The University of the State of New York

The State Education Department
State Review Officer
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No. 21-117

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Peter G. Albert, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed by respondent (the district) for her son's tuition costs at the International Institute for the Brain (iBrain) for the 2020-21 school year. The district cross-appeals asserting that the IHO erred in awarding district funding for the student's tuition and related expenses at iBrain. The appeal must be sustained in-part. 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

The student in this case was recently the subject of a prior State-level administrative review involving the student's 2019-20 school year (see Application of a Student with a Disability, Appeal No. 21-099). Accordingly, the parties' familiarity with the facts and procedural history preceding this case—as well as the student's educational history—is presumed and will not be repeated herein unless relevant to the disposition of the issues presented in this appeal.

The student was unilaterally placed at iBrain and received services at iBrain at district expense pursuant to an order on consent regarding pendency in the prior proceeding involving the 2019-20 school year (Parent Ex. B at p. 2). For the 2019-20 school year, the IHO who presided over that proceeding and the SRO who decided the appeal, both found that the student was offered

a free appropriate public education (FAPE) for the 2019-20 school year (Application of a Student with a Disability, Appeal No. 21-099).

The district determined that additional assessments of the student were necessary and sought parental consent on February 24, 2020, which the parent signed on March 23, 2020 (Dist. Ex. 5). A social history update and classroom observation were completed in March and April 2020 (see Dist. Exs. 8; 9).

The student's school, iBrain, developed its own educational plan for the student for the 2020-21 school year on May 22, 2020 (see Parent Ex. C). iBrain recommended placement in 12-month program in an 8:1+1 special class, with five 60-minute sessions of individual occupational therapy (OT) per week, five 60-minute sessions of individual physical therapy (PT) per week, four 60-minute sessions of individual speech-language therapy per week, one 60-minute session of group speech-language therapy per week, one 60-minute session of individual music therapy per week, and one 60-minute session of parent counseling and training per month (id. at p. 35). iBrain recommended that the student have a 1:1 paraprofessional and access to the school nurse (id.). The student was recommended for one 60-minute session of indirect assistive technology services per week, as well as access to specific assistive technology, including but not limited to an augmentative and alternative communication (AAC) device (id. at pp. 35-36). The student was also recommended for special transportation services (id. at p. 36).

A CSE convened on May 26, 2020 to conduct an annual review and develop an IEP for the student for the 2020-21 school year (see Parent Ex. H at pp. 1, 33, 37).[1] The CSE recommended an 8:1+1 special class in a specialized school (id. at p. 27). For related services, the CSE recommended five 60-minute individual OT sessions per week, five 60-minute individual PT sessions per week, three 60-minute individual speech-language therapy sessions per week, two 60-minutes group speech-language sessions per week, and one 60-minute group parent counseling and training session per month (id. at p. 28). Further, the CSE recommended school nurse services, an individual daily health paraprofessional, and an individual daily transportation paraprofessional (id.). As for assistive technology, the CSE recommended a dynamic display speech generating device and "Snap+Core First application" both daily throughout the day and a "BoardMaker Student Center application" two times per week for 60 minutes (id. at pp. 28-29). Additionally, the student was recommended for 12-month services and special transportation (id. at pp. 29, 32).

On June 19, 2020, the parent signed an enrollment contract with iBrain for the 2020-21 school year (see Parent Ex. D). In a letter to the district dated June 26, 2020, the parent indicated that she was unilaterally placing the student at iBrain for the 2020-21 extended school year (Parent Ex. I at p. 1). According to the parent "to date, the [district's] program and placement offered cannot appropriately address [the student's] educational needs for the extended school year 2020-2021" (id.).

[1]Although the May 2020 IEP was created for the 2020-21 school year, the implementation date for the IEP was listed as June 11, 2020 (Parent Ex. H at pp. 1, 27-29).

A. Due Process Complaint Notice and Subsequent Facts

In a due process complaint notice dated July 6, 2020, the parent asserted that the district failed to offer the student a FAPE for the 2020-21 school year (Parent Ex. A at p. 1).[2]

Specifically, the parent argued that the recommendation of an 8:1+1 special class in a district specialized school was not appropriate for the student as such classrooms in the district did "not have an environment properly matched to [the student's] academic, behavioral/social, physical, and management needs" (Parent Ex. A at p. 4). The parent indicated that a prior bad experience with the same "type of program and placement" in the district was the foundation for her belief that it would not meet the student's intensive management needs and would place the student in an environment with "peers possessing dissimilar needs" (id.). The parent also contended that the district failed to recommend sufficient related services and supports (id.). The parent asserted that the May 2020 CSE exclusively relied on reports from iBrain to describe the student's needs but ignored the parent's request for the student to receive all related services indicated on the iBrain IEP and failed to offer all related services as push-in (id.). Regarding assistive technology, the parent asserted that the CSE received sufficient information from iBrain, yet "unjustifiably indicated [it] would not actually provide any recommended devices and services" to the student (id. at p. 5). The parent argued that the assistive technology services recommended by iBrain would have provided meaningful educational benefit by allowing the student to make progress in his academic curriculum (id.).

The parent alleged that the district did not assign the student to attend a particular public school site and classroom for the 2020-21 school year, which denied the student educational benefit (Parent Ex. A at p. 3). The parent argued that the district was required to "offer a seat in a school where the IEP could be implemented" by the first day of the extended school year, which the district had failed to do (id.). The parent asserted that the district's failure to assign the student to a particular public school and classroom had left the student without an educational program or placement (id.). In addition, the parent contended that there was no 8:1+1 special class in a specialized school in the district for which 12-month services were offered (id.).

For relief, the parent requested that the district be required to fund the student's tuition at iBrain for the 2020-21 school year, including all related services and a 1:1 paraprofessional (Parent Ex. A at p. 6). Additionally, the parent requested reimbursement or prospective funding for special transportation services, including a transportation paraprofessional (id.). Finally, the parent requested an order compelling the district to provide assistive technology services and devices to assist the student with communication (id.).

In a prior written notice dated July 8, 2020, the district summarized the recommendations from the May 2020 CSE meeting (Dist. Ex. 12 at pp. 1-2). Also, in a school location letter dated

[2] The parent requested that this due process complaint notice be consolidated with her due process complaint notice regarding the 2019-20 school year (Parent Ex. A at pp. 1-2). However, the IHO assigned to the proceeding regarding the 2019-20 school year denied the request for consolidation (see July 22, 2020 Order Denying Consolidation).

July 8, 2020, the district notified the parent of the particular public school to which it assigned the student to attend for the 2020-21 school year (Dist. Ex. 13).[3]

B. Impartial Hearing Officer Decision

The parties proceeded to impartial hearing on January 8, 2021, which concluded on February 19, 2021, after three days of proceedings (see Tr. pp. 1-231).[4] In a decision dated April 14, 2021, the IHO found that the district offered the student a FAPE for the 2020-21 school year (IHO Decision at pp. 11, 13).

Initially, the IHO held that any argument that the district did not properly evaluate the student was not raised in the due process complaint notice and, therefore, she would not consider it; however, the IHO did note that the May 2020 CSE had sufficient information to develop an IEP for the student as it had input from the parents and iBrain, including reports from iBrain, and district evaluations (IHO Decision at p. 7). Next, the IHO discussed the student's needs and the recommendations of the May 2020 CSE (id.). The IHO indicated that the parent did not contest the appropriateness of the CSE's recommendations for an 8:1+1 special class, PT, OT, and speech-language therapy at the specified frequencies and durations, a 1:1 paraprofessional, or a 12-month program (id. at p. 8).

According to the IHO, the parent's concerns about the district specialized school were that the student's peer group would be inappropriate (IHO Decision at p. 8). The IHO held that parent failed to provide further explanation for this assertion beyond the limited statements in the due process complaint notice and that she saw "no reason to assume that the groupings would be inappropriate" (id.). As to the parent's allegation about the location for delivery of related services, the IHO indicated that it was not clear "why the Parents believe[d] that the related services were all pull out, as the IEP indicate[d] that they were push in and pull out" (id.). Regarding the lack of a recommendation for music therapy, the IHO found that the annual goals for music therapy could be met through other related services and that the IEP otherwise provided a similar program to that recommended by iBrain (id.). Further, the IHO found that there was no reason to find that the programs created by the CSE and iBrain were "significantly different or would not provide a FAPE" (id.). Notably, the IHO pointed out that the parent's closing brief "d[id] not, in fact, point to anything that they disagree[d] with in the recommended program" (id.).

The IHO found that the district established that it provided the parent with notice of an assigned school site on July 8, 2020 (IHO Decision at p. 9). The IHO noted that this was after the parent filed her due process complaint notice and was after the start of the school year on July 2, 2020; however, the IHO also noted that the enrollment contract with iBrain had a clause, which allowed the parent to withdraw from iBrain, if a FAPE was offered within two weeks of the commencement of the school year (id.). The IHO indicated that the parent attempted to raise additional issues with the school location site, including that it was not wheelchair accessible and

[3] The parent entered into a school transportation service agreement on September 2, 2020 (see Parent Ex. E).

[4] The parties submitted closing briefs to the IHO on March 19, 2021 (see IHO Exs. I; II). The parent submitted additional evidence with its closing brief, to which the district objected (IHO Exs. III; IV; V). Specifically, the parent submitted print outs from the internet that indicated that the assigned public school was not wheelchair accessible and that the extended school year began on July 2, 2020 (see IHO Exs. IV; V).

the parent was not able to tour the school (id. at pp. 9-10). The IHO held that these issues were not raised in the due process complaint notice (id.). The IHO found that the parent could have amended her due process complaint notice to include any allegations regarding the school location and that amending the complaint might "have given the [district] the opportunity to repair any concerns" before the two-week withdrawal period of the iBrain contract (id.). Regarding the parent's allegation that the school location was not wheelchair accessible, the IHO determined that the district did not agree to defend this issue by failing to object to the few questions asked by the parent's attorney on this issue, noting that the questions were not site specific (id. at p. 10). The IHO determined that, since the issue of whether the school location was wheelchair accessible was not raised in the due process complaint notice, the district did not have notice of the allegation (id.). The IHO held that the parent's evidence, submitted with the closing brief, on the issue might "not tell the whole story" and that any error with the document could not "have been determined without proper notice and opportunity for the [district] to defend" (id. at pp. 10-11).[5] Based on the foregoing, the IHO found that the district program was reasonably calculated to provide educational benefits (id. at p. 11).

Next, the IHO addressed the issues of whether iBrain was an appropriate unilateral placement (IHO Decision at pp. 11-13). The IHO found that iBrain was not an appropriate placement as the student was not properly grouped because he was the highest functioning student in the school (id. at p. 11). The IHO stated that it was "difficult to imagine how the Student, in a class of disparate students, each with their own levels of academic functioning, and with extreme deficits in many realms, c[ould] be expected to gain benefit during group instruction" (id.). Further, the IHO held that the student's grouping at iBrain was "shockingly inappropriate" and, though a unilateral placement should not be held to the same level of appropriateness as a district placement, it "must still furnish a program that affords the student an opportunity to learn academically, in an environment with other students who have similar academic needs" (id. at pp. 11-12). Also, the IHO stated that it was "difficult to imagine that the needs of students functioning at drastically lower levels than the Student [would] not consistently detract from the instruction provide[d] to the Student" (id. at p. 12). Further, the IHO opined that "one c[ould] easily surmise that without appropriate peer groupings, a student c[ould] not have the benefit of hearing the thoughts and ideas of peers during academic instruction" and that it "is through interactions with peers during classroom discussion that learning takes place, in addition to instruction by the teacher" (id.). The IHO noted that the student was the only student in the class who was able to read for himself (id. at p. 13). Based on these findings, the IHO determined that the student's peer grouping at iBrain was "not appropriate or conducive to allowing the Student appropriate access to education" and that the program offered by iBrain was not appropriate (id.).

As to equitable considerations, the IHO held that the June 26, 2020 ten-day notice of unilateral placement failed to explain with any detail why the parent believed that the district program could not meet the student's needs or even refer to the fact that the district had yet to offer the student a school placement (IHO Decision at p. 13). The IHO noted that the purpose of the ten-day letter is to provide information to the district that would allow the district to repair any failures in the program and, therefore, the failure to identify the reasons the parent believed the program was inappropriate would be an "equitable consideration that could impact any award in

[5] The IHO indicated that the district was within its right to refuse to agree to the admission of the additional evidence submitted by the parent with the closing brief.

this case" (id.). The IHO noted that she held that a FAPE was offered by the district in this case and denied the parent's request for the district to fund the student's attendance at iBrain for the 2020-21 school year (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erroneously found that the district offered the student a FAPE for the 2020-21 school year, that the unilateral placement of the student at iBrain was not appropriate, and that equitable considerations did not weigh in favor of an award of tuition reimbursement.

The parent asserts that the IHO erred by refusing to rule on the issue of the sufficiency of the evaluative information before the May 2020 CSE. The parent contends the district waived any objections as it permitted questions regarding the psychoeducational evaluation. The parent asserts that she should have been given flexibility to raise issues during the impartial hearing that were not raised in the due process complaint notice.

Moreover, the parent argues that the district was precluded from defending the May 2020 IEP because the issue was barred by the doctrine of res judicata. The parent contends that the prior impartial hearing challenged the student's program for the 2019-20 school year and that, during the 2019-20 school year, the CSE reconvened on May 26, 2020 and created a new IEP with an implementation date of June 11, 2020, which was during the 2019-20 school year. The parent asserts that the district should have been precluded from defending the May 2020 IEP because the district "had the burden to defend the IEP in the 2019-20 school year due process [hearing] and it failed to do so."

The parent contends that the district failed to offer the student a FAPE as the district did not timely send her the prior written notice or school location letter until after the 2020-21 school year began. The parent notes that it is uncontested that the district issued these documents on July 8, 2020, when the school year commenced on July 2, 2020. The parent argues that the failure to timely provide these documents resulted in a denial of FAPE regardless of the district's excuse for the delay. Further, the parent asserts that the terms of the enrollment contract with iBrain does not "absolve" the district from its liability.

Additionally, the parent argues that the IHO erred by failing to find that the proposed school location was inappropriate notwithstanding that it was not wheelchair accessible. The parent contends that the district carried the burden of proof to establish that the school was wheelchair accessible and failed to meet this burden. The parent argues that she submitted evidence that the school was not wheelchair accessible and that her evidence was a "publicly known fact" which the IHO should have acknowledged. Moreover, the parent asserts that the IHO erred by finding this allegation was not properly raised in the due process complaint notice as the due process complaint notice was filed before the school location letter was received and she was unable to allege such a fact. She contends that the IHO erred by finding that she could have amended her due process complaint and further argues that the district waived any objections to the argument regarding wheelchair accessibility by failing to object to the line of questioning during the hearing. The parent asserts that she should have been allowed flexibility in the scope of the impartial hearing as it relates to issues raised in the due process complaint notice. In addition, the parent contends that

the IHO erred by the finding that student would have been appropriately grouped in the proposed classroom in the district public school.

Next, the parent contends that the IHO erred in finding that iBrain was not an appropriate placement for the student. The parent indicates that the IHO noted that grouping regulations were "not strictly applied to unilateral placements" yet held iBrain to those standards. The parent asserts that a unilateral placement does not have to comply with federal or State regulatory procedures or requirements. Regarding equitable considerations, the parent argues that the IHO erred by finding that the 10-day notice was an equitable consideration that could impact an award of tuition reimbursement. The parent asserts that the 10-day notice "complied with both the spirit and the letter of the law" as it is not a pleading but simply notice of concern and rejection of a proposed placement.

In an answer, the district responds to the parent's allegations and argues that the IHO's decision should be upheld in its entirety. As for a cross-appeal, the district argues that, in the event that the IHO decision is overturned, equitable considerations warrant a total bar to an award of tuition reimbursement. The district points to the vague and late 10-day notice letter to support its contention.

In an answer to the district's cross-appeal, the parent contends that her "claims should be awarded without diminution."

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. __, 137 S. Ct. 988, 999 [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., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [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]

[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

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

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

VI. Discussion

A. Preliminary Matters

1. Scope of the Impartial Hearing

The parent argues that the IHO erred by finding that the parent failed to raise the issues of whether the May 2020 CSE had sufficient evaluative information about the student and whether the assigned public school location was wheelchair accessible in the due process complaint notice. The parent contends that case law allows for flexibility in the scope of an impartial hearing as it relates to issues raised in the due process complaint notice and that the district allowed its witnesses to answer questions regarding evaluations and wheelchair accessibility during the impartial hearing. Regarding whether the assigned public school location was wheelchair accessible, the parent claims that she could not raise the issue in the due process complaint notice because the district did not send a school location letter until after the parent filed the due process complaint notice.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution

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., 137 S. Ct. at 1000).

period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Here, review of the due process complaint notice supports the IHO's finding that the parent did not raise the sufficiency of evaluative information or the appropriateness of the assigned public school location due to wheelchair accessibility in the due process complaint notice. The closest allegation regarding evaluations in the due process complaint notice was that at the May 2020 CSE meeting the district "offered no educational or related services reports, therapists or any relevant assessments for the discussion of the student's needs" (Parent Ex. A at p. 4); however, read in context, the parent's claim was that the CSE relied exclusively on reports from iBrain to describe the student's needs and that, absent other sources of information about the student's needs, the CSE should therefore have adopted iBrain's recommendations for related services for the student (id.). This is not a sufficient statement to indicate that the parent was arguing that the CSE did not have sufficient evaluative information to create an appropriate program. Further, the parent made no specific arguments regarding the assigned public school location, such as whether it was wheelchair accessible. Even though, the parent had not yet received notice of the assigned public school location at the time she filed the due process complaint notice, there is no indication in the hearing record that she thereafter sought the district's agreement to expand the scope of issues or the IHO's permission to amend the due process complaint notice.

The next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

During the impartial hearing, the parent's attorney questioned the district witnesses regarding what evaluations the CSE had before it and relied upon and whether the assigned public school location was wheelchair accessible (Tr. pp. 79, 124-25, 142-44, 150). While the district did not object to these questions, it did not pursue the issues through direct examination of its own witnesses for the purposes of defending a claim that was identified in the due process complaint notice.[7] As such, the hearing record does not support that the IHO incorrectly limited the scope of the impartial hearing by finding that the parent did not raise issues pertaining to the sufficiency of evaluative information before the May 2020 CSE or the wheelchair accessibility at the assigned public school location. These issues were outside the scope of the impartial hearing and are outside the scope of review in this appeal.

[7] The parent attempted to raise the issue of wheelchair accessibility of the school placement with the post hearing brief by submitting additional evidence with the brief (see IHO Exs. II at p. 13-14, 15; IV). The district objected at that time (IHO Ex. III at pp. 9-10).

2. Res Judicata

Additionally, the parent asserts that the district should have been barred from defending the May 2020 IEP because the district failed to defend that IEP in the prior proceeding regarding the 2019-20 school year. The parent argues that since the May 2020 IEP was created and indicates that it was to be implemented during the 2019-20 school year, it should have been defended during the litigation regarding the 2019-20 school year.

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6). Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]).

The doctrine of res judicata applies to the party raising the claims, not the party set upon to defend against the claims. If the parent felt that the appropriateness of the May 2020 IEP was encompassed in the proceeding involving the 2019-20 school year, it is unclear why the parent brought a due process complaint notice challenging the IEP and continued in her litigation of the same. Additionally, even a cursory review of the proceeding involving the 2019-20 school year reveals that the May 2020 IEP was not at issue in that proceeding (see Application of a Student with a Disability, Appeal No. 21-099). Moreover, during the impartial hearing, the parent did not raise an argument that the district should have been precluded from defending the May 2020 IEP based on the prior proceedings involving the 2019-20 school year. As such, I will not entertain the issue any further.

B. 2020-21 School Year

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly determined that the May 2020 IEP offered the student a FAPE for the 2020-21 school year (see IHO Decision at pp. 6-8). Notably, the parent was not and is not objecting to the majority of the 2020-21 program recommended by the CSE and the IHO addressed the specific factual and legal claims raised by the parent, set forth and applied the proper legal standards to the evidence developed in the hearing record as to the parent's claims related to the appropriateness of the related services recommendations, the recommendation of push in/pull out services, and functional grouping (id. at 6-8). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and that she weighed the evidence and properly supported her conclusions (id.). Furthermore, an independent

review of the hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO other than as set forth below (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, the conclusions of the IHO with respect to the above issues are hereby adopted; however, the IHO's determination that the district's failure to notify the parent where the student's special education program would have been implemented did not result in a denial of FAPE is discussed more fully below.

The parent asserts that the IHO erred in finding that the district did not deny the student a FAPE despite the district's failure to provide the parent with prior written notice of the program recommended by the May 2020 CSE and a school location letter identifying the public school that would implement the program prior to the start of the 2020-21 school year.

In general, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).[8] The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 560 U.S. 904 [2010]; see also Deer Val. Unified Sch. Dist. v L.P., 942 F. Supp. 2d 880, 889 [D. Ariz. 2013]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). Additionally, a district "must ensure that . . . [t]he child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation" (34 CFR 300.323[d][1]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *13 [S.D.N.Y. May 27, 2014]).

Although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format describing the "bricks and mortar" location to which a student is assigned and where the student's IEP will be implemented, once an IEP is developed and a parent consents to a district's provision of special education services, the IDEA is clear such services must be provided to the student by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 420; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed.

[8] In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (N.Y. Educ. Law § 2[15]).

App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6). To be clear there is no requirement in the IDEA that a student's IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Moreover, parents generally do not have a procedural right to participate in the selection of a specific locational placement of their child (see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x. 1, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191-92 [finding that a district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection]).

However, 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] ["a parent must necessarily receive some form of notice of the school placement by the start of the school year"]; Tarlowe, 2008 WL 2736027, at *6 [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 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, on June 26, 2020, prior to the start of the school year, the parent notified the district of her intent to unilaterally place the student at iBrain, indicating "the student's needs were multi-faceted and complex, and to date, the [district's] program and placement offered cannot appropriately address [the student's] educational needs for the extended school year 2020-2021" (Parent Ex. I). However, the notice also indicated that the "parents remain[ed] willing and ready to entertain an appropriate [district] program and an appropriate public or approved non-public

school placement" (id.). The parent then filed her due process complaint notice on July 6, 2020 (Parent Ex. A). On July 8, 2020, the district sent a prior written notice and a school location letter to the parent (Dist. Exs. 12; 13).

It is undisputed that the district did not provide the parent with a prior written notice or a school location letter prior to the start of the extended school year as both documents were dated July 8, 2020 (see Dist. Exs. 12; 13). The district also acknowledged in its answer that "it did not offer [the student] a [district] placement until after the start of the 2020-2021 extended school year" (Answer with Cross-Appeal ¶ 4). In its post-hearing brief, the district had asserted that the reason for the delay in notifying the parent of the student's program and the school the student would have attended was that the parent was slow in providing the district with medical transportation documents and medical accommodation forms (IHO Ex. I at p. 15; see Tr. pp. 76-78). However, the district's policies, including those requiring specific medical documentation prior to arranging for services, cannot be used as an excuse for the district not meeting its obligations under the IDEA (see J.L. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 465 [S.D.N.Y. 2018]).

Additionally, to the extent that the IHO found that, there was no harm in the parent receiving the school location letter after the start of the school year because the parent's contract with iBrain allowed the parent to be released from the contract if the district offered the student a FAPE within two weeks of commencement of the school year (IHO Decision at p. 9); this finding did not take into account other circumstances at play in the beginning of the 2020-21 school year. More specifically, the student was not attending in-person classes at the time of the May 2020 CSE meeting due to the Covid-19 pandemic (Tr. pp. 97-98) and the CSE did not discuss how the student's services would have been delivered within the district as they did not discuss whether the student would receive an in-person, remote, or hybrid learning program (Tr. pp. 110-11). Further, the district witnesses did not know whether the student would have received a remote, hybrid or in-person learning program at the start of the extended 2020-21 school year (Tr. p. 119-20, 150-51).

Based on the above, the hearing record shows that the district failed in its obligation to notify the parent, either in writing or orally, as to where or how the student could access his IEP services. This error constitutes a procedural inadequacy, which, under different circumstances might not have risen to the level of a denial of a FAPE. However, due to the confusion as to whether the student's program would have been provided in person or remotely, the lack of information as to where the student would have received services limited the parent's ability to determine how the student would have received the recommended special education and related services at the start of the school year. Thus, although the district's delay in providing this information was not extensive, at the time the parent placed the student at iBrain for the extended 2020-21 school year, the parent had little information as to how or where the recommended special education program would have been implemented, which under these circumstances resulted in a denial of FAPE (see F.B., 2015 WL 5564446, at *11-*18; V.S., 25 F. Supp. 3d at 299-301; C.U., 2014 WL 2207997, at *14-*16).

Having found that the district denied the student a FAPE, I turn next to the appropriateness of iBrain as a unilateral placement.

C. Unilateral Placement

The parents contend that the IHO erred in finding that iBrain was not an appropriate unilateral placement. For the reasons set forth below, the evidence in the hearing record supports a finding that iBrain provided the student with instruction and services specially designed to meet the student's unique needs and, therefore, was an appropriate unilateral placement for the student for the 2020-21 school year. As such the IHO's determination to the contrary must be reversed.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

> instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

The student suffered a neonatal hypoxic ischemic encephalopathy which resulted in a brain injury and neonatal seizures; he has also received diagnoses of cerebral palsy and spastic quadriplegia (Parent Exs. C at p. 1; H at p. 1). His brain injury impacts his motor and sensory functioning, information processing, language, and speech (id.). He is non-ambulatory and non-verbal; however, he is able to communicate through assistive technology, specifically, using Tobii with Eye Gaze software (Parent Exs. C at p. 1). The student is able to function at or near grade level (Parent Exs. C at p. 1; H at p. 1). It is noted that the May 2020 iBrain IEP and the May 2020 district IEP are not identical, but they are substantially similar with significant portions of the present levels of performance contained in the district IEP taken directly from that of the iBrain IEP (compare Parent Ex. C at pp. 1-13, with Parent Ex H at pp. 4-16). The IHO held that the iBrain program was not appropriate because the student was functioning at or near grade level and he was not appropriately grouped within iBrain due to his high academic functioning (IHO Decision at pp. 11-13).

However, the hearing record demonstrates that iBrain took steps to ensure that the student was receiving academic instruction at his level of functioning. The iBrain director of special education (director) testified that the students in iBrain ranged in functioning from pre-K through elementary school level in both literacy and math (Tr. p. 176). She testified that, at the time, the student was functioning between the second and third grade levels "with some skills that spike[d] into some of the higher levels" and that he was on a fourth or fifth grade level "and up" in a couple of areas (id.). She acknowledged that the student was the highest functioning student at iBrain and that academically speaking he was more advanced than his peers (Tr. pp. 176-77).[9] According to the director, the student's class was grouped primarily based on ability, including how well students were able to socialize with peers and the extent to which they could communicate independently (Tr. p. 178). The students participated in 30 minutes of individual academics each day (Tr. p. 179). The age range for the student's class was 9 or 10 to 17 years old (id.). The director also testified that the 8:1+1 class that the student attended was for higher functioning students, though she did acknowledge that the student's classmates were lower functioning than he was (id.). Further, she testified that iBrain and its staff worked "really hard to put in as much academic work as possible into his day" (Tr. p. 180). She explained that they included academic work in his speech-language therapy and OT services, specifically adding a science component to speech and a math component to OT (Tr. pp. 180-81). She testified that she would meet with all of the student's providers to discuss how they were implementing academic skills throughout his school day (Tr. p. 181). The director testified that they would push related services into the classroom "as another way" to "integrate additional academic support into all of the therapy sessions" (Tr. p. 184). Overall, she testified that the student received approximately four hours of academics a day (Tr. p. 198). Moreover, she testified that the student received a different level of questions during science and history; specifically, for science, the student would learn more of the scientific facts and was working on understanding science concepts (Tr. pp. 208-09). She explained that while most of the

[9] The director testified that the student was the only student in the class who could read for himself (Tr. p. 208).

student's class worked on math skills in the kindergarten to first grade range, the student was working on skills in the third and fourth grade range (Tr. pp. 210-12). Additionally, although the student was the only student in his class who could read independently, the director explained how staff worked with the student on reading third and fourth grade level materials (Tr. pp. 207-08).

I next turn to the district's argument, made in its answer, that the evidence in the hearing record does not support a finding that the student made progress at iBrain during the 2020-21 school year and that the generalized statement of the director was insufficient evidence of progress.

While a student's progress is not dispositive of the appropriateness of a unilateral placement, a finding of some progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

Neither party submitted any progress reports regarding the 2020-21 school year. The director, in her January 26, 2021 affidavit, testified that the student at that point of the school year was "making progress towards his annual academic and related service goals" and that he made "progress in areas such as his receptive and expressive language skills, conductive education, and some academic areas (Parent Ex. L at p. 3). The director further testified on cross examination that iBrain measured progress via session notes from service providers and teachers (Tr. pp. 199). Here, the record lacks significant information regarding the student's progress during the 2020-21 school year; however, progress is not dispositive of the appropriateness of a unilateral placement.

Based on the above, the hearing record demonstrates that the student was receiving specialized instruction at his functional level to meet his academic needs. Although there is a lack of evidence of the student's progress and the student was higher functioning academically compared to the rest of the students in his class, these factors are not a sufficient reason for finding that iBrain was inappropriate, especially in light of the evidence that the student was receiving appropriate instruction at his functional level. Accordingly, the hearing record supports a finding that iBrain offered the student instruction specially designed to meet his unique academic needs.

D. Equitable Considerations

Turning next to equitable considerations, the IHO held that the parent's 10-day notice insufficiently identified the issues and areas of the program recommended for the 2020-21 school year that she objected to and, as such, equitable considerations could have been impacted in this proceeding (IHO Decision at p. 13). The district argues that the parent's request for tuition reimbursement should be denied in its entirety because the 10-day notice letter was overly vague and did not provide the district sufficient information to cure any deficiencies in the program. In response, the parent asserts that the 10-day notice meets "both the spirit and letter of the law."

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"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, the hearing record demonstrates that the parent failed to provide the district with notice of her intent to place the student at iBrain and seek district funding in a timely manner. The notice was dated June 26, 2020, while the 2020-21 extended school year began on July 1, 2020, and classes at the district public school started on July 2, 2020 (Educ. Law § 2[15]; IHO Ex. V at p. 2). Therefore, the parent did not provide the required 10 business days notice to the district that she was rejecting the placement proposed by the public agency, including stating her concerns, and her intent to enroll the student at iBrain (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). In addition, as noted by the IHO, the parent's notice to the district did not provide the district with sufficient information to determine why the parent rejected the May 2020 IEP as the notice was overly vague, only indicating that the student's needs were "multifaceted and complex" and that the district "program and placement offered cannot appropriately address" the student's needs for the extended 2020-21 school year (Parent Ex. I).

Given that the finding of a denial of FAPE in this matter is based on the district's failure to notify the parent of where and how the student would have received the special education program recommended in the May 2020 IEP, and that the district sent some of this information—the July

8, 2020 school location letter—within 10 business days from the date of the parent's notice, it would be inequitable to award the parent full tuition reimbursement.

Further, although it was raised by the district as an explanation for why the prior written notice and school location letter were not provided to the parent prior to the school year, the parent's failure to provide the district with requested documentation following the May 2020 CSE meeting is more applicable to equitable considerations. The district school psychologist testified that she was waiting for the parent to submit forms that the CSE had requested prior to the CSE meeting (Tr. p. 76).[10] The hearing record indicates that the forms were sent to the parent on at least three occasions in April and May 2020 (Tr. pp. 121-22, 158-59; Dist. Ex. 14 at pp. 2, 3). The school psychologist testified that she waited as long as she could for this documentation and that she ended up finalizing the IEP without this information (Tr. pp. 76-77; see Dist. Ex. 14 at p. 1). According to the school psychologist, the delay in receiving this documentation delayed the school location letter (Tr. p. 77). This noncooperation on the part of the parent, which is not explained by the parent or parent's counsel either during the hearing, in the post-hearing brief, or in the pleadings on appeal, provides another basis for weighing equitable considerations against the parent in this matter.[11]

Finally, turning to the district's allegations that the parent is not responsible for the cost of tuition, related services, or transportation, the hearing record includes the parent's executed enrollment contract with iBrain and an executed contract for the provision of transportation services (Parent Exs. D; E). The contract with iBrain set out a base tuition that included the cost of academic programming, a school nurse, and a 1:1 paraprofessional for the student (Parent Ex. D at pp. 1-2). The contract further indicated that related services were not a part of the base tuition and would be billed monthly at a specified hourly rate (id. at p. 2). The hearing record does not include any bills for related services. With respect to transportation, the parent signed a contract for transportation services on September 2, 2020 (Parent Ex. E). The contract provided that bills would be sent out on a monthly basis (id. at p. 2). The hearing record does not include any bills for transportation services and it is not clear as to how often this service was used by the student. Nevertheless, there is insufficient evidence to controvert the executed enrollment contract, which identified the essential terms, such as the educational services to be provided and the amount of tuition (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 456-57 [2d Cir. 2014] [faulting the IHO and the SRO for going beyond the written contract and relying on extrinsic documentary evidence that suggested that the parent was not obligated to pay the private school]).

Finally, although the parent requested direct payment to iBrain, the parent has not demonstrated an inability to pay the cost of the student's attendance at iBrain and direct payment is an appropriate remedy only where equitable considerations favor an award of the costs of private

[10] The school psychologist indicated that she was waiting for a medical accommodation form, a HIPAA form, and a physician's request for transportation accommodations (Tr. p. 76). According to the school psychologist, these forms were necessary for the transportation and nursing services on the IEP (id.).

[11] In the parent's answer to cross-appeal, the parent argues that the any failure to deliver the forms was irrelevant to the issue of whether the district offered the student of a FAPE, an argument for which I agree; however, the parent never provided any explanation as to why she delayed or failed to respond to the district's emails and there is no rationale provided for why the parent's decision not to cooperate with the CSE in obtaining this documentation should not weigh against equitable considerations (see Answer to Cross-Appeal ¶5).

school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011]). As the parent has demonstrated an obligation to pay, but has not demonstrated a lack of financial resources, tuition reimbursement upon proof of payment for services delivered is the appropriate remedy.

The district's request that the parent's request for tuition reimbursement be denied in its entirety is not supported by the hearing record; however, given the late notice of the parent's intent to unilaterally place the student at iBrain and her failure to provide the district with requested documentation, a 50 percent reduction in the total award of tuition reimbursement is warranted.

VII. Conclusion

Based on the above, while I agree with the IHO that the program offered to the student was appropriate, the IHO erred in determining that the district's failure to provide the parent with prior written notice and notice of the assigned public school location prior to the start of the school year did not result in a denial of FAPE for the extended 2020-21 school year. In addition, the evidence in the hearing record does not support the IHO's finding that iBrain was not an appropriate unilateral placement for the student for the 2020-21 school year. However, equitable considerations warrant a 50 percent reduction in the relief awarded, including tuition and transportation costs.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated April 14, 2021 is modified by reversing those portions which found that the district offered the student a FAPE for the 2020-21 school year and that iBrain was not an appropriate unilateral placement for the 2020-21 school year; and,

IT IS FURTHER ORDERED that the district shall reimburse the parent for 50 percent of the cost of the student's tuition at iBrain, as well as related services and transportation, for the 2020-21 school year, upon presentation of proof of payment.

Dated: **Albany, New York**
August 13, 2021

STEVEN KROLAK
STATE REVIEW OFFICER