The University of the State of New York

The State Education Department
State Review Officer
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No. 21-209

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 Sarah Khan, 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) which denied her request for compensatory educational services and to be reimbursed for the costs of the student's tuition at the International Institute for the Brain (iBrain) for a portion of the 2020-21 school year, for the entirety of the 2021-22 school year, and which denied her request for transportation funding.[1] Respondent (the district) cross-appeals from the IHO's determination that iBrain was an appropriate unilateral placement for the student for the 2021-22 school year, as well as from the IHO's order directing the district to create an individualized education program (IEP) for the student with specific recommendations. The appeal must be sustained in part, the cross-appeal must be sustained in part, and as explained herein, the matter must be remanded for further administrative proceedings.

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

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) or a local Committee on Preschool Special Education (CPSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 4402, 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3; 200.4[d][2]; 200.16). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

Given the limited issues to be resolved in this appeal, a full recitation of the student's educational history is not necessary. Briefly, however, and as relevant to those limited issues, the student in this case began receiving special education services through the Early Intervention (EI) program (see Dist. Ex. 2 at p. 6). According to the evidence in the hearing record, the student's EI services, as of February and March 2019, consisted of the following home-based services: four 30-minute sessions per week of speech/feeding therapy, three 30-minute sessions per week of occupational therapy (OT), four 30-minute sessions per week of physical therapy (PT), one 30-minute session per week of special instruction, and 56 hours per week of nursing services (see Dist. Ex. 2 at pp. 14, 20). In preparation for the student's transition from receiving EI services to receiving special education services through the CPSE, the district obtained the following multidisciplinary agency evaluations of the student: a social history, dated February 6, 2019 (February 2019 social history); a psychological evaluation, dated February 6, 2019 (February 2019 psychological evaluation); a bilingual educational evaluation, dated February 13, 2019 (February 2019 educational evaluation); behavioral observations (undated); a bilingual speech-language evaluation, dated February 6, 2019 (February 2019 speech-language evaluation); a bilingual physical therapy (PT) evaluation, dated March 4, 2019 (March 2019 PT evaluation); and an occupational therapy (OT) evaluation, dated March 12, 2019 (March 2019 OT evaluation) (see Dist. Ex. 2 at pp. 4, 8, 14, 19-20, 26, 30).[2]

On March 26, 2019, a CPSE convened for the student's initial special education eligibility determination and to develop an IEP for the 2019-20 school year, which identified September 2, 2019 as the projected implementation date and March 25, 2020 as the projected date of annual review (see Dist. Exs. 1 at pp. 1, 3; 2 at pp. 33-43; see also Tr. pp. 51, 72).[3] Finding the student eligible to receive special education and related services as a preschool student with a disability, the March 2019 CPSE recommended a 12-month school year program in an 8:1+2 special class placement in an "approved preschool" (full day program, five hours per day for five days per week), together with three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT (see Dist. Ex. 1 at pp. 12-13, 15). The March 2019 IEP included a description of the student's management needs, as well as approximately 11 annual goals with approximately 45 corresponding short-term objectives to address the student's identified needs in the areas of basic learning concepts, cognitive skills, receptive language skills, play skills, oral motor skills, feeding

[2] The hearing record also includes a "Preschool Student Evaluation Summary Report," which summarized the evaluative information and provided a "detailed statement of the [student's] individual needs" (Dist. Ex. 2 at pp. 1-3).

[3] The district's CPSE administrator who attending the March 2019 CPSE meeting testified that once a student was found eligible for CPSE services, the student "would then be eligible to extend [EI] services past their three-year-old birth date" (Tr. p. 72; see Dist. Ex. 1 at pp. 1-2). In addition to performing his role as CPSE administrator at the March 2019 CPSE meeting, the same individual acted as the district representative at the meeting (see Dist. Ex. 1 at p. 2). At the impartial hearing, the CPSE administrator testified that he was "New York State certified as a school building leader and a school district leader," and in addition, was "duly certified" in New York State as an "early childhood teacher, general education and students with disabilities" (Tr. p. 48). The CPSE administrator was also a "certified teacher of the speech and hearing handicap" in New York State (Tr. pp. 48-49).

skills, expressive language skills, fine motor skills, gross motor skills, exploration of her environment, and strength and tone for gross motor skills (id. at pp. 4, 6-11). The March 2019 CPSE also recommended special transportation services (id. at p. 15).[4]

On August 5, 2019, a CPSE reconvened (see Dist. Ex. 3 at pp. 1, 3; see also Tr. pp. 51, 58). At the impartial hearing, the CPSE administrator testified that the CPSE reconvened in August because the student's EI services would terminate on August 31, 2019; therefore, the CPSE "would have reviewed" the previously completed evaluations of the student, as well as the "most current progress reports from [EI]" (Tr. pp. 58-59). He further testified that the August 2019 CPSE identified and recommended a specific school location at that meeting within which to implement the student's CPSE IEP in September 2019; to wit, "ADAPT" (Tr. pp. 67-70, 82; see Dist. Ex. 5).[5] The August 2019 CPSE recommended a 6:1+2 special class placement, which modified the recommendation for an 8:1+2 special class placement at the March 2019 CPSE meeting; otherwise, no further changes were made to the student's IEP (compare Dist. Ex. 3 at pp. 1, 12, with Dist. Ex. 1 at pp. 1, 12).

In a "Final Notice of Recommendation" (FNR), dated August 5, 2019, the district summarized the special education program recommended for the student and identified the specific school location within which to implement the student's IEP (Dist. Ex. 4 at p. 1). The parent executed the FNR on August 5, 2019, which documented her consent for the student to receive the preschool services (id.).

On September 26, 2019, a CPSE convened and added a recommendation to the student's IEP for the services of a full-time, individual nurse during the day, as well as 1:1 adult supervision (nurse) for special transportation; otherwise, no further changes were made to the student's IEP, except to note that the expected date for implementation changed from September 2, 2019 to October 2, 2019 (compare Parent Ex. B at pp. 1, 12, 15, with Dist. Ex. 3 at pp. 1, 12, 15, and Dist. Ex. 1 at pp. 1, 12, 15). At the impartial hearing, the CPSE administrator—who had attended the March 2019, the August 2019, and the September 2019 CPSE meetings—testified that the recommendation for nursing services required an approval from the "Office of School Health" before it could be added to a student's IEP (Tr. pp. 57, 59-60). He also explained in his testimony that he assumed the "student didn't start without a nurse at the school if they needed a nurse" (Tr. pp. 57-58). The CPSE administrator also testified that, at the September 2019 meeting, he would have reviewed the "IEP again that was already developed, as well as the nursing review that was done by the Office of School Health" (Tr. p. 58). He could not recall, however, whether the

[4] At the impartial hearing, the CPSE administrator testified that the March 2019 CPSE did not identify or recommend a location within which to implement the student's CPSE IEP because the student was not starting the program at that time (see Tr. p. 82). He also testified that, although the March 2019 CPSE recommended a 12-month school year program for the student, the March 2019 CPSE did not recommend a location for the student to receive summer 2019 services (i.e., July and August 2019) because the student—at the parent's request—continued to receive EI services until August 31, 2019 (see Tr. pp. 82-83). As a result, September 2019 was the "first conceivable date" the student would begin attending a location recommended by the CPSE (Tr. pp. 82-83).

[5] The recommended site location was interchangeably referred to as "ADAPT" or the "Roosevelt Children's Center" throughout the hearing record (compare Dist. Ex. 5 at p. 1, with Tr. pp. 52, 67-68). For clarification, the recommended site location will be referred to as "ADAPT" in this decision.

September 2019 CPSE reviewed the same materials that had been reviewed at the August 2019 CPSE meeting (see Tr. pp. 58-59).

In an FNR dated September 26, 2019, the district summarized the special education program recommended for the student and identified the same school location set forth in the August 5, 2019 FNR as the location within which to implement the student's IEP (compare Dist. Ex. 5 at p. 1, with Dist. Ex. 4 at p. 1).

The student attended ADAPT for the 2019-20 school year until approximately March 2020, when school buildings were closed due to the COVID-19 pandemic, and the student then received a "complete remote-learning experience" (see Tr. pp. 215-16; Parent Ex. R at pp. 1-2; see, e.g., Dist. Exs. 8 at p. 1 [reflecting the student's receipt of PT via teletherapy]; 15 at p. 1 [reflecting that the student "transitioned to remote learning four days per week" in March 2020]).

The hearing record also reflects that the student continued to attend ADAPT for the 2020-21 school year, until the parent unilaterally placed the student at iBrain in April 2021; the student remained at iBrain through the conclusion of the 2020-21 school year in June 2021 (see Parent Exs. K at p. 1; R at pp. 1-2; see generally Parent Exs. M; P).[6] For that latter portion of the 2020-21 school year at iBrain, the student attended a 6:1+1 special class placement with full-time, 1:1 nursing services and full-time, 1:1 paraprofessional services, in addition to receiving the following related services: five 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, five 60-minute sessions per week of individual speech-language therapy, and three 60-minute sessions per week of music therapy (see Parent Ex. Q at pp. 3-4). All of the student's related services at iBrain were delivered on a "push in/pull out basis" (id. at p. 3). The evidence also reflects that the student used an assistive technology device and "related supports and devices for use throughout the day across all school environments" (id.). In addition, the parent received a monthly session of parent counseling and training services (60-minute session) (id. at p. 4). Finally, the student received transportation services consisting of a "1:1 nurse, oxygen, limited travel time of no more than 60 minutes, air conditioning, a lift bus, and wheelchair accessibility" (id.).

A. Due Process Complaint Notice

By due process complaint notice dated June 22, 2021, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20, 2020-21, and 2021-22 school years (see Parent Ex. A at p. 1). With respect to the 2019-20 school year and as relevant to this appeal, the parent asserted that IEP failed to include "relevant evaluations," such as a Stanford-Binet test, an OT evaluation, a PT evaluation, a speech-language evaluation, and a neuropsychological evaluation (id. at pp. 6-9). In addition, the parent contended that the IEP failed to include related services with sufficient frequencies and durations, and recommended pull-out related services as opposed to push-in related services (id. at p. 9). Next, the parent contended that

[6] It appears that, in or around January 2021, the student transitioned to a 12:1+3 special class placement at ADAPT, following IEP meetings held on December 1, 2020 and January 11, 2021 and the development of a January 2021 IEP (see Dist. Exs. 6 at p. 1, 16; 10 at pp. 1, 3, 5, 21; 11 at pp. 1-2; 15 at p. 1).

the IEP failed to include recommendations for assistive technology and parent counseling and training services (id. at pp. 9-10).

As relief, in part and as relevant herein for the alleged violations, the parent requested a finding that the district failed to offer the student a FAPE for "her entire educational career" beginning with the 2019-20 school year (12-month program), an order directing the district to "fund" the student's educational placement at iBrain for the 2020-21 and 2021-22 school years, an order finding that equitable considerations support a "full award of payment" by the district "directly" to iBrain for the costs of tuition (including 1:1 paraprofessional and nursing services), an order directing the district to "fund the cost of special transportation" for the 2020-21 and 2021-22 school years, an order directing the district to provide the student with assistive technology devices and an "AAC" to assist with communication, an order directing the district to provide "compensatory services" for the district's "failure to address [the s]tudent's needs in prior school years," and an order finding that the student was eligible for extended-age eligibility to "compensate" for the district's failure to offer the student a FAPE for "her entire educational career" (Parent Ex. A at pp. 13-14).[7]

B. Facts Post-Dating the Due Process Complaint Notice

In a letter dated June 23, 2021, the parent notified the district of her intentions to unilaterally place the student at iBrain for the 2021-22 school year (12-month program) and to seek funding from the district for the student's attendance at iBrain for the 2021-22 school year (see Parent Ex. O at p. 1). On July 2, 2021, the parent executed an enrollment contract with iBrain for the student's attendance during the 2021-22 school year from July 7, 2021 through June 24, 2022 (see Parent Ex. S at pp. 1, 7).

C. Impartial Hearing Officer Decision

On July 23, 2021, the parties proceeded to an impartial hearing, which concluded on the same day (see Tr. pp. 1-239). In a decision dated September 5, 2021, the IHO found that the district offered the student a FAPE for the 2019-20 school year, but failed to offer the student a FAPE for the 2020-21 and 2021-22 school years (see IHO Decision at pp. 7-8).[8] In reaching the determination that the district offered the student a FAPE for the 2019-20 school year, the IHO found that the 6:1+2 special class placement with related services of speech-language therapy, OT, and PT was "informed by a comprehensive set of evaluations" (IHO Decision at p. 7, citing Dist. Ex. 2). In addition, the IHO found the CPSE administrator's testimony concerning the "appropriateness of the program to be convincing," and moreover, the district had not committed any procedural violations rising to the level of a denial of a FAPE (id.). The IHO also found that

[7] In this context, the term "AAC" refers to augmentative and alternative communication.

[8] In an interim decision regarding pendency, dated September 5, 2021, the IHO found that the student's most recently implemented IEP, dated January 2021—which "placed the [s]tudent at the [State]-approved school, ADAPT"—constituted the student's pendency services (see Interim IHO Decision at p. 2). Neither party has appealed the IHO's interim decision on pendency (see generally Req. for Rev.; Answer & Cr. App.; Reply & Answer to Cr. App.).

the student was "provided a placement" where she "made progress and received an educational benefit through a reasonably calculated educational program" (id.).

With respect to the "2020-2021 and 2021-2022 school years," the IHO found that the district failed to present convincing evidence of a FAPE to the student when it changed the ratio of the student's special class setting from a smaller special class setting to a 12:1+3 and later to 12:1+1 and he concluded that neither IEP was appropriate for the student (IHO Decision at pp. 7-8).

With respect to the parent's unilateral placement of the student at iBrain, the IHO found that the parent sustained her burden to establish that it was appropriate for both the 2020-21 and 2021-22 school years (see IHO Decision at p. 8). However, despite finding that iBrain was appropriate and met the student's unique needs, the IHO—based on equitable considerations—declined to award either direct funding or tuition reimbursement for both the portion of the 2020-21 school year the student attended iBrain and for the entirety of the 2021-22 school year, and declined to award transportation funding as well (id. at pp. 8-9). In denying the parent's requested relief, the IHO determined that, while the parent sought "direct tuition funding," the parent failed to present any evidence of "limited financial means," as required pursuant to the holding in Mr. and Mrs. A. v. New York City Department of Education, 769 F. Supp. 2d 403 (S.D.N.Y. 2011) (id.). In addition, the IHO denied the parent's request for compensatory educational services, noting that while sought as relief for "'prior school years,'" the parent did not "specify or describe the form this relief should take" (id. at p. 9).

Nevertheless, although the IHO denied the parent's requests to be reimbursed for the costs of the student's tuition at iBrain for the 2020-21 and 2021-22 school years, the IHO awarded the following as relief: the district must provide the parent with "all attendance records and progress reports (that have not already been provided) pertaining to any and all related services administered by the [district] or via a [district] placement"; the district must conduct "new evaluations" of the student—which "must address cognition, psychology, speech[-]language, OT, PT, behavior, and [assistive technology] services"—within 20 calendar days of the date of the decision; the district must convene a CSE meeting within 30 calendar days of the date of this decision to consider the findings of the evaluations ordered herein, as well as the IHO's decision; and finally, the district, upon convening a CSE meeting, must "offer placement in a special class of no more than 6 students, with related services at the same levels as reflected in the April 2021 IEP" (IHO Decision at pp. 9-10 [emphasis in original]).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by finding that the district offered the student a FAPE for the 2019-20 school year and by failing to find that equitable considerations weighed in favor of the parent's requested relief for tuition reimbursement and related services (including transportation) for the 2019-20, 2020-21, and 2021-22 school years.[9] The parent also

[9] The parent also argues that because the district "opened the door" to the 2018-19 school year by submitting the IEPs from the March 2019 and August 2019 CPSE meetings into evidence and "eliciting testimony about them at the hearing," the IHO should have found the district failed to offer the student a FAPE for the 2018-19 school year and granted compensatory educational services as relief (Req. for Rev. ¶ 25). The parent's argument

argues that the IHO abused his discretion by failing to fashion any appropriate remedy.[10] In addition, the parent contends that the IHO erred by failing to award compensatory educational services, as she requested both compensatory educational services and extended-age eligibility in the due process complaint notice to remedy the district's failure to offer the student a FAPE "for [the student's] entire educational career." As a final point, the parent argues that the IHO abused his discretion at the impartial hearing by disallowing testimony from an iBrain witness regarding the specifics of the student's program at iBrain for the 2021-22 school year, and further, by refusing to allow the parties to submit written closing briefs. As relief, the parent seeks to reverse the IHO's decision and to "award the [p]arent the relief sought."[11]

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's findings that the district offered the student a FAPE for the 2019-20 school year, the parent was not entitled to direct funding of the student's tuition at iBrain for the 2020-21 school year, and the parent was not entitled to compensatory educational services (see Answer & Cr. App. ¶¶ 15-21, 22-24, 26). As a cross-appeal, the district argues that the IHO erred by finding that iBrain was an appropriate unilateral placement for the student for the 2021-22 school year because the hearing record failed to contain sufficient evidence to support this finding (see Answer & Cr. App. ¶¶ 10-13). Next, the district cross-appeals the IHO's order directing the district to develop

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mischaracterizes the facts in the hearing record, which demonstrate that the student's IEP for the 2019-20 school year was initially developed at the March 2019 CPSE meeting and was subsequently modified at the CPSE meetings held in August and September 2019—and that none of these IEPs were to be implemented at any point during the 2018-19 school year (see Dist. Exs. 1 at pp. 1, 3; 3 at pp. 1, 3; Parent Ex. B at pp. 1, 3). In addition, the parent's argument ignores the fact that her own attorney, in his opening statement, noted that "[t]here [were] a number of IEPs that the [district] ha[d] prepared from 2019, . . . actually from March 26, 2019," which the district's attorney responded to in his opening statement (Tr. pp. 22-23, 28-29). As such, the parent's argument is without merit and will not be discussed.

[10] The parent affirmatively sets forth in the request for review that the following IHO findings should be upheld: the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years; iBrain was an appropriate unilateral placement; and the hearing record failed to contain evidence of a lack of cooperation by the parent (see Req. for Rev. at p. 2). In addition, to the extent that the parent appeals the IHO's findings that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years because the IHO's findings were based solely on the "class size ratio," the parent was not aggrieved by these FAPE determinations—regardless of the basis—and therefore cannot appeal those FAPE findings (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). Here, had the district—as the aggrieved party—cross-appealed the IHO's findings that it denied the student a FAPE for the 2020-21 and 2021-22 school years, the parent would have had the opportunity to respond to those allegations in an answer. But the district did not cross-appeal these findings, as explained below. Consequently, any allegations of IHO error in the parent's request for review related to the district's failure to offer the student a FAPE for the 2020-21 and 2021-22 school years will not be addressed in this decision.

[11] While not specified in the request for review, the parent—in the memorandum of law submitted in support of the request for review—noted that she sought the following as relief: "full tuition at iBRAIN (including cost for special transportation) along with compensatory education for past denial of FAPE" (Parent Mem. of Law at pp. 22-23).

an IEP with specific recommendations or characteristics (see Answer & Cr. App. ¶ 14).[12] As relief, the district seeks to dismiss the parent's appeal and to sustain the district's cross-appeal.

In an answer to the district's cross-appeal, the parent responds to the district's allegations and argues that the IHO properly concluded that iBrain was an appropriate unilateral placement for the student for the 2021-22 school year. The parent also argues that the IHO had the discretion and equitable authority to direct the district to recommend and implement a specific class size with specific levels of related services. As a reply to the district's answer, the parent reasserts her arguments that the district failed to offer the student a FAPE for the 2019-20 school year and that the IHO erred by failing to award tuition reimbursement, compensatory educational services, and transportation funding as relief.

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.

[12] In its cross-appeal, the district affirmatively states in a footnote that it was "not cross-appealing any other findings or orders in the IHO Decision" (Answer & Cr. App. at p. 2 & n.2, ¶ 27). Accordingly, the IHO's findings that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years, as well as the IHO's finding that iBrain was an appropriate unilateral placement for the student for that portion of the 2020-21 school year the student attended iBrain, have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Moreover, since neither party challenges the following relief ordered by the IHO, these orders will not be further addressed in this decision: the district must provide the parent with "all attendance records and progress reports (that have not already been provided) pertaining to any and all related services administered by the [district] or via a [district] placement"; the district must conduct "new evaluations" of the student—which "must address cognition, psychology, speech[-]language, OT, PT, behavior, and [assistive technology] services"—within 20 calendar days of the date of the decision; and the district must convene a CSE meeting within 30 calendar days of the date of the decision to consider the findings of the ordered evaluations o(IHO Decision at pp. 9-10).

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]).[13]

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. 2019-20 School Year—CPSE Process

Generally, the parent's arguments to overturn the IHO's finding that the district offered the student a FAPE for the 2019-20 school year focus on alleged procedural violations in the development of the student's September 2019 CPSE IEP.[14] For reasons explained below, the evidence in the hearing record supports the IHO's finding for the 2019-20 school year; however, even if the alleged procedural violations resulted in a finding that the district failed to offer the student a FAPE, relief in the form of an award of compensatory educational services would not be warranted in this case.

1. Evaluative Information

With respect to the 2019-20 school year, the parent argues that, contrary to the IHO's findings, the CPSE did not rely on comprehensive evaluations to develop the student's IEP. The parent asserts that the district failed to evaluate the student in all areas of need, including assistive

[13] 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., 137 S. Ct. at 1000).

[14] As previously noted, evidence in the hearing record demonstrates that the student's CPSE IEP for the 2019-20 school year was initially developed at the March 2019 CPSE meeting, and was thereafter subsequently modified at the August 2019 and September 2019 CPSE meetings (see Dist. Exs. 1 at p. 1; 3 at p. 1; Parent Ex. B at p. 1). Therefore, for clarity, references to the student's 2019-20 IEP will be with respect to the final IEP—that is, the September 2019 CPSE IEP—unless otherwise specified.

technology, OT, PT, speech-language therapy, music therapy, and a neuropsychological evaluation.[15] Relatedly, the parent argues that although the district did not conduct any new or additional evaluations between the development of the March 2019 IEP, the August 2019 IEP, and the September 2019 IEP, the hearing record contains no evidence to support the change in the student-to-teacher ratio of the special class placement—that is, from an 8:1+2 special class to a 6:1+2 special class.[16]

To the extent that the parent asserts that a student must be reevaluated every time the special education services listed on a student's IEP are revised, that general proposition is inconsistent with the IDEA and State law. A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3];

[15] Upon review, the parent's due process complaint notice did not include any specific allegations concerning whether the district failed to conduct either a music therapy evaluation or an assistive technology evaluation with respect to the 2019-20 school year, but instead, included a generic catch-all phrase within the context of failing to recommend appropriate frequencies, durations, and locations of related services for the 2020-21 and 2021-22 school year, which alleged that the student's 2019-20 IEP did not "include relevant evaluations such as, but not limited to, a Stanford-Binet test, which [was] appropriate for non-verbal student; OT, PT, SLT evaluations; or, a neuropsychological evaluation" (Parent Ex. A at pp. 8-9). In addition, the parent's due process complaint notice did not allege that the district failed to assess the student in all areas of need—including assistive technology—with respect to the 2019-20 school year, but rather, alleged this violation with regard to the 2020-21 and 2021-22 school years (id. at p. 12). It is only out of an abundance of caution that the parent's arguments on appeal will be reviewed and considered, and the parent's attorney is cautioned that, in the future, greater care is needed because the lack of specificity—especially where, as here, multiple school years and multiple IEPs were challenged—may result in a determination that an issue(s) may be deemed outside the scope of the impartial hearing because they were not adequately identified in the due process complaint notice.

[16] It is altogether unclear what the parent intended by asserting this allegation when, based on the parent's own allegations in the due process complaint notice, the student required a 6:1+1 special class placement and the parent never challenged the 6:1+2 special class placement ultimately recommended for the student for the 2019-20 school year (see Parent Ex. A at p. 8). Additionally, there is no specific assessment that the district was required to conduct in making the special class recommendation; rather, the CPSE was required to make the determination regarding IEP program and services recommendations based on the results of the initial or most recent evaluation; the student's strengths; the concerns of the parent for enhancing the student's education; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (see 34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

With respect to preschool students with disabilities, State regulation requires a parent to select an "approved program with a multidisciplinary evaluation component to conduct an individual evaluation"—as defined in 8 NYCRR 200.1(aa)—and the completion of a "summary report" that must include a "detailed statement of the preschool student's individual needs, if any" (8 NYCRR 200.16[c][1]-[c][2]). State regulation defines an individual evaluation as "any procedures, tests or assessments used selectively with an individual student, including a physical examination . . . , an individual psychological evaluation, . . . , a social history and other appropriate assessments or evaluations as may be necessary to determine whether a student has a disability and the extent of his/her special education needs" (8 NYCRR 200.1[aa]).

Contrary to the parent's contentions, the evidence in the hearing record demonstrates that the district obtained the following multidisciplinary agency evaluations of the student to develop the student's IEP at the March 2019 CPSE meeting: a February 2019 social history; a February 2019 psychological evaluation; a February 2019 educational evaluation (bilingual); behavioral observations (undated); a February 2019 speech-language evaluation (bilingual); a March 2019 PT evaluation (bilingual); and a March 2019 OT evaluation (see Tr. pp. 55, 74-75; Dist. Exs. 2 at pp. 4, 8, 14, 19-20, 26, 30; see also Dist. Ex. 1 at pp. 1, 3).[17] Therefore, to the extent that the parent argues that the district failed to conduct evaluations in the areas of OT, PT, and speech-language therapy, those assertions fail as they are simply belied by the evidence in the hearing record.

However, the evidence in the hearing record reflects that, consistent with the parent's arguments, the district did not conduct an assistive technology evaluation, a music therapy evaluation, or a neuropsychological evaluation of the student (see generally Tr. pp. 1-239; Parent Exs. A-T; Dist. Exs. 1-17). The parent argues that, pursuant to State regulation, the district was required to assess the student in all areas of suspected disability (see Parent Mem. of Law at p. 12, citing 8 NYCRR 200.4[b][6][vii]), and the district's "Standard Operating Procedures Manual (SOPM)" recommended conducting a neuropsychological evaluation "for students who have a traumatic brain injury" (Parent Mem. of Law at p. 12, n.4).

First, while the parent relies on the district's SOPM as a basis for finding that the district should have conducted a neuropsychological evaluation of the student, there is no similar requirement set forth in State or federal regulations, and generally, defects arising out of the SOPM that do not also constitute a violation of State or federal laws and policy do not appear to constitute

[17] Although the student's 2019-20 IEP did not specifically list the dates of the evaluation reports used in the development of that IEP, the information in the IEP was consistent with the information in the multidisciplinary evaluations completed in February and March 2019 (compare Parent Ex. B at pp. 3-4, with Dist. Ex. 2 at pp. 4, 8, 14, 19-20, 26, 30).

a deprivation of a FAPE (see, e.g., M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *9-*10 [S.D.N.Y. Aug. 27, 2010]). As a result, the parent's argument must be dismissed.

Next, to the extent that the parent argues that the district's failure to conduct evaluations in the areas of assistive technology and music therapy constitutes a basis upon which to conclude that the district failed to offer the student a FAPE for the 2019-20 school year, the parent does not point to any facts or evidence to establish that either evaluation was warranted—other than noting that the student was nonverbal—or to any facts or evidence to establish that the absence of such evaluations affected the substantive appropriateness of the student's IEP for the 2019-20 school year (see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 541 [2d Cir. 2017]).[18] Moreover, even if the district's failure to conduct an assistive technology evaluation or a music therapy evaluation constituted a procedural violation, the parent, once again, fails to point to any facts or evidence to establish that this violation impeded the student's right to a FAPE, hindered the parent's opportunity to participate in the decision-making process, or otherwise deprived the student of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). In addition, the IHO ordered the district to conduct an assistive technology evaluation of the student, which neither party has challenged on appeal.

2. CPSE Composition

On appeal, the parent contends that the IHO improperly weighed the CPSE administrator's testimony concerning the development of the student's IEP for the 2019-20 school year, because the administrator had no personal knowledge of the student and knew little, if anything, about the student and her needs, and relied solely on the evaluative information provided by a multidisciplinary agency to develop the IEP. The parent also contends that the district failed to invite individuals who had worked with the student and who had knowledge of the student and her needs to the "IEP meetings"—which deprived the parent of the opportunity to participate—and also failed to invite a special education teacher of the student to the meetings, which violated State and federal regulations.[19]

[18] The list of related services in 8 NYCRR 200.1(qq) is not exhaustive, and a CSE or CPSE is not prohibited from providing music therapy for a student, but there are no specific federal or State-mandated instruments for conducting a "music therapy evaluation" or assessment for a student with a disability under IDEA. The State regulates the profession of creative arts therapy (Educ. Law § 8404; 8 NYCRR 52.34 and 79-11).

[19] It must be noted that, in the due process complaint notice, the parent specifically alleged that the "January 2020 IEP meeting" failed to include a "special education teacher or individual who could interpret evaluations" and that "there was no indication of a written excusal 5 days prior to the meeting" to excuse their attendance (Parent Ex. A at p. 11). Initially, there is no indication of a January 2020 CSE meeting in the hearing record, and it is likely that the parent was referencing the January 2021 CSE meeting, which is only relevant to the 2020-21 school year and will not be discussed for the reasons set forth above. However, more generally, the parent noted as a catch-all allegation that "there were no related service providers present at the meetings" (id.). According to the due process complaint notice, the absence of required members deprived the parent of the opportunity to participate "fully and meaningfully" because there was no one to "explain the [s]tudent's latest evaluation results and present needs" (id.). Contrary to the parent's allegations in the due process complaint notice, the CSE administrator—as a certified special education teacher—was, pursuant to the IDEA and State regulations, an individual capable of interpreting instructional implications of evaluation results (see Tr. pp. 58-63, 72-73; see also 20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][2]).

The IDEA and State regulations require a CPSE to include to include the following members: the parents; a regular education teacher of the student (if the student was, or may be, participating in the regular education environment); a special education teacher of the student or special education provider of the student; a district representative (who serves as the chairperson of the committee); an individual capable of interpreting instructional implications of evaluation results (who may be the regular education teacher, special education teacher or provider, district representative, or a school psychologist); and other persons having knowledge or special expertise regarding the student as designated by the parents or district (20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][2] [emphasis added]).

At the March 2019 CPSE meeting, the attendance sheet listed the following individuals as attendees: a bilingual district special education teacher, a CPSE administrator/district representative, an EI service coordinator, and both parents (see Dist. Ex. 1 at p. 2). At the August 2019 and September 2019 CPSE meetings, the attendance sheet listed only the CPSE administrator/district representative and the parent as attendees (see Dist. Ex. 3 at p. 2; Parent Ex. B at p. 2). However, the CPSE administrator/district representative also fulfilled the role of district special education teacher at the August and September 2019 CPSE meetings (see Dist. Ex. 3 at p. 2; Parent Ex. B at p. 2).

At the impartial hearing, the CPSE administrator testified that, as a certified special education teacher, his role at the CPSE meeting was to "speak to the special education evaluations, as well as the special education program that [was] being considered or recommended, as well as services, and the goals" (Tr. pp. 60-61). He also testified that, as a CPSE administrator/district representative, his role was "tasked with making a final recommendation based on all of the information provided" by exploring the "options of the many different, . . . , [S]tate approved schools that contract with us to determine what would be the most appropriate to address the needs and the goals on the IEP" (Tr. pp. 61, 67). During cross-examination, the CPSE administrator testified that, at the March 2019 CPSE meeting as the CPSE administrator, his role "would have been to review the evaluations that were conducted by the multidisciplinary agency, as well as hear from the parent and any other relevant information, and then make a recommendation for a program" (Tr. pp. 72-73). In addition, he testified that the March 2019 CPSE meeting was to make an "initial recommendation," as well as to determine if the student was "eligible for CPSE services, which would start in the next school year" and which would then "extend [EI] services [for the student] past [her] three-year-old birth date" (Tr. p. 73). The CPSE administrator also testified that, at the March 2019 CPSE meeting, the "members of the IEP team" who "signed into that meeting had access to the multidisciplinary evaluation agency's evaluations that were conducted" (Tr. pp. 74-75). The CPSE administrator's testimony confirmed that he was not a special education teacher of the student, and although the March 2019 CPSE meeting did not include any of the student's then-current providers, the "agency provider was present" (Tr. pp. 76-77). His testimony also confirmed that although he had never observed or met the student, a classroom observation of the student had been completed by the multidisciplinary agency (Tr. pp. 76-77).

Based on a review of the evidence in the hearing record, the parent correctly asserts that a special education teacher of the student, as a required member, did not participate in any of the CPSE meetings held to develop the student's 2019-20 IEP, which constitutes a procedural violation. With respect to the parent's argument that the district failed to invite individuals who had worked with the student and who had knowledge of the student and her needs to the CPSE

meetings, the evidence in the hearing record generally supports this contention; however, the attendance of these additional individuals is discretionary under both the IDEA and State regulation and moreover, place the onus on the parent to notify the district of her intent to invite such members if so desired (see 20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][2]). Therefore, the absence of individuals who had worked with the student or had knowledge of her needs at the CPSE meetings did not, in this case, constitute a procedural violation.

To the extent that the parent asserts that the IHO improperly weighed the CPSE administrator's testimony about the recommendations in the student's 2019-20 IEP because he had no personal knowledge of the student, had never observed the student, and instead, relied solely on the evaluative information to develop the IEP, the hearing record does not support this argument. Instead, the evidence in the hearing record demonstrates that the CPSE administrator, who was also a certified special education teacher, testified about the student's needs, as well as how the CPSE properly discussed, and relied on, the evaluative information to develop the student's 2019-20 IEP (see Tr. pp. 61-67, 72, 74-87).

In light of the foregoing, even if the district committed a procedural violation by failing to have a special education teacher who was also a "teacher of the student" at the CPSE meetings, there is no evidence that this procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]).

3. Timing of Provision of Nursing Services

Here, the parent asserts that the IHO erred by finding that there were no procedural violations that resulted in a finding that the district failed to offer the student a FAPE, and points to evidence that the student had no "placement at the start of the [20]19-20 ESY" (Req. for Rev. ¶ 13, citing to Parent Ex. R [representing the parent's direct testimony via affidavit]).

In the parent's affidavit, she attested that the district "lost all of [her] paperwork"—such as "medical documents to demonstrate [the student's] need for a nurse during school hours"—and, as a result, the resubmission of these documents delayed the student's ability to "start school until late [f]all 2019" (Parent Ex. R at ¶ 6). At the impartial hearing, the CPSE administrator testified that although he did not know the exact date the student began attending ADAPT for the 2019-20 school year, it would be information provided by the school itself; however, he further testified that ADAPT had been recommended as the location within which to implement the student's 2019-20 IEP at the August 2019 CPSE meeting and the evidence in the hearing record included an FNR, dated August 5, 2019, which reflected the recommended location as ADAPT (see Tr. pp. 53-56; Dist. Ex. 4 at p. 1). The CPSE administrator also testified, however, that the recommendation for nursing services was not added to the student's IEP until the September 2019 CPSE meeting—and notably, that he "assum[ed] the student didn't start without a nurse at the school if they needed a nurse" (Tr. pp. 57-58). According to the September 2019 IEP, the expected date of implementation was October 2, 2019 (see Parent Ex. B at p. 3). During cross-examination at the impartial hearing, the parent reiterated that the student did not begin attending ADAPT until "October" or "November" (Tr. pp. 215-16).

On appeal, the district concedes that it never implemented the March 2019 or August 2019 IEPs and asserts that the district "quickly cured the absence of nursing services" by amending the student's IEP in September 2019 and implementing that program (Answer with Cross-Appeal ¶19). However, in reviewing the IHO's decision, although the IHO noted the lack of nursing services at the start of the school year, it does not appear that the IHO considered whether the student missed school entirely for approximately one month at the start of the 2019-20 school year due to the lack of nursing services (IHO Decision at pp. 2-3, 4, 7).[20] As a portion of this appeal already requires a remand to the IHO, as discussed more fully below, this issue is also remanded to the IHO to determine whether the missed program and services at the start of the 2019-20 school year denied the student a FAPE, and what, if any, compensatory educational services would be an appropriate remedy. 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]). In deciding what would be an appropriate remedy, the IHO my reconsider his determination that for the 2019-20 school year "despite significant challenges, [the student] made progress and received an educational benefit" (IHO Decision at p. 7). The parent has only marginally challenged this finding, asserting generally, without any citations to the hearing record, that "the evidence does not suggest that [the student] made any meaningful progress during that school year" (Req. for Rev. ¶14).

4. September 2019 IEP

The parent asserts that the IHO erred by finding that the district's recommended placement was reasonably calculated to provide educational benefits, as that finding ignored evidence demonstrating that the student should have been classified as having a traumatic brain injury, she required 60-minute sessions of related services delivered on a push-in basis, she required assistive technology devices and services because she was nonverbal, and the district failed to recommend parent counseling and training.

First, with respect to the 2019-20 school year, the CPSE had, pursuant to State regulation, only one option for the student's classification—namely, as a preschool student with a disability—and therefore, the parent's contention that the student's 2019-20 IEP was not reasonably calculated to enable the student to receive educational benefits because the CPSE did not classify her as a student with a traumatic brain injury is without merit (see 8 NYCRR 200.16[d][1]; 8 NYCRR 200.1[aa] [defining preschool student with a disability]).

[20] The facts of this case are similar to another in which the U.S. District Court has already criticized the district's practice of limiting the CSE's authority to put health-related services on a student's IEP by delegating approval of such services to personnel who are not participants in the CSE (see J.L. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 464 (S.D.N.Y. 2018]). It appears that the practice persists, albeit the delay does not appear to be as long as in J.L.

Next, the parent's assertion that the student required 60-minute push-in related services is not supported by the hearing record. Based on the evaluative information available to the March 2019 CPSE, the student had been receiving home-based related services through the EI program that were 30 minutes in duration (see Dist. Ex. 2 at pp. 14, 20). In addition, although the parent points to evidence that the student received 60-minute related services at iBrain as support for her contention, the student only began attending iBrain in April 2021—nearly two years after the date of the evaluative information before the CPSE (see Req. for Rev. ¶ 14, citing to Parent Ex. Q [representing direct testimony via affidavit of iBrain's director of special education]).

Next, the hearing record does not contain evidence to support the parent's contention that the student required related services delivered on a push-in basis in order to generalize skills (see generally Tr. pp. 1-239; Parent Exs. A-T; Dist. Exs. 1-17). Here, the parent merely asserts that the student required push-in related services and points to the student's 2019-20 IEP to note the absence of such recommendation in the IEP as support for this assertion (see Req. for Rev. ¶ 14, citing to Parent Ex. B and Dist. Exs. 1; 3).

Finally, the parent's assertion that the student's 2019-20 IEP failed to include a recommendation for parent counseling and training is supported by the evidence in the hearing record. State regulation required the CPSE to consider the inclusion of related services on a preschool student's IEP (8 NYCRR 200.16 [i]). However, the student's 2019-20 IEP did not include a recommendation for parent counseling and training, and at the impartial hearing, the CPSE administrator's testimony confirmed it was not recommended (see Tr. pp. 86-87; see generally Parent Ex. B; Dist. Exs. 1; 3). Nevertheless, the Second Circuit has consistently held that the failure to include parent counseling and training on an IEP does not usually constitute a denial of a FAPE (see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 122-23 [2d Cir. 2016]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]; R.E., 694 F.3d at 191; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 538 [2d Cir. 2017]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 32 [2d Cir. Mar. 16, 2016]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 39 [2d Cir. Mar. 19, 2015]; but see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80-82 [2d Cir. 2014]). The Second Circuit explained that, "[t]hough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 7 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. Jul. 24, 2013]).

Based on the above, the hearing record supports the IHO's conclusion that the September 2019 IEP offered the student a FAPE.

B. Unilateral Placement

In its cross-appeal, the district contends that the IHO erred by finding iBrain was an appropriate unilateral placement for the student for the 2021-22 school year because, contrary to the IHO's finding, the parent did not present sufficient evidence to sustain her burden of proof.

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).

In this case, the hearing record includes evidence about the special education program the student received at iBrain primarily through the testimony from iBrain's director of special education provided via affidavit and cross-examination; the student's April 2019 iBrain IEP; and

the parent's testimony elicited via affidavit, direct examination, and cross-examination at the impartial hearing (see Tr. pp. 181-201; Parent Exs. N; Q-R). After concluding her cross-examination at the impartial hearing, the parent's attorney asked a follow-up question (i.e., redirect examination) to iBrain's director of special education related to the student's program at iBrain for the 2021-22 school year (see Tr. p. 201). The parent's attorney asked whether the student was "still enrolled in the iBrain school" and the director responded "Yes, she is" (Tr. p. 201). At that point, the district's attorney objected to the question as being outside the scope of his cross-examination (see Tr. p. 202). The IHO overruled the objection, and the IHO allowed the witness to continue to respond to the question (see Tr. p. 202). The iBrain director completed her response to the question by stating that the student had "been attending for, . . . , the whole of the school year as it stands now" and further responded that she was "receiving services for the extended school year"—meaning the 2021-22 school year (Tr. pp. 202-03). The district's attorney continued to object to questions about the 2021-22 school year as outside the scope of both cross-examination and the witness's own affidavit, which did not include any information about the student's program at iBrain for the 2021-22 school year (Tr. pp. 203-04; see generally Parent Ex. Q). The parties discussed whether additional testimony could be elicited from iBrain's director of special education regarding the 2021-22 school year, and the IHO ultimately decided to preclude further testimony from the iBrain director of special education about the program the student was receiving during the 2021-22 school year (see Tr. pp. 204-08).[21]

When the parent testified at the impartial hearing, she confirmed that the student was then-currently attending iBrain in a 6:1+1 special class (see Tr. pp. 208-12). In addition, the parent testified that the student received OT, PT, speech-language therapy, and music therapy at iBrain during the 2021-22 school year, as well as assistive technology services, 1:1 nursing services, and 1:1 paraprofessional services (see Tr. pp. 213-14). The parent also testified that the student was transported round-trip to iBrain via ambulance (see Tr. p. 214).

In addition to the testimonial evidence concerning the student's 2021-22 special education program at iBrain, the student's April 2021 iBrain IEP sheds light on the services she received (see generally Parent Ex. N). Significantly, although the April 2021 iBrain IEP does not reflect a specific end date, the recommendations in the IEP strongly suggest that the IEP was to be in effect for "one academic year" or "over the course of the school year" as reflected in some of the student's annual goals (Parent Ex. N at pp. 26-27, 31-33).

[21]Although the parent argues that the IHO abused his discretion by precluding the witness's additional testimony about the student's program at iBrain for the 2021-22 school year, unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]).

In this instance, although the evidence in the hearing record concerning the student's program at iBrain for the 2021-22 school year was somewhat limited, the district's argument that the evidence was insufficient to meet the parent's burden does not warrant disturbing the IHO's finding that iBrain was an appropriate placement for the student for the 2021-22 school year.

C. Equitable Considerations

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

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 10 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 IHO found that, while the hearing record did not include any "evidence of a lack of cooperation" by the parent, the parent's requested relief for tuition and transportation was not warranted because she did not present any evidence of "limited financial means," which was

necessary to receive an award of "direct tuition funding" (IHO Decision at pp. 8-9). As explained below, the IHO's failure to award tuition and transportation relief must be modified.

D. Relief

1. Compensatory Educational Services and Extended-Age Eligibility

At this juncture, the district has essentially conceded that it denied the student a FAPE for both the 2020-21 and 2021-22 school years by not cross-appealing from those determinations in the IHO's decision. Yet, while the district acknowledges in the answer and cross-appeal that the parent may have been entitled to an award of some tuition and transportation costs limited to the short duration of the student's attendance at iBrain during the 2020-21 school year (April 2021 through June 2021), the district—despite bearing the burden of production and persuasion under New York law and now conceding that it failed to offer the student a FAPE for the entire 2020-21 school year—does not identify a clear position one way or the other in its pleadings that would inform a decision maker as to its position about how to best remediate the situation (i.e., the total amount of compensatory educational services by type with frequency, duration, and location recommendations), for the remaining portion of the 2020-21 school year from approximately September 2020 through April 2021.

Under the due process procedures set forth in New York State law, the district was required to address its burdens in the due process hearing context by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that most reasonably and efficiently could place the student in the position that he would have been but for the denial of a FAPE (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 457 [2d Cir. 2015], cert. denied, 136 S. Ct. 2022 [2016], quoting Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [noting that the "'ultimate award [of compensatory education] must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place'"]). However, the district appears to have concluded its participation, for all intents and purposes, with its concession of liability and statutory violation—that it denied the student a FAPE. Where, as here, New York State law has placed the burden of production and persuasion at an impartial hearing on the district—unlike states which align the burden of production and persuasion consistent with Schaffer v. Weast, 546 U.S. 49, 58-62 (2005)—it is not an SRO's responsibility to craft the district's position regarding the primary issue in the case: the appropriate compensatory education remedy.

However, while allocating an evidentiary burden to the district, a parent nevertheless has a responsibility to identify the remedy sought, which the parent in this case has not done aside from asserting general statements that the student is entitled to an unspecified amount of unidentified compensatory educational services and extended-age eligibility. Contrary to the parent's argument, the IHO was not required to make the parent's case for her either. The IHO was authorized to ask questions to clarify evidence offered by the parties in order to fashion an award of compensatory educational services, but in this case the parties themselves made no meaningful

effort at all to develop the hearing record. But the IHO also did not raise this quandary with the parties and direct them to address the issue.[22]

Thus, the IHO did not render a decision upon this issue other than noting the absence of evidence. Therefore, given the total absence of evidence in the hearing record upon which to consider or fashion an award of compensatory educational services for the portion of the 2020-21 school year from approximately September 2020 through April 2021 when the student began attending iBrain, the undersigned 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]). Here, the appropriate remedy is a remand to continue these proceedings for the purpose of fashioning a remedy for the district's failure to offer the student a FAPE from September 2020 through April 2021.[23]

2. Direct Funding for iBrain

It is well settled that parents who reject a school district's IEP and choose to unilaterally place their child at a private school without consent or referral by the local educational agency do so at their own financial risk (Burlington, 471 U.S. at 373-74; Carter, 510 U.S. at 14; Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020], cert. denied, 141 S. Ct. 1075 [2021], reh'g denied, 141 S. Ct. 1530 [2021]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 356-58 [S.D.N.Y. 2009] [finding the parent in that matter had no financial standing to sue for direct retrospective payment to private placement where terms of enrollment contract absolved her of responsibility for paying tuition]). In such instances, retroactive reimbursement to parents by a school district is an available remedy under the IDEA (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). Alternatively, with regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied

[22] In a case involving compensatory education relief, it may be necessary for an IHO to warn the parties that a two-phase approach to the evidentiary hearing may be necessary, the first phase of which concludes in an interim decision which describes whether there was a denial of a FAPE (the FAPE violation phase), and if so, the parties are then provided with a further opportunity to present fact-specific evidence regarding the type of and extent to which compensatory education is appropriate for the student (remedy phase). Following the second phase, the IHO can then address the compensatory education remedy in a final decision in which the fact-specific inquiry is discussed in detail. This approach is suggested because, unlike tuition reimbursement cases, parties and IHOs in this State are frequently reluctant to fully develop the evidentiary record on the issue of relief in compensatory education disputes, especially when the district's provision of a FAPE is sharply disputed.

[23] Given the decision to remand the matter for further administrative proceedings, it is unnecessary at this juncture to fully consider the parent's request for extended-age eligibility as relief. I note only that the student is currently in kindergarten and it strains credulity that any plausible argument can be made that compensatory education relief should be prolonged into the remote future, that is, approximately 16 years from now after the student ages out of IDEA services.

a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014] [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). It has been held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]).

a. 2020-21 School Year

Here, it is undisputed that the student attended iBrain from April 2021 through June 2021 during the 2020-21 school year, the IHO found iBrain was an appropriate unilateral placement for the 2020-21 school year, and the district does not cross-appeal the IHO's finding that iBrain was an appropriate unilateral placement for the 2020-21 school year. In addition, the district acknowledges in its answer and cross-appeal that the IHO "probably could have found that the equities favored" the parent, and therefore, "probably could have awarded the [parent] reimbursement of some tuition, transportation, and related services costs," and that "any such reimbursement would necessarily be limited to the [20]20-21" school year (Answer & Cr. App. ¶ 22, citing Req. for Rev. at p. 8, ¶¶ 20-21).

With respect to the parent's financial obligation for the student's attendance at iBrain for the 2020-21 school year from April 5, 2021 through June 30, 2021, the hearing record includes an enrollment contract signed by the parent on March 31, 2021 and signed by iBrain on July 16, 2021 (see Parent Ex. P at pp. 1, 7). The contract provided that the parent would be responsible for the tuition and supplemental costs for the student's attendance at iBrain (see generally Parent Ex. P). The hearing record also includes a "School Transportation Service Agreement," referencing the student's attendance at iBrain for a portion of the 2020-21 school year from April 2021 through June 2021, which was executed by the parent on April 7, 2021, for round-trip transportation services related to the student's attendance at iBrain for that portion of the 2020-21 school year (see Parent Ex. M at pp. 1, 5).

b. 2021-22 School Year

With respect to the parent's financial obligation for the student's attendance at iBrain for the 2021-22 school year from July 7, 2021 through June 24, 2022, the hearing record includes an enrollment contract signed by the parent on July 2, 2021, and signed by iBrain on July 7, 2021 (see Parent Ex. S at pp. 1, 7). The contract provided that the parent would be responsible for the tuition and supplemental costs for the student's attendance at iBrain (see generally Parent Ex. S). In contrast to the evidence related to the 2020-21 school year, the hearing record does not include a transportation agreement or contract for the 2021-22 school year (see generally Tr. pp. 1-239; Parent Exs. A-T; Dist. Exs. 1-17).

With regard to the parent's ability to pay, since the parent selected iBrain as the unilateral placement and her financial status is at issue, it was the parent's burden of production and persuasion with respect to whether she had the financial resources to "front" the costs of the services (Application of the Dep't of Educ., Appeal No. 21-163; Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041). In this case, neither the parent's affidavit nor her additional testimony at the impartial hearing provided any information regarding whether the parent had made any of the payments under the tuition contract she executed with iBrain for either the 2020-21 or the 2021-22 school years, despite having established a financial obligation for the costs of the student's tuition at iBrain, as well as the costs of transportation; moreover, the parent has not presented any evidence to demonstrate an inability to pay (see Tr. pp. 208-18; Parent Ex. R at pp. 1-2). For example, there is no evidence in the hearing record regarding the parent's financial resources, such as a copy of a recent tax return or evidence regarding the parent's assets, liabilities, income, or expenses (see generally Tr. pp. 1-239; Parent Exs. A-T; Dist. Exs. 1-17).

In this instance, although the hearing record lacks information regarding the parent's financial resources for both the 2020-21 and 2021-22 school years, the IHO erred by denying all tuition and transportation relief solely on this basis. The parent's financial obligation to pay for the unilateral placement has been established in the evidentiary record, even if the parent failed to establish her lack of financial resources. The evidence of the parent's financial obligation is sufficient to establish an injury that should be remediated.[24] Therefore, the IHO's order will be modified to order the district to reimburse the parent for the costs of the student's tuition and transportation costs at iBrain for that portion of the 2020-21 school year the student attended (April 2021 through June 2021), and for the entirety of the 2021-22 school year upon proof that the parent has paid for services delivered to the student.

3. Prospective Relief

As the final contention in the district's cross-appeal, the district argues that the IHO erred by directing a CSE to develop an IEP for the student with a special class placement of no more than six students and with related services recommendations at the frequencies and durations set forth in the student's April 2021 IEP.

An award of prospective relief in the form of IEP amendments and the prospective placement of a student in a particular type of program and placement, such as the IHO's order in this matter directing the specific contents of a future IEP, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective

[24] There is no evidence of collusion or fraud with regard to the evidence establishing the parent's indebtedness for the unilateral placement (i.e. that the contracts were merely sham transactions intended to defraud the district).

placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). In ordering a specific set of directives required to be included in a future IEP for the student, the IHO improperly stepped into the role of the CSE (see Application of a Student with a Disability, Appeal No. 19-018 [explaining that it is far less problematic for an IHO to order discrete forms of compensatory education because it is expected that such remedial services will be provided in a setting in which the CSE will also continue to have the responsibility to develop and implement a comprehensive IEP taking into account all aspects of the student's needs]).

Additionally, at this point, since the IHO already adjudicated the parent's claims related to the 2019-20, 2020-21, and 2021-22 school years, the district has not appealed the IHO's finding that it denied the student a FAPE for the current school year (2021-22), and, on appeal, I have awarded the parent's reimbursement for the cost of the student's attendance at iBrain for the current school year, the IHO's order directing the CSE to recommend a specific class placement for the student would only be relevant on a going-forward basis and for the 2022-23 school year, which is not at issue in the current impartial hearing. In addition, given that a CSE has an obligation to review a student's IEP at least annually, the CSE should have the opportunity to convene to produce an IEP for the 2022-23 school year (see Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current school year]). Consequently, the IHO's order directing a CSE to develop an IEP with specific program recommendations for the student must be reversed.

VII. Conclusion

Having found that the IHO erred in not sufficiently considering the effect that the lack of a recommendation for nursing services had on the student's program at the start of the 2019-20 school year and in not considering what a compensatory education award for the denial of FAPE prior to the student's placement at iBrain during the 2020-21 school year, the matter must be remanded for reconsideration by the IHO upon further development of the hearing record if necessary and in accordance with this decision. In addition, having found that the district denied the student a FAPE for the 2020-21 and 2021-22 school years, that iBrain was an appropriate placement, and that equitable considerations did not warrant a reduction in the requested relief, an appropriate award, considering the parent did not present evidence of an inability to pay the costs of the student's tuition at iBrain, was to award reimbursement for the costs of tuition.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated September 5, 2021, is modified by reversing those portions which found that the district offered the student a FAPE for the part of the 2019-20 school year prior to the district implementing the student's IEP; denying the parent's request for compensatory education for the 2020-21 school year prior to the student's placement at iBrain, finding that the parent was not entitled to an award of tuition reimbursement at iBrain for

the 2020-21 and 2021-22 school years, and directing the CSE to recommend a specific placement for the student when it reconvenes; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO to reconvene the impartial hearing and issue a new determination regarding whether the district offered the student a FAPE for the portion of the 2019-20 school year prior to the district implementing the September 2019 IEP and determining what, if any, compensatory education is necessary to remediate a denial of FAPE for that portion of the 2019-20 school year and what, if any, compensatory education is necessary to make up for a denial of FAPE for the 2020-21 school year prior to the student's placement at iBrain; and

IT IS FURTHER ORDERED that unless the parties shall otherwise agree, upon the parent's presentation of proof of payment, the district shall be required to reimburse the parent for the costs of the student's attendance at iBrain from April 5, 2021 through June 30, 2021 for the 2020-21 school year, including tuition and costs for related services and transportation; and

IT IS FURTHER ORDERED that unless the parties shall otherwise agree, upon the parent's presentation of proof of payment, the district shall be required to reimburse the parent for the costs of the student's attendance at iBrain for the 2021-22 school year, including tuition and costs for related services and transportation.

Dated: **Albany, New York**
November 17, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER