps based on a last agreed-upon IEP.

Once a student's "then-current educational" placement or pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 532 [2d Cir. 2020]; Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23;

Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings" (S.S., 2010 WL 983719, at *1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (id.). Thus, it has been held that a district would not be responsible for funding a student's tuition for the time period between the start of the student's school year through the date of the pendency changing event (i.e., the unappealed IHO decision or SRO decision in favor of the parent) until the parent prevailed on the merits of the due process complaint notice (Murphy, 86 F. Supp. 2d at 367).[8]

Here, the July 26, 2023 SRO decision therefore constituted a pendency changing event which would apply "only on a going-forward basis" (S.S., 2010 WL 983719, at *1). Based on the foregoing, it was not proper for the IHO to order the pendency program to be retroactive to the date of the due process complaint notice.

B. FAPE

Turning first to the issue of whether the district offered the student a FAPE for the 2022-23 school year, the evidence in the hearing record support's the IHO's decision. The evidence in the hearing record supports findings that the district failed to offer the student a FAPE based upon two primary shortcomings: (1) the failure to recommend limited travel time and air conditioning as special education transportation accommodations; and (2) the failure to provide the student with a clear and unambiguous assigned public school site in which to implement her IEP.

With respect to special transportation, the IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Specialized forms of transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891, 894 [1984]; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly

[8] With that said, it has been held that in certain circumstances a court may, on equitable grounds, retroactively adjust a student's pendency placement if an administrative decision in a parent's favor was not issued in a timely manner (see Mackey, 386 F.3d at 164-66; Arlington, 421 F. Supp. 2d at 701; S.H.W. v. New York City Dep't of Educ., 2023 WL 2753165, at *8 [S.D.N.Y. Mar. 31, 2023]; O'Shea, 353 F. Supp. 2d at 457-58; Murphy, 86 F. Supp. 2d at 366-67).

causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The transportation must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

For school aged children, according to State guidance, the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate," which may include special seating, vehicle and/or equipment needs, adult supervision, type of transportation, and other accommodations ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at https://www.nysed.gov/sites/default/files/programs/special-education/special-transportation-for-students-with-disabilities_0.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]).

Here, the parent testified that the student required air conditioning because she had asthma and a history of seizures, and she required limited travel time because she was administered medication and "tube" feedings "at a certain time" (Tr. pp. 234-35). Additionally, the parent testified that the student had those accommodations first placed on an IEP "several years ago" (Tr. p. 235). The evidence also shows that the April 2021 CSE had recommended that the student receive limited travel time and air conditioning accommodations (see Parent Ex. K at pp. 36-37). Further, the school psychologist, who also served as the district representative at the March 2022 CSE meeting, testified that a draft iBrain report and education plan was one of the documents reviewed at the meeting (Tr. pp. 120-22; Dist. Ex. 2). Review of the March 2022 iBrain report and education plan reflects the recommendation that the student required, among other things, air conditioning and limited travel time of 90 minutes for transportation to and from the school (Parent Ex. B at p. 65).

The district representative testified that she did not recall whether the March 2022 CSE discussed the student's special transportation services, and the hearing record does not indicate why the CSE did not recommend limited travel time and air conditioning during transport in the student's March 2022 IEP (Tr. p. 140). While the district claims on appeal that it "had no information recommending these accommodations . . . when the [CSE] prepared" the March 2022 IEP, the record belies this assertion.

Additionally, any contentions that the parent was required to submit additional forms in order to obtain these transportation accommodations, if the "Office of School Health" approved them (see Tr. pp. 141, 235-237, 246, 274-275; see also Dist. Ex. 16), lack merit. Requiring parents to provide the district with specific paperwork which the district would examine at another time through a separate "Office of School Health," and then, perhaps, decide if the student's IEP would be amended to include transportation accommodations of air conditioning and limited travel time is a scenario that bears considerable similarity to litigation that was brought against the district which complained of systemic "policies that never required [the Office of School Health] or [Office of Pupil Transportation]—agencies critical to providing the services at issue in this action—to appear for IEP meetings. . . . Accordingly, Plaintiffs were required to contact OSH and

OPT separately after the IEP meeting. This policy created a disjointed bureaucracy in which OSH and OPT acted in isolation without coordinating—much less knowing—the services each was required to provide" (J.L. on behalf of J.P. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 464-65 [S.D.N.Y. 2018]).

This is not the process called for under IDEA because it is the CSE that is required to make the determination of which services should be placed on a student's IEP, and it is the district's responsibility to ensure that the CSE has sufficient information about the student's needs and that individuals who can make appropriate decisions are part of the CSE process. Placing the onus on the parent, rather than the district, to obtain the required medical forms is problematic since the district may not delegate its responsibilities to the student under IDEA to the parents (see 8 NYCRR 200.4[b][3]). The district members of the CSE in this case failed to appreciate that they were the individuals responsible to determine whether the student needed transportation with air conditioning and limited travel time in order to receive a FAPE. A district is authorized to conduct necessary medical assessments in order to provide appropriate special education programming to a student with a disability (see Shelby S v. Conroe Indep. Sch. Dist., 454 F.3d 450, 454 [5th Cir. 2006]).[9] Additionally, the parent testified that she eventually submitted the medical documentation for these accommodations to the district; however, there is nothing in the evidence to show that the district took any action regarding the forms and accommodations once submitted (see Tr. p. 237; see also Dist. Ex. 16).

Based on the foregoing, there is insufficient basis to disturb the IHO's finding that the district failed to offer the student a FAPE in part based upon its failure to recommend limited travel time and air conditioning for the student's special education transportation.

Turning to the student's recommended assigned school location, similarly, I find that the IHO was correct that the district erred and consequently failed to offer the student a FAPE for the 2022-23 school year.

Although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016] [noting that "a parent must necessarily receive some form of notice of the school placement by the start of the school year"]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [finding that a district's delay does not violate the IDEA so long as a public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation, it nonetheless follows that it must be shared with the parent before the student's IEP may be implemented. This analysis also fits with the competing notions that, while a district's assignment of a student to a particular school site is an administrative

[9] This does not mean that medical assessments must always be conducted by a district under all circumstances to provide the parent with free medical diagnoses whenever they seek it. The thrust of the requirement is to ensure compliance with the educational objectives of the IDEA and "[i]f alternative assessment methods meet the evaluation criteria [required under Part B], then these methods may be used in lieu of a medical assessment" (Letter to Williams, 21 IDELR 73 [OSEP 1994]).

decision which must be made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]), there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

Here, there is evidence in the hearing record to support the IHO's conclusion that the student never received a definitive or clear placement location (IHO Decision at p. 18). Review of the hearing record shows that the parent received an email on June 7, 2022, from the special education evaluation placement program officer (placement program officer) indicating the school site to which the student was assigned (site 1) (Parent Ex. D). Attached to the email was a school location letter that indicated a different location (site 2) to which the student was assigned (Parent Ex. E at p. 5). According to the parent, she reached out to the officer who authored the email, requested clarification as to which school the student was assigned to attend, and was told she would receive an updated letter (Tr. pp. 237-38). She further testified that she waited "about a week or so" and reached out to the officer again via telephone and email; however, she reported that she did not receive a response (Tr. p. 238). Additionally, in February 2023, the parent emailed the district regarding the discrepancy in the school location letters, and informed district staff that she had not received "a new letter" regarding the assigned school site as she had requested (Dist. Ex. 19 at pp. 1-3).

Here, the IHO determined that the district failed to timely provide the student with the exact name and location of the actual recommended school location and noted that the parent made efforts to clarify the recommended placement (IHO Decision at p. 18). The district has not put forth a sufficient showing to rebut the parent's testimony and the evidence in the hearing record regarding her communications with the district. As such, there is not a convincing basis to disturb the IHO's finding that the district denied the student a FAPE due to its failure to provide a definitive assigned public school site for the student.[10]

[10] Additionally, with respect to the district's contentions regarding the assigned public school's ability to implement the student's IEP, as there is no indication in the record that the parent was definitively informed of which location the student was assigned to attend, it is unnecessary to examine whether the location identified by the district could have implemented the recommendations in the student's IEP, as this would merely be speculative.

C. Unilateral Placement

Turning to a review of the appropriateness of the 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 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).

Here, the IHO found that the parent met her burden to establish that the student's program at iBrain was appropriate (IHO Decision at pp. 22-24). As the district notes on appeal, however, the IHO's analysis has little reference, if any, to the related service sessions the student missed while she attended iBrain during the 2022-23 school year. As such, the district contends that the parent failed to sustain her burden that the private program was appropriate due to the substantial gaps in the provision of related services to the student. The parent contends that she met her burden as there was testimony that the program at iBrain was comprehensive and that the student made progress. The parent further contends that any lapse in services would be rectified by iBrain's provision of make-up services to the student.

There is evidence in the hearing record that the student was not provided with a number of sessions of related services throughout the 2022-23 school year.[11] In February 2023, the parent reported that "staffing issues" at iBrain led to a decline in the amount of related services the student was receiving (Dist. Ex. 17 at p. 1), alleging, for example, that on February 8, 2023 the student had only received OT, wherein she was mandated to receive a full roster of related services daily, including OT, PT, and speech-language therapy (Dist. Ex. 17 at p. 1). According to the parent, the student had not received a "full week of PT since" September 2022 and iBrain "[a]dministration [was not] asking parents if they want[ed] make up sessions" (id.). On February 10, 2023, the parent alleged that the student had missed over 70 PT sessions, before later stating that the student had only missed 23 and that iBrain was "working on a plan to make up missed sessions" (compare Dist. Ex. 18 at p. 1, with Dist. Ex. 19 at p. 1).[12] Adding to the confusion, the deputy director of related services at iBrain testified that during the 2022-23 school year the student had missed 24 sessions, then later testified that the student had missed 23 sessions, and also that the student had made up seven of those PT sessions (Tr. pp. 550, 564-67).

Additionally, when the IHO asked if the special education director could provide an accounting of the related services provided and missed for the student, she stated that she believed she could, but that iBrain had "been having a little bit of IT issues" and therefore she wanted to "double check it" (Tr. pp. 538-39). The special education director testified that she wanted to "verify the numbers," referring to the internal records that tracked the service sessions missed and subsequently made up (see Tr. pp. 526-27, 532, 561, 567). The deputy director only focused her inquiry for sessions missed for PT services, and only from September 2022 to February 2023, despite acknowledging that the student may have missed sessions during the summer months as well (Tr. pp. 555-61).

In addition to the confusion as to the number of PT sessions missed, it is unclear from the hearing record the number of sessions the student had missed for related services other than PT, and there appears to be potentially conflicting testimony and evidence surrounding this issue. The

[11] The hearing record shows that iBrain recommended that the student receive five 60-minute sessions of individual PT per week, five 60-minute sessions of speech-language therapy per week, with one session being in a group setting, and four sessions being in an individual setting, and five 60-minute sessions of OT per week (Parent Ex. B at pp. 31, 54-58).

[12] The parent testified that she originally thought she heard from a staff member from iBrain that the number of missed PT sessions was 70, but that she was later informed it was 23 (Tr. pp. 495, 516).

parent stated in her emails to the district that the student was not receiving her whole program of related services, for example, she did not receive the recommended speech-language therapy or PT on February 8, 2023 (Dist. Ex. 17 at p. 1). Further, the parent testified that many of the student's related service providers had left their positions at iBrain during the school year, while the deputy director testified that she did not recall staffing changes in disciplines outside of PT (compare Tr. pp. 485-86, with Tr. pp. 554-55). Additionally, the deputy director's testimony and preparations thereto solely focused upon missed PT sessions, rather than the full program of related services (Tr. pp. 555-58). Given the parent's February 8, 2023 assertion that the student was receiving related services on a "rotation basis based with what staff/student ratio" (Dist. Ex. 17 at p. 1), the hearing record is insufficiently developed regarding what the "rotation basis" meant, and the amount of OT and speech-language sessions the student may have missed.

The IHO, noting these apparent gaps in the hearing record, asked the special education director to provide a written accounting of the sessions for related services that would reflect the related services that were scheduled by type, describe what was actually provided, the dates services were provided, and any make up sessions that were provided because the information in those documents was "absolutely important" to complete the hearing record and clarify the issue (see Tr. pp. 538-40, 544). Two witnesses from iBrain, the special education director and the deputy director, testified to using a "dashboard" system to track those very same metrics (Tr. pp. 526-27, 532, 561, 567). The special education director, in response to the IHO's request, agreed that she could provide the IHO with the requested records by June 30, 2022 (Tr. p. 539). Despite this, when the parties convened before the IHO for a status conference on August 3, 2023, the records had not been provided to the IHO (Tr. pp. 586-88). Parent's counsel indicated that he made an inquiry to iBrain regarding the requested information, and was informed that the information regarding the student's related service sessions was "not available and [wa]s unable to be compiled" (Tr. p. 588). This is seemingly contradictory to earlier testimony, including the deputy director's assertion that the same information was compiled in order to determine that the student had missed 23 or 24 sessions of PT, and subsequently made up seven sessions (see Tr. pp. 565-67). Despite the IHO instructing parent's counsel to contact iBrain again, reminding the school that it was an order from the IHO, the requested information and records were still not provided prior to the IHO's decision, dated July 23, 2024, almost a year later (Tr. pp. 592-95; see IHO Decision at pp. 3, 9).[13]

Based on the foregoing, while the 2022-23 iBrain educational plan may have been adequate as written, there is evidence in the record that the student had not received all of her related services in accordance with iBrain's recommendations. Given that a significant portion of the student's iBrain educational plan consisted of related services, their omission may be detrimental to a finding that iBrain provided a program specially designed to meet the unique needs of the student.

[13] Further, testimony regarding the importance of receiving the full mandate is mixed by both iBrain witnesses. The special education director testified that, in order for the student "to make progress as outlined and expected in her IEP," she required the full mandate; however, the special education director clarified that the student would not make "zero progress" but she would not make the progress expected if not receiving her full mandate of related services (Tr. p. 531). When asked if a student could make progress if they do not receive all of their recommended services, the deputy director responded saying that the way the program is designed, the reason they are meeting these mandates is because it is required to make that consistent progress" (Tr. p. 569). However, she further opined that missing one session out of five would not prevent a student from progressing (Tr. pp. 569-570).

However, the hearing record is insufficiently developed regarding the degree to which iBrain failed to deliver the student's related services. There remain several questions with respect to the provision of related services to the student, and to the implementation of the student's program by iBrain. There is conflicting, and potentially incomplete, information regarding the amount of PT sessions the student missed, it is not known to what extent the student was not provided with OT and speech-language therapy services, and it is unknown exactly how many sessions of each related service were made up, despite the assertion that the student had made up seven PT sessions at one point in time. While the ultimate number of related services sessions delivered may have been appropriate for the student, particularly if make-up sessions were provided within the school year, without definitive evidence of the number of sessions the student missed during the 2022-23 school year, and in which related services, it cannot be said that a fully developed hearing record exists on this issue. Particularly concerning is the fact that despite the IHO's repeated attempts to gain clarity on the issue, her decision ultimately contained a finding of iBrain's appropriateness without addressing the evidence of missed related services in the hearing record or the impact, if any, of this evidence on her determination.

Despite parent's counsel's assertions in the proceedings below, I disagree that the record did not require more information on this issue. I also remind the parent that it is their burden to demonstrate that the unilateral placement was appropriate.

D. Remand to IHO

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

As discussed above, the hearing record appears to be incomplete with respect to the provision of related services to the student by the unilateral placement. Accordingly, the IHO's decision must be reversed, and the matter remanded to the IHO for further proceedings relating to relief sought by the parent in the July 6, 2022 due process complaint notice, including whether iBrain was an appropriate unilateral placement for the student and whether the equitable considerations weigh in favor of an award of tuition funding. Upon remand, the IHO shall fully develop the hearing record on each issue that must be ruled upon. On the issue of delivery of related services at iBrain, this should include, for example, testimony and/or progress reports from iBrain related services providers and related services delivery reports from iBrain; if the parent does not offer this information, the district may wish to request subpoenas, which the IHO has the authority to issue if necessary (see 8 NYCRR 200.5[j][3][iv]).[14]

[14] Similarly, I leave it to the IHO's sound discretion to make appropriate credibility determinations, in light of the parties' arguments on credibility of witnesses at the due process hearing.

E. 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"]).

Here, the IHO found that, despite the need for an award of funding for transportation services to the student by the district, there was no evidence in the record "relating to the actual number of days the student was transported on a roundtrip basis to and from the Private School by the Transportation Provider," and that the "parent did not testify as to any specific invoices received or the aggregate costs incurred for transportation" (IHO Decision at p. 28). The IHO went on to find that, as a result of the lack of evidence of actual expenditures, the IHO was unable to determine a specific amount for an award granting full retrospective payment to the student's transportation provider (id.). Consequently, the IHO ordered that the district was to "remit a payment representing full renumeration to the Transportation Provider, subsequent to reach an agreement with the Parent as to calculated total amount due the Transportation Provider for the roundtrip Special Transportation services provided to the Student during the 2022/2023 school year" (id.).

The parent appeals, contending, in sum and substance, that it was improper for the IHO to essentially reduce the contracted cost of transportation services, which was contracted for a flat rate based upon a 219 day term for the school year (see Parent Ex. H at pp. 1-2).

I note that the parent is correct, in that the contract between the parent and the transportation provider provides for a term of 219 days for the 12-month 2022-23 school year (Parent Ex. H at p. 1). Additionally, the contract states that "each AM TRIP and PM TRIP will be billed as a flat rate of $405.00," and that the amount for the transportation services would be based upon the term of 219 days, irrespective of whether the student utilized the transportation services on any given day, unless the transportation provider was at fault for the student's failure to utilize (see id. at pp. 1-2).

As noted above, this matter is to be remanded to the IHO based upon the incomplete hearing record. As such, upon remand, I ask that the IHO clarify her position with respect to the

transportation award, and remind the IHO that among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

VII. Conclusion

The evidence in the hearing record demonstrates that the district failed to offer the student a FAPE for the 2022-23 school year. However, as the hearing record is insufficiently developed on the issue of iBrain's delivery of related services during the 2022-23 school year, this matter is remanded to the IHO to make determinations on these issues after further development of the hearing record, as well as for the IHO to clarify her position with respect to the relief granted for the student's special education transportation services.

I have considered the parties' remaining contentions and find that the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's interim decision on pendency, dated July 23, 2024, is modified by reversing that portion which found that the student was entitled to pendency at iBrain based on the SRO decision in Application of a Student with a Disability, Appeal No. 23-105 retroactive to the date of the parent's July 6, 2022 due process complaint notice;

IT IS FURTHER ORDERED the student was entitled to pendency at iBrain based program for a placement with iBrain on the SRO decision in Application of a Student with a Disability, Appeal No. 23-105 retroactive to July 26, 2023, the date of that decision;

IT IS FURTHER ORDERED that the IHO's decision dated July 23, 2024 is modified by reversing those portions which found that the unilateral placement at iBrain was appropriate for the 2022-23 school year and ordered the district to directly pay the cost of the student's tuition at iBrain for the 2022-23 school year; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings regarding the appropriateness of iBrain for the 2022-23 school year and equitable considerations.

Dated: **Albany, New York**
December 23, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER