



The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 20-157

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Theresa Crotty, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondent, by John Henry Olthoff, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (parent's) son and ordered it to reimburse the parent or directly fund the cost of the student's tuition at the International Institute for the Brain (iBrain) for the 2019-20 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

At the time the student's IEP was developed in May 2019, he demonstrated severe cognitive and motor limitations, global developmental delays, was non-verbal and non-ambulatory, and was fully dependent for all activities of daily living (ADLs) (Dist. Ex. 18 at pp. 1, 8, 23). His diagnoses included epileptic seizure disorder, quadriplegic cerebral palsy, neuromuscular scoliosis, dysphagia and cortical vision impairment (id. at p. 1). The student's oral motor function was not sufficient for feeding or communication and he was fed nectar thick liquids and pureed/mashed

solids; he communicated using facial expressions, vocalizations, and activating switches with assistance (*id.* at pp. 1-3, 6).

The student attended the International Academy of Hope (iHope) during the 2016-17 school year – a placement reportedly funded by the school district (Parent Ex. B at p. 4).

On November 3, 2017, the parent filed a due process complaint notice regarding the 2017-18 school year seeking, among other things, a pendency order which would continue the program and services that the student received at iHope (Parent Ex. B at pp. 3-4). In an order dated January 3, 2018, effective November 3, 2017, an IHO determined that the student's pendency placement was at iHope in a 6:1+1 special class, with related services of three 30-minute individual sessions per week of occupational therapy (OT), three 30-minute individual sessions per week of physical therapy (PT), and two 30-minute individual sessions per week of speech-language therapy (*id.* at p. 4). In addition, the pendency order included transportation to and from iHope from the student's home (*id.*).

The student began attending iBrain on July 7, 2018 (Parent Ex. D at p. 1).

On May 30, 2019, a CSE convened to develop the student's IEP for the 2019-20 school year (Dist. Ex. 18). Finding that the student was eligible for special education as a student with multiple disabilities, the May 2019 CSE recommended a 12-month, 12:1+(3:1) special class placement in a specialized school together with four 30-minute individual sessions per week of OT, five 30-minute individual sessions per week of PT, five 60-minute individual sessions per week of speech-language therapy, one 60-minute session per month of parent counseling and training individually or in a group, and three 30-minute periods per week of adapted physical education (*id.* at pp. 1, 20-21).¹ In addition, the CSE recommended supports to meet the student's management needs, developed 18 annual goals and corresponding short-term objectives, and determined that the student was eligible for alternate assessment and specialized transportation services (*id.* at pp. 8-20, 22-23). Further, the May 2019 CSE recommended the support of a 1:1 full-time paraprofessional as well as a 1:1 transportation paraprofessional, and assistive technology devices and services (*id.* at pp.20-21).

The parent signed an enrollment contract with iBrain on June 20, 2019 for the 2019-20 school year (Parent Ex. E at pp. 1-7). By letter dated June 21, 2019, the parent notified the district that she was unilaterally placing the student at iBrain and would be seeking public funding for that placement (Parent Ex. J).

A. July 2019 Due Process Complaint Notice

In a due process complaint notice dated July 8, 2019, the parent requested an impartial hearing alleging that the district had denied the student a FAPE for the 2019-20 school year (Parent Ex. A at pp. 1-3). As an initial matter, the parent requested a consolidation of her July 8, 2019 due

¹ In referring to the recommended special class, the parties and the hearing record refer both to 12:1+(3:1) and 12:1+4 class ratios; however, the recommendation included in the IEP was for a 12:1+(3:1) ratio and that is how the recommended special class is referred to throughout this decision (Dist. Ex. 18 at p. 20; *see e.g.* Tr. pp. 166, 176-77, 219, 258;).

process complaint notice with a due process complaint notice she had filed regarding the student's placement for the 2018-19 school year (id.). The parent also requested pendency based on an unappealed IHO decision which found that an August 2016 district IEP was the basis for pendency for the student in a prior proceeding and the parent requested that the district prospectively pay the student's full tuition at iBrain including special transportation during the pendency of the proceeding (id. at pp. 1-2).

Turning to the merits, the parent generally asserted that the district significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE (id. at p. 2). The parent also alleged that the district failed to hold the May 2019 annual review meeting at a time mutually agreeable to the parent and in a manner which complied with the parent's request for a full committee meeting including a school physician and parent member (id. at p. 2). Further, the parent asserted that the May 2019 IEP was not appropriate because it: failed to accurately state the student's classification as a student with a traumatic brain injury; was not the product of any individualized assessment of the student's needs; inadequately described the student's management needs; inappropriately reduced the student's related services mandates; failed to provide an appropriate special class placement due to insufficient 1:1 support and monitoring and a lack of 1:1 direct instruction; did not address the student's highly intensive management needs; was not the student's least restrictive environment; and did not provide for extended school day programming (id. at pp. 2-3). As relief, the parent requested that the district directly pay iBrain the cost of the student's tuition for the 2019-20 school year, including 1:1 paraprofessional services in school, transportation and 1:1 paraprofessional services during travel, as well as to reconvene an annual review meeting for the student (id. at p. 3).

B. Events Subsequent to July 2019 Due Process Complaint Notice

In an order of consolidation dated July 24, 2019, an IHO denied the parent's request for consolidation of this matter with a due process complaint notice filed regarding the 2018-19 school year because the resolution period had ended in the other matter and the case was scheduled for a hearing (see July 24, 2019 Interim Decision on Consolidation).

The parties proceeded to an impartial hearing on December 10, 2019 and December 18, 2019 to discuss the student's pendency placement (see Tr. pp. 1-23).² In an interim decision on pendency dated January 13, 2020, the IHO determined that the student's pendency placement was the programming at iHope but that, because iBrain was "substantially similar" to iHope, the IHO ordered the district to fund the student's tuition at iBrain for the pendency of the proceeding (see January 13, 2020 IHO Interim Decision on Pendency at pp. 1-5; see also Parent Ex. B at pp. 1-4).

In an order dated July 22, 2020, the IHO decided not to consolidate this matter, with the parent's due process complaint notice concerning the 2020-21 school year (July 22, 2020 Interim Decision on Consolidation).

² On December 6, 2019, after an IHO had issued the July 24, 2019 Interim Order of Consolidation, a new IHO was appointed to hear this matter (Tr. p. 2). All references to the IHO in this decision are to the IHO appointed on December 6, 2019.

C. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on the merits of the parent's allegations on January 24, 2020, which concluded on June 29, 2020 after seven days of proceedings (see Tr. pp. 24-326). In a decision dated August 30, 2020, the IHO found that the district failed to offer the student a FAPE for the 2019-20 school year because the recommended 12:1+(3:1) special class was too large to meet the student's individual needs (IHO Decision at p. 6).³ More specifically, the IHO determined that the ratio of one teacher to 12 students "was not sufficiently restrictive to provide the level of services that this student required to obtain an educational benefit from instruction"; and that, although the district's proposed placement included additional support staff, this fact would not compensate for the fact that there was only one teacher for 12 students (id.).

The IHO noted that the parent's alleged procedural violations did not rise to the level of a denial of a FAPE because any defect with the district's meeting notices and/or the prior written notice were "de minimus" (IHO Decision at p. 6). In addition, the IHO found that the district physician participating in the CSE meeting by telephone and not in person, did not deny the student a FAPE because "there is no requirement that the [district] physician was required to participate in person" (id. at p. 7). Further, the IHO did not find that the level of related services that the district offered the student denied the student a FAPE (id. at p. 7). Finally, the IHO found that the district's classification of the student as a student with multiple disabilities instead of a traumatic brain injury did not result in a denial of FAPE because the classification did not determine the program (id.).

Turning to the appropriateness of the parent's placement of the student at iBrain for the 2019-20 school year, the IHO determined that iBrain was appropriate, noting that the school provided instruction that was specially designed to meet the student's unique needs (IHO Decision at pp.7-8). Specifically, the IHO found that iBrain provided the student with intensive services throughout the school day which were designed to address his significant delays (id. at 8). The IHO did not credit the district's assertion that the student only received three hours of academic instruction per week (id.). The IHO noted that the student's related services providers pushed in throughout the student's academic program and, as a result, he received academic instruction and his related services simultaneously (id.). In addition, the IHO found that although all of the students at iBrain had similar needs and thus received similar programs while at iBrain, this did not detract from the fact that the student's placement at iBrain addressed his unique needs (id.).

The IHO found that equitable considerations did not warrant a denial of tuition reimbursement (IHO Decision at p. 9). The IHO noted that the parent provided the district with the requisite 10-day notice prior to enrolling the student at iBrain; and, although the parent refused to attend the IEP meeting and did not visit the district's proposed school, the IHO found that the parent did not obstruct the CSE's process because the CSE held the subject meeting without the parent and developed an IEP for the 2019-20 school year (id.). Further, the IHO opined that the fact that the parent did not visit the proposed district school did not show bad faith because the

³ The August 30, 2020 IHO Decision is not paginated (see IHO Decision). I have paginated the IHO's decision starting with the first page as page "1" and so on to the last page as page "12".

parent disagreed with the IEP and as such, it did not matter where the IEP would have been implemented (*id.*).

With respect to relief, the IHO ordered the district to reimburse the parents or provide direct funding for the total cost of tuition at iBrain, as well as for related services and transportation for the 2019-20 school year (IHO Decision at p. 9).

IV. Appeal for State-Level Review

In a request for review, the district asserts that the IHO erred by finding that the recommended 12:1+(3:1) special class was not an appropriate program for the student. Specifically, the district argues that its recommended program comports with Part 200 of the New York State regulations which states that "[t]he maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students" in addition to the teacher, "the staff/student ratio shall be one staff person to three students;" and also provides that "additional staff may be teachers, supplementary school personnel, and/or related services providers." 8 NYCRR 200.6(h)(4)(iii)." The district asserts that given the student's multiple disabilities and the nature of his educational program, a 12:1+(3:1) class ratio was an appropriate placement for the student. The district also notes that the CSE specifically considered but rejected a 6:1+1 program due to its inability to properly address all of the student's needs.

The district further argues that the IHO erred by finding that iBrain was an appropriate placement for the student. In addition, the district asserts that the IHO erred by finding that equitable considerations did not warrant a denial of tuition reimbursement and that the IHO's decision should be reversed.

In an answer, the parent asserts that the IHO correctly found that the district had denied the student a FAPE during the 2019-20 school year and correctly found that iBrain was an appropriate placement for the student for the 2019-20 school year. In addition, the parent argues that the IHO correctly found that equitable considerations supported the parent's request for 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. 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]).⁴

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

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

VI. Discussion

A. Preliminary Matters—Scope of Review

As an initial matter, it is necessary to identify which of the parties' arguments are properly before me on appeal.

The district appeals from the IHO's determination that the student was denied a FAPE because the 12:1+(3:1) special class recommended by the May 2019 CSE was too large to meet the student's individual needs. As set forth above, in addition to the one appealed finding, the IHO made several findings regarding the parent's allegations related to the 2019-20 school year, finding in favor of the district (IHO Decision at pp. 6-7). Specifically, the IHO found that none of the procedural violations alleged by the parent rose to the level of a denial of a FAPE, noting that any defect with the district's meeting notices and/or prior written notice were de minimus and that the district physician was not required to appear at the May 2019 CSE meeting in person (id.). The IHO also found that neither the level of related services offered by the district nor the district's classification of the student as a student with multiple disabilities was inappropriate (id.). The

⁴ 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).

IHO did not specifically address the parent's assertions in the due process complaint notice that the May 2019 IEP was not the product of any individualized assessment of the student's needs, that it inadequately described the student's management needs, or that it did not provide for extended school day programming.

The parent has not filed a cross-appeal alleging that the IHO erred in the above mentioned findings or in failing to address any of the other claims raised in the parent's due process complaint notice. State regulations governing practice before the Office of State Review require that a "request for review clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding," and indicate the relief sought by the petitioner (8 NYCRR 279.4[a]). Tethered closely to this requirement is the State regulation which mandates that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately" (8 NYCRR 279.8[c][2]). "[A]ny issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][4]).[20-138]

To be sure, the parent was not aggrieved by the IHO's determination that the district failed to offer the student a FAPE for the 2019-20 school year. However, when State regulations governing appeals before the Office of State Review were last amended, it was specifically contemplated that a prevailing party would be chargeable with the knowledge that they may have to defend themselves in an appeal and that might require an appeal of any underlying determinations made by the IHO (or failures to rule) that were unfavorable to the prevailing party (see N.Y. State Register Vol. 38, Issue 26, at p. 49 [June 29, 2016]; Application of a Student with a Disability, Appeal No. 18-131). Here, through the district's service of the notice of intention to appeal and case information statement, the parent was on notice that the district intended to appeal from the IHO's determination that the district failed to offer the student a FAPE for the 2019-20 school year (see Dist. Notice of Intention to Appeal; see also 8 NYCRR 279.2[d]). Therefore, it was incumbent upon the parent to assert in a cross-appeal, any alternative bases in support of the allegation that the district failed to offer the student a FAPE (8 NYCRR 279.8(c)(4) ["any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]).⁵ As the parent did not avail

⁵ At least one district court has held that, notwithstanding the explicit language in the regulation, "a non-aggrieved party's failure to []appeal an unaddressed issue does not constitute a waiver" (G.S. v Pleasantville Union Free Sch. Dist., 2020 WL 4586895, at *16 [S.D.N.Y. Aug. 10, 2020]). Moreover, while the district court in G.S. summarized several court cases supporting the view that a non-aggrieved party need not appeal unaddressed issues, the authority cited pre-dated the amendment to the State regulations, effective January 1, 2017, which added the language explicitly requiring an appeal of unaddressed issues and providing that issues not appealed would be deemed abandoned, and it is unclear whether or not this regulatory history was available to the court (2020 WL 4586895, at *16, citing NB & CB v. New York City Dep't of Educ., 2016 WL 5816925, at *4 [S.D.N.Y. Sept. 29, 2016], *aff'd sub nom.*, 711 Fed. App'x 29 [2d Cir. Oct. 10, 2017], W.W. v New York City Dep't of Educ., 2014 WL 1330113, at *15 [S.D.N.Y. Mar. 31, 2014], T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 337-38 [S.D.N.Y. 2013], FB v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 588 [S.D.N.Y. 2013], and J.M. v. New York City Dep't. of Educ., 2013 WL 5951436, at *21 [S.D.N.Y. Nov. 7, 2013]; see N.Y. State Register Vol. 38, Issue 39, at pp. 37-38 [Sept. 28, 2016]; N.Y. State Register Vol. 38, Issue 26, at pp. 49-52 [June 29, 2016]; N.Y. State Register Vol. 38, Issue 4, at pp. 24-26 [Jan. 27, 2016]). Among the intentions of the

herself of the opportunity to cross-appeal from the IHO's other findings or from the IHO's failure to address claims raised in the due process complaint notice, those claims are not a proper subject of this appeal and, accordingly, the only issue before me with respect to FAPE is whether the IHO erred in finding that the district's recommendation of a 12:1+(3:1) special class was not appropriate for the student for the 2019-20 school year.

B. 12:1+(3:1) Special Class Recommendation

The district asserts on appeal that the IHO erred in finding that the May 2019 IEP did not offer the student a FAPE and that the recommended 12:1+(3:1) special class was not an appropriate placement for the student in light of his management and other individualized needs. Specifically, the district argues that the IHO's conclusion is incorrect because maximum class size for those students with severe multiple disabilities whose programs consist primarily of habilitation and treatment shall not exceed 12 students; in addition to the teacher, "the staff/student ratio shall be one staff person to three students," and "the additional staff maybe teachers, supplementary school personnel, and/or related service providers" (8 NYCRR 200.6(h)(4)(iii)).

Although the student's present levels of educational performance are not in dispute on appeal, in order to determine whether the district's placement recommendation for the 2019-20 school year of a 12:1+(3:1) special class for the student was appropriate, a brief discussion of the student's needs as reflected in the May 2019 IEP is necessary.

According to a prior written notice dated June 17, 2019, the May 2019 CSE considered the following assessments and reports when developing the student's IEP: a February 26, 2019 updated social history, a March 19, 2019 psychoeducational evaluation report; ; an April 1, 2019 classroom observation report; an April 29, 2019 assistive technology evaluation report, and a May 6, 2019 teacher report (Dist. Ex. 20 at p. 2; see Parent Ex. D; Dist. Exs. 6; 7; 8; 11).

With respect to intellectual functioning, the May 2019 IEP indicated that the student demonstrated severe impairments in cognition, language, memory, attention, reasoning, abstract thinking, judgement, problem solving, information processing, and speech (Dist. Ex. 18 at p. 1). The student's limitations included a short attention span, and difficulty concentrating on tasks and memorizing steps or directions, which posed a challenge for learning new skills and following complex directions (id.).

With respect to the student's academic skills, the May 2019 IEP indicated that the student "made progress in both literacy and math IEP goals and [] demonstrated the potential to continue to make gains across these domains" " (Dist. Ex. 18 at p. 1). In the area of literacy, the student had been working on identifying primary colors upon request and had improved his ability to do so

amendments to the regulations was to ensure that parties articulated all aspects of the IHO's rulings or failures to rule that they intended to pursue so that the State Review Officer would not be tasked with reviving every claim asserted in the due process complaint notice on a parent's behalf or further prolonging proceedings by remanding matters to impartial hearing officers if avoidable. Further the mechanism of the notices of intention to appeal and cross-appeal were contemplated to, among other things, give each party notice of the other party's intentions early on in the process to allow proper contemplation of which claims needed to be asserted if it became necessary to argue, for example, that alternative grounds supported the IHO's ultimate decision (see 8 NYCRR 279.2).

utilizing moderate adult support, two head switches, and by reaching (*id.*). According to the IEP, the student identified red, green and yellow with an average of sixty percent accuracy; and in the upcoming year would work toward identifying his name and the letters in his name (*id.*). With respect to mathematics, the student was working on classifying and matching objects based on their physical characteristics and identifying big and small objects from a field of two (*id.* at p. 2). The IEP noted that the student benefited from working towards these skills throughout his day in a functional, generalizable manner including, given the necessary support, comparing amounts and sizes to demonstrate a consistent understanding of mathematical concepts (*id.*). The IEP further noted that the student had improved his ability to classify or match objects based on physical appearance, while his level of required prompting had decreased (*id.*). According to the May 2019 IEP, the student was going to begin to work on identifying numbers one through six in the 2019-20 academic year (*id.*).

Turning to classroom behavior, the IEP indicated that the student could be highly distractible, and it was challenging for him to attend to academic tasks in large group settings (Dist. Ex. 18 at p. 2). The student demonstrated his best academic work when shielded from visual distractions in a modified environment with reduced noise and his ability to remain engaged and participate in activities increased by temporary removal of distractors through the use of a screen during academics (*id.*). The IEP noted that the student required constant praise and frequent redirection in order to attend to academic tasks (*id.*). The IEP stated that the student required an environment which offered highly individualized attention and support and continual adult supervision via a 1:1 paraprofessional throughout the duration of the school day (*id.* at p. 3).

With respect to speech-language skills, the May 2019 IEP indicated that the student communicated using facial expressions, turning his head to activate a switch when given verbal prompts, and vocalizations (Dist. Ex. 18 at p. 1). The IEP indicated that the student required increased processing time in order to understand what was being asked of him and increased motor planning time in order to activate his switch (*id.* at p. 2). In addition, "on a hard day," the student needed increased rest breaks and supports in order to fully participate in therapy sessions (*id.* at p. 2). Specifically, when asked to do something such as activating a switch or looking at a clinician, the student needed 15 to 20 seconds at a minimum to do what was being asked of him (*id.* at p. 3). In terms of receptive language, the IEP stated that the student responded to common gestures, used pictures to help increase both understanding and expression, started to follow simple directions with familiar routines, and understood and followed general conversations (*id.* at p. 2). Further, the student oriented to sound, responded to "no," recognized his own name, and understood short sentences about familiar objects, directions that described where something was, and one to two step commands (*id.*). When pictures and visuals were used, the student required that they be placed on his right side where his vision and visual perception capabilities were stronger (*id.*). With respect to expressive language, the IEP indicated that the student communicated most successfully using his switch, facial expressions, and vocalizations (*id.* at p. 3). However, the IEP explained that the student understood symbols and was starting to use clear and simple symbols in motivating situations and was also using gestures, body language, and behavior to intentionally communicate (*id.* at pp. 2-3). The student was dependent upon his communication partner (i.e. his mom, paraprofessional, teachers, or therapist) to interpret facial expressions and provide partner assisted scanning options (*id.* at p. 3). The IEP noted that the student named things using his switch or vocal approximations, used specific words or gestures to direct or request action by another person,

and used gestures with clear meaning and single words with meaning (id.). With respect to an augmentative alternative communication device, the student used a jellybean switch connected to a switch interface that allowed him to control a computer by using the switch, positioned on his left headrest, like a mouse (id.). The switch could also be connected to a voice output device which allowed the student to make selections; however, in order to successfully use the voice output device he relied on a communication partner to provide him with partner assisted scanning choices (id.). With respect to oral motor/feeding skills, the IEP indicated that the student had poor head and neck control and required support to keep his head in an upright position and his mouth closed (id. at p. 6). In addition, the student had ungraded, uncoordinated jaw movements, which were apparent during mealtimes (id.). According to the IEP, the student's oral motor function was not sufficient for feeding, and the student presented with atypical swallow patterns including an exaggerated tongue thrust (id.). The student also presented with inadequate bolus formation, upper lip not clearing the spoon, lack of awareness of food loss, open mouth while managing food, and up and down munching without a rotary chew pattern (id.). The student was fed nectar thick liquid with a nose cup and sports water bottle; and was fed puree and soft solids with a spoon (id.) While feeding, the student required physical support for his head, jaw, and neck as well as a brace and a collar (id.).

With respect to vocational and life skills, the student communicated his preferences through facial expressions or vocalizations and expressed his dislikes by pouting or crying (Dist. Ex. 18 at p. 3). The student liked to participate in small group and hands-on activities that allowed him to explore his materials and environment and he benefited from prompts and reminders if there was a change in his routine or if something new was going to occur (id.).

The IEP noted that with respect to social/emotional development, the student presented with severe impairments in psychosocial behavior (Dist. Ex. 18 at p. 4). Given the student's developmental delays, atypical methods of communication, and need for increased processing and response times, the student demonstrated significant needs and required intense support in engaging in social behavior (id.). Still, the student enjoyed interacting with peers and adults, greeting others, and following along with conversations (id.). He showed a clear preference for certain objects, activities, and people, and was starting to show interest in social interactions, and consistently utilized symbols when interacting socially (id.). According to the IEP, the student consistently requested an activity and greeted peers (id. at p. 3). Further, the student was motivated to participate in activities with peers, and made progress on increasing his social skills with peers in his class; however, he struggled with skills such as working out simple plans for a play activity or planning and carrying out cooperative play (id. at pp. 3-4). The student also struggled to initiate familiar play routines and to take turns in simple play activities (id. at p. 4).

With respect to ADLs, the IEP noted that the student had made progress toward the goal of improving his self-care skills (Dist. Ex. 18 at p. 4). Specifically, the student was able to lift a toothbrush towards his mouth with adapted equipment to maintain his grasp, push his arms through the sleeves of his jacket with moderate physical assistance, and pull the zipper up and down once threaded with adapted equipment for grasp (id.). The student was working towards toilet training, and his use of his switch expanded to playing computer games and to answering questions from teachers in the morning meeting (id.). The student was fully dependent in all ADLs (id. at p. 8).

Turning to physical development, the IEP indicated that the student benefited from bilateral hand/wrist orthoses, a back brace, and an activity chair to ensure appropriate positioning to maximize function (Dist. Ex. 18 at p. 5). The student required increased physical assistance for accuracy of grasp due to stereotypical movement patterns and utilized a gross grasp pattern to hold objects with physical assistance required for release of objects or maintaining grasp for a prolonged amount of time (id. at p. 7). According to the IEP, the student used a manual wheelchair for his primary mobility at home, in the community, and for transportation to school (id.). The student required maximum motivation to self-propel a posterior pacer gait trainer, walking two to three steps while maximally supported at the trunk with the saddle seat (id. at p. 5). The student was dependent for all mobility transfers and transitions but was able to assist during floor mobility (id. at pp. 5-6). The student also assisted with transferring from his wheelchair to the mat, performing a sit to stand transfer with one person and walking two to five steps towards the mat with maximum to moderate assistance at the trunk (id. at pp. 5, 7). The student stood against support with a one person assist for five minutes before requiring additional support and sat in his activity chair with a tray keeping his head in mid-line for morning meetings (id. at p. 5). The student displayed difficulty in motor planning due to decreased motor control and visual impairments, dynamic stiffness, overall tone and stereotypical movement patterns (id. at p. 6). The student required contact guard assistance to cross midline as both arms extended during intentional reaching or during reaches that required arm extension (id. at p. 7).

With respect to vision, the IEP stated that the student was diagnosed with cortical visual impairment, and although he could see, the student was not able to participate in numerous activities that are interpreted by the visual parts of the brain (Dist. Ex. 18 at p. 5). The student worked on viewing items in an array of two, using his right and upper central visual fields in order to make a choice (id.). The student required items to be presented individually and was not shifting his gaze when items were presented in an array of two (id.). The student performed best when looking at items against a black backdrop or lightbox (id. at pp. 5, 7).

The parent asserted that the district failed to offer the student an appropriate placement and denied the student a FAPE for the 2019-20 school year by recommending a 12:1+(3:1) special class placement in a specialized school (Parent Ex. A at pp. 2-3). More specifically, the parent asserted that the recommended class ratio of 12:1+(3:1) was insufficient to address the student's needs because it was too large a ratio to ensure the constant supervision and monitoring that the student required in order to remain safe and did not offer "the 1:1 direct instruction and support" that the student required to make progress (id.).

State regulation provides that the maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students (see 8 NYCRR 200.6[h][4][iii]). In addition to the teacher, the staff/student ratio shall be one staff person to three students (id.). The additional staff may be teachers, supplementary school personnel, or related service providers (id.).

State regulation also indicates that the maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction (see 8

NYCRR 200.6[h][4][ii][a]). Management needs, in turn, are defined by State regulations as "the nature of and degree to which environmental modifications and human material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social and physical development (8 NYCRR 200.1[ww][3][i][d]).

As previously described, the student exhibited significant global, cognitive, communication, physical, and health-related needs (see Dist. Ex. 18 at pp. 1-8). To address those needs, the May 2019 CSE recommended a 12:1+(3:1) special class in a specialized school with the support of a full-time 1:1 paraprofessional and related services including OT, PT, speech-language therapy, adapted physical education, and parent counseling and training (id. at pp. 20-21). More specifically, to address the student's fine motor and self-care deficits, the CSE recommended that the student receive OT four times per week for 30-minute sessions; developed annual goals that targeted the student's motor control, positioning, ADLs, and functional independence needs; and recommended the continued use of adapted equipment (id. at pp. 4-5, 7-8, 13, 17-21). In addition, to address the student's speech-language and oral motor deficits, the May 2019 CSE recommended that the student receive speech-language therapy five times per week for 60-minute sessions; developed annual goals that targeted the student's receptive, expressive, and pragmatic language needs, as well as his feeding needs, and recommended that the student be provided with access to switches, voice output devices, and "high tech AAC devices," as well as adapted equipment and braces necessary for safe feeding (id. at pp. 2-4, 6, 8, 14-15, 18, 20-21). Further, to address the student's gross motor deficits, the CSE recommended that the student receive PT five times per week for 30-minute sessions; developed annual goals that targeted the student's gross motor, ambulation, habilitative, and positioning needs; and recommended braces, a wheelchair, an activity chair, a stander, and a gait trainer (id. at pp. 1, 5-8, 15-17, 20). To assist the student's family in carrying over the student's annual goals at home, the CSE recommended one 60-minute session per month of parent counseling and training and developed an annual goal that targeted the student's need to increase functional and social skills across environments, and the family's need to obtain more information regarding financial resources, social supports, and equipment for the student (id. at pp. 18-20). Additionally, to address the student's significant cognitive, academic, and global delays, the May 2019 CSE recommended a 12:1+(3:1) special class placement in a specialized school; developed annual goals that targeted the student's learning, habilitative, and social skills needs; and recommended a multi-modal approach utilizing adapted equipment, switches, voice-output devices, and prompting/modeling (id. at pp. 1-4, 8-13, 17, 20).

Contrary to the parent's assertion that the May 2019 CSE failed to offer the student an appropriate school program and placement that met his highly intensive management needs, a review of the May 2019 IEP shows that the majority of the extensive special education, vision, PT, OT, and speech-language therapy management needs identified in the May 2019 iBrain IEP were included in the district's May 2019 IEP (compare Parent Ex. D at pp. 19-20, with Dist. Ex. 18 at p. 8; see Parent Ex. A at p. 3). For example, management needs included in the May 2019 IEP indicated that the student needed "[c]ontinual 1:1 adult support for redirection and repetition of directions," "[m]ulti-modal approach for academic tasks," and "[o]pportunities for autonomy over schedule and preferred activities" (compare Parent Ex. D at pp. 19-20, with Dist. Ex. 18 at p. 8). In addition, the May 2019 IEP indicated that the student benefited from the following: meaningful

repetition of instruction; use of several types of adaptive equipment and switches; shields from visual and/or sound distractors; use of visually adapted instructional materials; and opportunities to engage with peers, professionals, and community members in a variety of environments (see Parent Ex. D at pp. 19-20; Dist. Ex. 18 at p. 8).

As noted above, the parent asserted that the recommended 12:1+(3:1) special class was "insufficient to address [the student's] needs because it was too large a ratio to ensure the constant 1:1 support and monitoring [the student] require[d] in order to remain safe and d[id] not offer the 1:1 direct instruction and support the student require[d] to make any progress" (Parent Ex. A at p. 3).

Turning to the parent's claim that the 12:1+(3:1) special class did "not offer the 1:1 direct instruction and support the student require[d]," the hearing record does not support the parent's connection between 1:1 instruction and direct instruction. This confusion may be attributable to the iBrain director of special education's description of iBrain as "follow[ing] a direct instructional model" and providing "as much one-on-one instruction [as needed], depending on the severity of the brain injury" (Tr. pp. 267-68).⁶ However, State guidance indicates that a plan for effective instruction includes direct instruction, which relates to how instruction is provided rather than the student-to-teacher ratio (see Quality Indicator Review and Resource Guides for Special Education Instructional Practices, Office of Special Educ., [Dec. 2011], p. 5, available at <http://www.p12.nysed.gov/specialed/techassist/instructpractice-jan12.pdf>). Nevertheless, as discussed below, the hearing record shows that the student would have received both direct instruction and support in a 1:1 setting in the district's recommended program.

The May 2019 IEP included management needs specifying that the student required direct instruction for all new concepts (Dist. Ex. 18 at p. 8). The student's management needs also included continual 1:1 support for redirection and repetition and for physical and verbal prompting, as well as simplified directions given in a 1:1 format (id.).

With respect to "the constant 1:1 support and monitoring" the student required to remain safe, the May 2019 CSE recommended the services of a full time, 1:1 paraprofessional as well as a transportation paraprofessional, and the May 2019 CSE also developed an annual goal that targeted the close monitoring of the student's medical needs and precautions necessary to address feeding, transfer and transport, skin health, and toileting with consistent consultation with the school nurse (Dist. Ex. 18 at pp. 19-21).⁷ Given the CSE's recommendations, in the recommended 12:1+(3:1) special class, the student would have been supported in the classroom by one group paraprofessional for every three students, the special education teacher and a 1:1 paraprofessional,

⁶ The parent's answer refers to "30 minutes of direct instruction (1:1 with his teacher)" that the student received at iBrain, citing only to the affidavit testimony of the iBrain director of special education (Answer ¶32); however, while the affidavit indicated that the student "exhibit[ed] highly intensive management needs which require[d] a high degree of individualized attention and intervention" and, separately, indicated that iBrain utilized "a direct instructional model," there is no indication in the affidavit that the student received or needed direct 1:1 instruction (Parent Ex. L at p. 3; see Parent Ex. L).

⁷ The student's medical forms did not indicate that the student required 1:1 nursing services (Parent Exs. I at p. 14; M at p. 3).

as well as related service providers. Based on these recommendations and the student's needs, the student would have received constant 1:1 support and monitoring in order to remain safe.

The CSE recommended the services of a 1:1 paraprofessional and developed an annual goal that targeted the paraprofessional's consistent consultation with the special education teacher regarding close monitoring of the student's academic needs and alertness; and for the paraprofessional to follow guidelines generated by the special education teacher to provide academic support during specified times, practice skills throughout the day, and prompting when needed (*id.* at pp. 19-21). The school psychologist, who served as the district representative at the student's May 2019 CSE meeting, testified that direct instruction would be provided by an adult in the classroom, which could be the special education teacher or a teacher assistant, as they could both provide direct instruction (Tr. p. 165). She stated that a paraprofessional could also provide direct instruction if they were trained to provide that support (Tr. p. 165). The school psychologist explained that paraprofessionals assisted in providing some academic support in the classroom and providing some instruction to the student depending on the student's needs and the purpose of the paraprofessional (Tr. pp. 165-66). She further explained that in special classes with group paraprofessionals, such as the recommended 12:1+(3:1) special class, the group paraprofessionals were trained to provide instruction to students and that is why they were noted as group paraprofessionals (Tr. p. 166). In contrast, she testified that individual paraprofessionals were for individualized services (Tr. p. 166).

The school psychologist confirmed that the student required a small student-to-teacher ratio (Tr. p. 148). She also confirmed that in a 12:1+(3:1) special class, the 12 referred to the number of students, the one referred to the only certified special education teacher in the class, and the three to one referred to one teacher assistant or paraprofessional to every three students (Tr. pp. 148-49). Similarly, she explained that a 6:1+1 special class ratio represented six students, one special education teacher, and one paraprofessional for six students (Tr. p. 149). She indicated that in every class, a student could have an individual paraprofessional and whether or not they did was dependent on the student (Tr. p. 149). The school psychologist confirmed that placement in a special class with a 6:1+1, 8:1+1, or 12:1+1 ratio were all deemed inappropriate for the student because he required a smaller student-to-teacher ratio due to his severe cognitive and motor limitations (Tr. pp. 149-50). The school psychologist agreed that in a 12:1+(3:1) special class there was one special education teacher for every 12 students and in a 6:1+1 special class there was one special education teacher for every six students (Tr. pp. 150-52). However, she reported that the CSE determined that a 12:1+(3:1) special class provided more support than a 6:1+1 special class (Tr. p. 176). More specifically, she testified that in the 12:1+(3:1) special class, in addition to being supported by the special education teacher the student would have had the support of a 3:1 group paraprofessional, and his individual paraprofessional (Tr. p. 176). In contrast, she noted that the paraprofessional in a 6:1+1 special class would be shared among the six students (Tr. p. 176).

Neither party disputes that the student had "highly intensive needs" requiring a high degree of individualized attention and intervention to maintain his physical well-being throughout the school day (*see* Dist. Ex. 18 at p. 8). As discussed above, the May 2019 IEP included a significant number of management supports and strategies to address those needs, in addition to full time 1:1 paraprofessional services to address the student's health and safety needs (*see* Dist. Ex. 18 at pp.

8, 20). However, the parent's strict adherence to the language in State regulation guiding 6:1+1 special class placements to the exclusion of other appropriate placement options is reductive and overlooks that the student's highly intensive needs were due to his severe multiple disabilities, and that a program consisting of habilitation and treatment was appropriate to meet the student's needs.

In consideration of the above, the hearing record supports the CSE's decision to recommend a 12:1+(3:1) special class for the student, along with related services and the additional support of a 1:1 paraprofessional, as this placement addressed the student's unique needs, including the provision of both direct instruction and sufficient 1:1 support.

VII. Conclusion

A review of the hearing record supports a finding that the district's recommendation of a 12:1+(3:1) special class, with the additional support of a 1:1 paraprofessional, offered the student a FAPE for the 2019-20 school year. Having determined that the district offered the student a FAPE, the necessary inquiry is at an end and there is no need to reach the issue of whether iBrain was an appropriate unilateral placement for the student or whether equitable considerations support an award of tuition reimbursement.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated August 30, 2020 is modified by reversing that portion which found that the district did not offer the student a FAPE for the 2019-20 school year.

**Dated: Albany, New York
November 6, 2020**

**STEVEN KROLAK
STATE REVIEW OFFICER**