The University of the State of New York

The State Education Department
State Review Officer
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No. 21-056

Application of a STUDENT WITH A DISABILITY, by her parents, 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 petitioners, by Peter G. Albert, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which reduced their requested reimbursement for their daughter's tuition costs for the 2019-20 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered an appropriate educational program to the student for that year. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student in this appeal has been the subject of several prior State level appeals (see Application of the Dep't of Educ., Appeal No. 20-039; Application of a Student with a Disability, Appeal No. 19-089; Application of a Student with a Disability, Appeal No. 18-123). The student attended the International Academy of Hope (iHope) during the 2017-18 school year, and for the 2018-19 school year the parents commenced a due process proceeding against the district and

unilaterally placed the student at the International Institute for the Brain (iBrain) (see Parent Exs. A at p. 1; B at p. 5; F at p. 3; Dist. Ex. 5 at p. 1).[1]

On December 13, 2018, the district advised the parents of the need to evaluate the student to assess her current functioning and determine an appropriate program and services (Dist. Exs. 2; 4). In a February 6, 2019 email, the district notified the parents of the need to schedule a CSE meeting to develop the student's 2019-20 school year IEP (Dist. Ex. 1 at p. 9). On February 11, 2019, the parents provided the district with consent to evaluate the student, and district staff conducted a psychoeducational evaluation and a social history update (Dist. Exs. 4; 5; 14).

In a February 19, 2019 letter to the district, the parents requested that the next scheduled meeting of the CSE be a "Full" committee, including specifically, a district school psychologist, a district social worker, and participating in-person, a district physician and an additional parent member (Dist. Ex. 8 at p. 1). The parents also asked that the district provide notice of the CSE meeting to staff at iBrain, including the student's special education teacher, physical therapist, occupational therapist, and speech-language therapist (id.).

On March 11, 2019 a district social worker administered the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3) Parent/Caregiver Form and in spring 2019 conducted a classroom observation of the student at iBrain (Dist. Exs. 6; 7; 15 at p. 1).[2] In a March 22, 2019 email to the director of special education at iBrain (director), the district requested the names of the student's iBrain teachers and service providers for inclusion on the upcoming CSE meeting notice (Dist. Ex. 1 at p. 6). The director provided those names via email on March 25, 2019 (id.).

On April 17, 2019 the district conducted an assistive technology evaluation of the student (Dist. Ex. 9). In a May 17, 2019 email, the district reminded the parents of the upcoming May 24, 2019 CSE meeting and attached the results of the most recent assessments that would be utilized at the meeting (Dist. Ex. 1 at p. 4).

In a May 24, 2019 prior written notice, the district informed the parents that it had received a May 21, 2019 email from the parents' counsel canceling the May 24, 2019 CSE meeting, and notified the parents that the meeting was rescheduled for June 7, 2019, "to ensure appropriate and timely services for the 2019-2020 school year" (Dist. Ex. 10). The prior written notice also requested the parents' assistance in obtaining iBrain teachers/providers' progress reports, attendance records, the student's schedule, and any updated assessments prior to the next scheduled IEP meeting date (id. at p. 2).

On June 7, 2019, the CSE convened to develop the student's 2019-20 school year IEP (see Dist. Ex. 11). Participants included a district school psychologist who also served as the district representative, a district special education teacher, a district social worker, a district physician (by

[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).

[2] The classroom observation report reflects dates of the observation as both March 19, 2019, and April 15, 2019 and this document is referred to by both dates in the hearing record (Dist. Ex. 7; see Dist. Exs. 11 at p. 1; 12 at p. 2; 13 at p. 2; 15 at p. 3).

telephone), an additional parent member, and the district supervisor of psychologists (Dist. Exs. 11 at p. 18; 15 at p. 3). According to the CSE meeting minutes and the IEP attendance page, the CSE called both parents, without success, prior to the start of the CSE meeting (Dist. Exs. 11 at p. 18; 12 at p. 3). The June 2019 IEP indicated that iBrain did not provide Teacher/Provider progress reports to the district, nor did iBrain staff participate in the CSE meeting (Dist. Ex. 11 at p. 1). The CSE found the student eligible for special education programming and related services as a student with multiple disabilities and for the 2019-20 school year, recommended a 12-month program consisting of an 8:1+1 special class placement in a district specialized school along with five 30-minute sessions per week of individual occupational therapy (OT), three 30-minute sessions per week of individual physical therapy (PT), and four 30-minute sessions of individual speech-language therapy per week, as well as 1:1 health paraprofessional and 1:1 transportation paraprofessional services (id. at pp. 12-16). Further, the CSE recommended that the student use an "IPAD-Go Talk Now Plus" throughout the day at school and home (id. at p. 12). The CSE also recommended that the parents receive one 60-minute session per month of group parent counseling and training (id. at pp. 12, 15).

In a June 21, 2019 letter the parents provided the district with 10-day notice of their intent to unilaterally place the student at iBrain for the 2019-20 school year and seek public funding for that placement (Parent Ex. N). Also on June 21, 2019, the parents signed an enrollment contract with iBrain for the 2019-20 12-month school year beginning July 8, 2019 (Parent Ex. K).[3] On June 25, 2019, the district provided the parents with prior written notice of the CSE's recommendations (Dist. Ex. 13).

A. Due Process Complaint Notice

In a July 8, 2019 due process complaint notice, the parents requested an impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (Parent Ex. A at p. 2).[4] The parents asserted that the June 7, 2019 CSE meeting was not held at a time which was mutually agreeable to them and did not have a district physician and parent member physically present at the meeting (id. at p. 2). The parents also asserted that the June 7, 2019 IEP was inappropriate because: the CSE failed to classify the student as having a traumatic brain injury; the IEP failed to provide appropriate levels of support the student required; the IEP failed to provide for 1:1 direct instruction and support; and the IEP failed to offer an appropriate program and placement (id. at pp. 2-3). The parents further asserted that the recommended 8+1+1 special class in a district specialized school was not the student's least restrictive environment (LRE) (id. at p. 3). Finally, the parents assert that the recommended placement was the same placement offered in the prior school year, which they investigated and determined to be inappropriate to address the student's needs (id.). For relief, the parents requested

[3] On July 8, 2019, the parents signed a transportation contract for the 2019-20 extended school year for the student's transportation to and from iBrain (Parent Ex. G).

[4] The parents requested that the 2019-20 due process proceeding be consolidated with another pending due process proceeding concerning the student's 2018-19 school year which had yet to be fully adjudicated (Parent Ex. A at p. 1). In a July 24, 2019 Order of Consolidation, the IHO assigned to hear the merits concerning the 2018-19 school year denied the parents' request to consolidate the 2018-19 and 2019-20 school year cases (Order of Consolidation).

direct payment for the student's tuition at iBrain for the 2019-20 extended school year, including the costs of transportation that included the provision of a 1:1 paraprofessional (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 4, 2019 and concluded on August 7, 2020 after nine days of hearing (Tr. pp. 1-416). The bulk of the impartial hearing that centered on the substantive merits of the parents' claims occurred over four days (Tr. pp. 22-77, 84-413). In a decision dated January 2, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2019-20 school year, iBrain was an appropriate unilateral placement, and equitable considerations did not favor full reimbursement (IHO Decision at pp. 14-27).[5]

With respect to the district's failure to offer the student a FAPE, the IHO found that the June 7, 2019 CSE failed to reconvene within the 60-day period after the parents' request and to justify its change of the student's disability classification from traumatic brain injury (TBI) to multiple disabilities, and further determined that the change in classification was therefore improper (id. at pp. 17, 18). The IHO also found that the district failed to offer the student an appropriate functional grouping placement (id. at pp. 18-19). The IHO further found that the district failed to offer related services in sufficient type, frequency, or duration (id. at pp. 19-21). The IHO noted the parents' assertions as to the prior written notice (that it was not in the parents' primary language and it scheduled the CSE meeting with no input from the parents) and the failure of the district's physician to attend the meeting in person, however, the IHO made no distinct FAPE findings regarding these issues (id. at pp. 15-17).

With respect to the appropriateness of iBrain as a unilateral placement, the IHO found that "the parent[s] met [their] burden of demonstrating that iBrain provided the student with specially designed instruction which addressed the student's unique individual needs and allowed her to make some educational progress" (IHO Decision at p. 24). The IHO pointed to several factors, including that iBrain provided a small class size, appropriate functional grouping, and appropriate type, frequency, and duration of related services which were integrated into the student's educational programming, including assistive technology supports (IHO Decision at pp. 22-24).

With respect to equitable factors favoring an award of tuition reimbursement, the IHO noted that "parents, and in this case the placement, cannot deliberately impede the district's ability to offer FAPE" [emphasis added] (IHO Decision at p. 24). The IHO noted the district's assertions that the concerted efforts and actions taken by the parents, with the assistance of counsel and iBrain—including their refusal to cooperate with the IEP process, failure to attend the CSE meeting despite requisite notification, failure to answer telephone calls, cancellation of meetings, and rejection of the district's proposed placement without having any information about the placement—were flagrant and impeded its efforts to provide a FAPE (id. at pp. 2-26). The IHO determined, based on timelines and parent testimony that "the parent[s] w[ere] intent on placing the student in a private placement," visited the district program subsequent to filing the due process

[5] The first five pages of the decision document include an unnumbered title page, appearance and witness list, and exhibit pages while the body of the decision is numbered 2-28. All citations to the decision are therefore to the unnumbered title page as page 1, and to those decision pages numbered 2-28.

complaint notice, and signed the contract to enroll the student at iBrain on the same date that they filed their 10-day notice (id. at pp. 25-26). The IHO also called into question the parents' testimony concerning when the district's placement was "investigated or visited," as well the timing of the visit (id.). However, the IHO found that despite the parents' actions, a denial of any award was not warranted (id. at p. 26).

The IHO ordered the district to fund the parents' cost of tuition and related services at iBrain for the 2019-20 at a reduced amount of 65 percent of those costs due to equitable factors (IHO Decision at p. 26).

IV. Appeal for State-Level Review

The parents appeal, asserting the IHO erred in reducing the amount of the tuition reimbursement award by 35 percent due to equitable factors. Specifically, the parents assert the IHO erred in determining that the parents never intended to send the student to a district placement, as demonstrated by contracting with iBrain on the same day they provided their 10-day notice to the district. The parents also assert that since the IHO found the district failed to offer the student a FAPE, the district was precluded by law from asserting that equitable factors were in its favor, and as such, the IHO was also precluded by law from finding that equities favor the district over the parents, even if in part. The parents further assert that even if the balance of equities were in equipoise, a reduction of the costs of tuition and related services by 35 percent was unwarranted. The parents request that an SRO reverse that portion of the IHO's determination which reduced the tuition and related services costs award by 35 percent.

In its answer, the district responds "with a general denial of all the allegations" in the request for review and argues in favor of the IHO's determination that equitable factors did not favor a full award of tuition and related services reimbursement. In its cross-appeal, the district asserts the IHO erred in finding the district failed to offer the student a FAPE for the 2019-20 school year and that iBrain was an appropriate unilateral placement for the student. Specifically, the district asserts that the IHO erred in finding that the district failed to provide the parents with prior written notice in their primary language; and that the failure to have the district's physician attend the CSE meeting in person, the lack of the student's then-current teachers and related service providers, the failure to conduct any evaluations prior to the CSE meeting, and the change in the student's classification were all contributing factors in the district's denial of FAPE.[6]

The district also asserts that the IHO erred in finding that iBrain was an appropriate unilateral placement because: iBrain only enrolls students classified with traumatic brain injuries and that no students at iBrain are classified with multiple disabilities; the student received 60-minute blocks of related services without any evaluations to support that duration; iBrain only provided the student with 8.5 hours of academic instruction per week out of 40 possible hours of instruction and related services blocks; the hearing record is devoid of any proof that iBrain programming was individualized to meet the unique needs of the student, and instead the

[6] Contrary to the district's contention, the IHO did not find that the district failed to provide the parents with prior written notice in their native language, rather, the IHO was summarizing the parents' counsel's argument (IHO Decision at p. 15).

programming is a "one-size-fits-all" approach to the children with severe disabilities enrolled at iBrain.

The district also asserts first, that the IHO erred in only reducing the tuition award by 35 percent and should have denied all reimbursement based on the parents', the iBrain staff's, and the parents' advocates' actions. The district points to events, that when taken together, it contends justify a total bar to reimbursement, including the advocate's canceling of meetings, the iBrain staff's failure to attend the CSE meeting and their failure to provide the CSE with requested related services providers' progress reports, and the parents' failure to answer their phones on the morning of the re-scheduled CSE meeting. In the alternative, the district asserts that if the SRO does not bar reimbursement, the IHO's 35 percent reduction should be affirmed.

In a reply and answer to the district's cross-appeal, the parents deny each and every assertion made by the district, reiterate their assertions and claims as found in the request for review, and reiterate their request that an SRO uphold the IHO's determinations that the district failed to offer the student a FAPE and iBrain was an appropriate unilateral placement for the student. The parents further reaffirm their request that an SRO reverse the IHO as to the reduction of the award.

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]).[7]

[7] 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

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. June 7, 2019 CSE Meeting and IEP

In a cross-appeal, the district asserts that the IHO's determinations that the CSE's failure to have a district physician participate in person at the June 2019 CSE meeting and ensure that the student's iBrain teachers and related service providers attend the CSE meeting were improper bases to find that the district had denied the student a FAPE.

First, the IHO appeared to agree with the parents' assertion that the district's physician "needed to be present and participate in the IEP meeting to assist the IEP team in the determination of what would be appropriate for [the student] and that his/her opinion would have great weight to explain why reduced 30-minute related services sessions were not appropriate for [the student];" noting that the lack of the physician's input "may be a violation of FAPE" (IHO Decision at pp. 16-17). Regarding this issue, State and federal regulations require that the following members attend a CSE meeting:

> (i) the parents or persons in parental relationship to the student; (ii) not less than one regular education teacher of the student whenever the student is or may be participating in the regular education environment; (iii) not less than one special education teacher of the student, or, if appropriate, not less than one special education provider of the student; (iv) a school psychologist; (v) a representative of the school district who is qualified to provide or supervise special education and who is knowledgeable about the general education curriculum and the availability of resources of the school district; (vi) an individual who can interpret the instructional implications of evaluation results; (vii) a school physician, if specifically requested in

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).

> writing by the parent of the student or by a member of the school at least 72 hours prior to the meeting; (viii) an additional parent member of a student with a disability residing in the school district or a neighboring school district…if specifically requested in writing by the parent of the student, the student or by a member of the committee at least 72 hours prior to the meeting; (ix) other persons having knowledge or special expertise regarding the student; and (x) if appropriate, the student

(8 NYCRR 200.3[a]; 34 CFR 300.321[a]).[8]

Here, the student's physician provided medical documentation to the district on May 24, 2019 (see Parent Ex. Q). According to the June 2019 CSE meeting minutes, the district physician participated in the CSE meeting by telephone, at which time she indicated that she had consulted with the student's physician, who reported that the student was "doing better" and that the student's seizures were "under control" (Dist. Exs. 11 at p. 18; 12 at p. 2). Additionally, the district physician relayed the student's physician's report that the student needed supervision for "moving around in her environment and when eating" (Dist. Ex. 12 at p. 2). Thus, while the parents may have preferred that the district's physician participate in the June 2019 CSE meeting in person, the hearing record shows that the student's physician provided updated medical information to the district, and the district physician sought information about the student's medical status from her doctor, which the district physician relayed to the CSE during the meeting (Tr. pp. 236-37; Parent Ex. Q; Dist. Exs. 11 at p. 18; 12 at p. 2). Finally, it is disingenuous for the parents to claim that the physical presence of the district's physician was required to allow the CSE, including the parents and the student's then-current teachers and providers, to obtain critical input from the physician when neither the parents nor the student's then-current teachers and providers participated in the meeting.

With respect to the lack of attendance of the iBrain teacher or related service providers, the IHO found that "there was no teacher or service provider who worked with [the student] that attended the [CSE] meeting" (IHO Decision at p. 17). While the IHO is correct, the district does not have the authority to compel the attendance or participation of iBrain staff at a CSE meeting, and the hearing record shows that the district took other steps to include iBrain staff in the CSE meeting process; including requesting the names of and progress reports from the teacher and service providers who worked with the student (see Dist. Exs. 1 at pp. 3-6; 10 at p. 2; 11 at p. 1). The district did, however, ensure that all of the required members of the CSE participated in the June 2020 CSE meeting (Dist. Ex. 11 at p. 18).

Based on the above, to the extent the IHO relied upon the district physician's lack of physical presence at the meeting, the type of input she provided, and the absence of the student's then-current iBrain teachers or related service providers at the CSE meeting, the evidence in the hearing record does not support a finding that the district failed to offer the student a FAPE on the basis of the June 2019 CSE member's participation.

[8] Unlike State regulations, federal regulations do not require that an additional parent member or physician attend at the parents' written request (compare 8 NYCRR 200.3[a] with 34 CFR 300.321[a]).

Second, the district asserts in the cross-appeal that the IHO erred in finding that the CSE failed to support the change in the student's disability classification from TBI to multiple disabilities (IHO Decision at p. 18). Generally, with respect to disputes regarding a student's particular disability category or classification, federal and State regulations require districts to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA, as well as to gather information that will enable the student to be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]). Courts have given considerably less weight on identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed though special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; G.W. v. Rye City School Dist., 2013 WL 1286154, * 14 [S.D.N.Y. 2013]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). "Indeed, '[t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education'" Heather S. v. State of Wisconsin, 125 F.3d 1045, 1055 (7th Cir.1997).

Accordingly, the IDEA requires that CSEs do not merely rely not upon the disability category of a student to determine the needs, goals, accommodations, and special education services in his or her IEP, but instead utilize the information gleaned from the evaluation process. To wit, the 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 (see 34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Once a student has been found eligible for special education, the present levels of performance sections of the IEP derived from the relevant evaluations and assessments becomes the operative focus with respect to the student's needs and not the "label" that is used when a student meets the criteria for one or more of the disability categories.

> "Traumatic brain injury" is defined as "an acquired injury to the brain caused by an external physical force or by certain medical conditions such as stroke, encephalitis, aneurysm, anoxia or brain tumors with resulting impairments that adversely affect educational performance. The term includes open or closed head injuries or brain injuries from certain medical conditions resulting in mild, moderate or severe impairments in one or more areas, including cognition, language, memory, attention, reasoning, abstract thinking, judgement, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, information processing, and speech. The term does not include injuries that are congenital or caused by birth trauma."
>
> (see 8 NYCRR 200.1[zz][12]).

> "Multiple disabilities means concomitant impairments (such as intellectual disability-blindness, intellectual disability-orthopedic impairment, etc.), the combination of which cause such severe educational needs that they cannot be accommodated in a special education program solely for one of the impairments. The term does not include deaf-blindness." (see 8 NYCRR 200.1[zz][8]).

As discussed in greater detail below, the student required a small, highly-structured special education setting due to her severe intellectual, communication, and adaptive delays that adversely affected all areas of daily living, as well as her diminished ability to sustain attention and poor impulse control, and the parties agree she requires special education and related services (see Dist. Ex. 14).

At this juncture, when the student's eligibility for special education is not in dispute, the significance of the disability category label is more relevant to the local education agency (LEA) and State reporting requirements than it is to determine an appropriate IEP for the individual student.[9] Therefore, given the breadth of the student's needs, more than one disability category label could be appropriate, and under the circumstances of this matter, the IHO erred in determining that the district's assignment of the multiple disabilities classification category to the student contributed to the denial of a FAPE.

Third, regarding the district's appeal of the IHO's finding that the CSE "failed to conduct any evaluations in advance" of the June 2019 CSE meeting, a review of the decision shows that

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[9] The disability category for each eligible student with a disability is necessary as part of the data collection requirements imposed by Congress and the United States Department of Education upon the State, which require annual reports of [t]he number and percentage of children with disabilities, by race, ethnicity, limited English proficiency status, gender, and disability category, who fall in over a dozen other subcategories (20 U.S.C. § 1418[a]; 34 CFR 300.641). Although it does not bind the CSE in its responsibility to provide individualized services in accordance with the student's unique needs, for reporting requirement purposes

> [i]f a child with a disability has more than one disability, the State Education Agency (SEA)must report that child in accordance with the following procedure:
>
> (1) If a child has only two disabilities and those disabilities are deafness and blindness, and the child is not reported as having a developmental delay, that child must be reported under the category "deaf-blindness."
>
> (2) A child who has more than one disability and is not reported as having deaf-blindness or as having a developmental delay must be reported under the category "multiple disabilities"

(34 CFR § 300.641[d]). The LEA must, in turn, annually submit this information to the SEA though its SEDCAR system (see, e.g., Verification Reports: School Age Students by Disability and Race/Ethnicity" available at http://www.p12.nysed.gov/sedcar/forms/vr/1819/pdf/vr3.pdf; see also Special Education Data Collection, Analysis & Reporting available at http://www.p12.nysed.gov/sedcar/data.htm). According to the Official Analysis of Comments to the revised IDEA regulations the United States Department of Education indicated that the multiple disability category "helps ensure that children with more than one disability are not counted more than once for the annual report of children served because State's do not have to decide among two or more disability categories in which to count a child with multiple disabilities" (Multiple Disabilities, 71 Fed. Reg. 46550 [August 14, 2006]).

the IHO's determination on this matter was more nuanced than the district argues. Specifically, in the decision the IHO reiterated the parents' position that they had requested that the CSE conduct "any necessary evaluations" for consideration of a nonpublic school placement in advance of the CSE meeting (IHO Decision at p. 17). The IHO then went on to find that the CSE's failure "to conduct any evaluations in advance of the IEP meeting c[ould] be a violation of the [district's] own policies" in circumstances where parents request that the CSE consider a nonpublic school placement (id.).[10] To the extent that the IHO may have relied on the district's failure to evaluate the student for the purpose of determining a nonpublic school placement, the IDEA provides no such requirement. Rather, as discussed above, evaluations are required to be conducted in all areas of disability and to develop an accurate picture of the student's need for special education in order to develop an appropriate recommendation for the student, but need not be conducted within the conceptual framework of a specific potential placement.

Turning next to the district's appeal of the IHO's determination that the June 2019 CSE failed to offer appropriate related services to the student, the June 2019 IEP reflects that the CSE reviewed a February 2019 psychological evaluation report, a February 2019 social history update, results of a March 2019 adaptive behavior assessment, a spring 2019 classroom observation, and an April 2019 assistive technology evaluation report (Dist. Ex. 13 at p. 1; see Dist. Exs. 5-7, 9, 14). Additionally, according to the June 2019 IEP, documentation the CSE reviewed also included an April 2, 2018 comprehensive teacher report, a January 12, 2018 quarterly progress report, and an IEP from the 2018-19 school year, yet those documents were not included in the hearing record (Dist. Ex. 11 at p. 1; see Dist. Ex. 12 at p. 1; 13 at p. 2).[11]

On February 11, 2019, a district bilingual school psychologist conducted a psychoeducational evaluation of the student (Dist. Ex. 14). According to the report, the primary language spoken in the home was Japanese, and although the student presented as "active and alert," she did not sustain attention and focus in order for a "formal assessment" to be administered (id. at pp. 1-2). Overall, the results of the bilingual school psychologist's observations and interview with the parent indicated that the student had received a diagnosis of a seizure disorder, and that she was "experiencing increased seizure activity and some declines in functioning in the recent years" (id. at p. 2). The bilingual school psychologist reported that the student was minimally verbal, presented with severe intellectual, communication, and adaptive delays that adversely affected all areas of daily living, and that she required a small highly structured special education setting (id.). In the area of communication, the student was observed to use one- and two-word utterances and "engaged in spontaneous repetitive successive verbalizations"; however, significant articulation delays were noted (id. at pp. 1-2). The report indicated that the amount of words the student produced had decreased, her primary mode of communication at home consisted of physical gestures, facial expressions, and vocalizations, and that the student's "utterances were audible, but they lacked appropriate sophistication and diction" (id. at p. 2). While the student was ambulatory, the parent reported due to current medications she required supervision, and she was

[10] The IHO's decision is not clear whether this potential violation of district policy contributed to the denial of a FAPE in this matter (see IHO Decision at p. 17).

[11] It is unclear if the reference to the student's 2018-19 IEP was regarding a district IEP or an iBrain IEP (see Dist. Ex. 11 at p. 1).

dependent in all areas of daily living (id.). The student was observed to be social, appeared to be receptive to novel encounters and appeared to enjoy individual attention, but demonstrated a diminished ability to sustain attention and poor impulse control (id. at pp. 1-2).

Also on February 11, 2019, a district social worker conducted a social history with the student's mother serving as the primary informant (Dist. Ex. 5; see Dist. Ex. 15 at p. 1). According to the report, the student received diagnoses of traumatic brain injury and seizure disorder, which the parent reported had "gradually" worsened, interfered with the student's sleep and growth, and caused regression "academically and developmentally" (id.). The parent reported that the student received PT, OT, and speech-language therapy at iBrain (id. at p. 1).[12] Regarding communication skills, the parent reported that the student's hearing was within normal limits and that she responded to her name, mainly communicated using an assistive device, and in the past was able to count from 1 to 10 (id.). According to the parent, the student was able to say a few words in English and Japanese (id. at p. 2). The parent reported that the student was "active" in the home and able to ambulate independently; however, required supervision because her seizure medications caused a loss of balance (id. at p. 1). Additionally, the parent indicated that the student had a difficult time transitioning which resulted in tantrums when she became frustrated or overwhelmed (id.).

On March 11, 2019 the district social worker administered the Vineland-3 Parent/Caregiver Form to the parent to assess the student's adaptive skills (Dist. Ex. 6). Results indicated that the student's adaptive behavior composite, and communication, daily living, and socialization domain scores were "well below the normative mean," with each percentile rank below the first percentile, although results showed that the student's socialization skills were a relative strength for her (id. at pp. 2, 7). Results also indicated that the student did not present with maladaptive behaviors (id. at pp. 5, 7).

In spring 2019, the district social worker conducted a classroom observation of the student in her 8:1+1 classroom at iBrain during "Morning Meeting" (Dist. Ex. 7). The student was observed sitting in a wooden chair with a seatbelt and displaying excitement by clapping her hands and rocking back and forth in her chair when the teacher played music from a radio (id. at p. 1). When the teacher announced that it was dance time, the student attempted to unbuckle her seat belt by herself without success, and after the paraprofessional unbuckled her, was able to stand up (id.). The student made sounds, moved her arms and body to the music, jumped, and flapped her arms while the teacher held her to provide safety and prevent her from falling (id.). During that time the social worker observed the student singing along with the music by verbalizing some words and humming other words (id.). Next, the class transitioned from dance time to playing Jenga, and when it was the student's turn, she clapped and showed excitement when her paraprofessional removed a piece without the Jenga tower collapsing (id. at p. 2). According to the observation report, the student understood transitions, and when it was time to clean up, communicated to her paraprofessional her desire to stand up by trying to unbuckle her seatbelt (id.). The student was observed walking back to her desk while holding the teacher's hand, where she sat in her chair with her feet crossed and watched Elmo on her iPad (id.). When another student

[12] The parent reported that the student received services in the home including respite services, "dog therapy," and home health aide services (Dist. Ex. 5 at p. 1).

attempted to interact with her, the social worker reported that the student responded well; however, also attempted to grab that student's glasses off of her face (id.).

On April 17, 2019 the district arranged for an assistive technology evaluation of the student at iBrain (Dist. Ex. 9). Record review revealed that the student "mainly communicate[d] via an assistive device," although she was "still learning how to use the device and sometimes ha[d] tantrums when she ha[d] trouble communicating" (id. at p. 1). The evaluator reported that the student ambulated to the evaluation accompanied by iBrain staff and sat in a standard chair at the table without the need for adaptation of her seating or the tabletop (id.). According to iBrain staff, the student used an iPad with "Snap+Core software" in a field of nine with success (Dist. Ex. 9 at p. 1). During the evaluation, the evaluator observed that the student isolated her finger to activate icons in a field of nine to answer questions, make requests, and interact with staff (id.). At times, the student tapped the screen twice or more when selecting icons, which sometimes slowed the selection process and prompted the evaluator to recommend software that was "capable of ignoring multiple taps" (id.). Overall, the evaluator found that when provided with the device and software used during the evaluation, the student demonstrated the ability to locate and activate icons as she interacted with staff, visually attend, and exhibit purposeful actions (id. at p. 2). The evaluator recommended that the student continue to use an iPad with Snap+Core software, and due to her difficulty carrying the iPad, receive an iAdapter case with carrying strap and keyguard overlay that would be compatible with the iPad and software (id.).

Further, regarding the student's gross motor and adaptive skills the June 2019 IEP reflected portions of the psychological evaluation and classroom observation reports which indicated that the student was ambulatory but required supervision for balance, stood with support, jumped and moved her arms and body to music, sat in a chair with a seatbelt, and was dependent for all areas of daily living (Dist. Ex. 11 at pp. 1, 2). According to the IEP, the student required monitoring when walking and climbing stairs due to safety issues, she used a wheelchair on the bus, and an adaptive stroller at school (id. at p. 3). The June 2019 IEP reflected portions of the psychological and assistive technology evaluation reports which showed that the student mainly communicated using an assistive device, was minimally verbal, was able to say "a few words" in English and Japanese, at times used one- and two-word utterances with significant articulation delays noted, and appeared to understand transitions (id. at pp. 1, 2). Additionally, the student was able to locate and activate icons on an iPad to interact with staff and used "switch devices and voice output devices in academic contexts" (id. at pp. 2, 3). Specific to related services, the June 2019 CSE recommended that the student receive five 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, and four 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 11 at p. 12).

When asked during the hearing what, if any, other evaluations or reports the June 2019 CSE required to complete the student's IEP, the district social worker testified that the CSE would have needed documents including OT, PT, and vision therapy reports, and "any other related" professional working with the student to present those documents for the CSE meeting (see Tr. pp. 157-58). She opined that staff including the student's teacher and related service providers at iBrain "should have a report" and further testified that she had contacted iBrain about those reports, but did not recall whether she had received any reports from the school (Tr. pp. 158-59). Despite a May 24, 2019 request from the district for the parents' assistance in "obtaining teachers/providers' progress reports . . . and any updated assessments," prior to the CSE meeting, according to the

social worker, she did not receive any additional reports from the parent (Tr. p. 159; Dist. Ex. 10 at p. 2).

The district school psychologist who participated in the June 2019 CSE meeting testified that the CSE had requested that iBrain or the parents submit "updated teacher report and progress reports from [the student's] service providers" to the CSE but that the district did not receive any documents (Tr. pp. 167, 177-79; Dist. Ex. 11 at p. 18). He testified that having those documents would have helped the CSE "formulate services that [the student] would need in school so she would be a productive student" (Tr. pp. 179-80). At the time of the June 2019 CSE meeting, the district did not have an "updated evaluations" from the student's occupational therapist, physical therapist, or speech-language therapist, and the school psychologist testified that the CSE based its related service frequency per week recommendations on what had been "previously" recommended for the student at an undisclosed point in time (see Tr. pp. 213-15).[13] He further stated that the CSE's rationale for 30-minute sessions was based upon "best practice" and his opinion that "anything longer" for students who exhibited needs similar to the student in this matter resulted in frustration (see Tr. pp. 213-14).

Review of the above evaluative information and the June 2019 IEP present levels of performance provides little information about the student's specific related services needs (see Dist. Exs. 5-7, 9, 14). While some of the reports the CSE had available reflect the student received PT, OT, and speech-language therapy at iBrain, they do not indicate what gross motor, fine motor, or communication needs of the student those services addressed, the frequency and duration of such services, and how the student progressed with the level of services she received (see Dist. Exs. 5 at p. 1; 7 at p. 1; 9 at p. 1). Nor is it clear from the hearing record that the June 2019 CSE's recommendations regarding the weekly frequency and duration of each specific related service—that was based on prior recommendations not included in the hearing record—continued to be appropriate to meet her needs (see Tr. pp. 213-14; see also Tr. pp. 176-77). It is the district which is responsible for ensuring that evaluations occur when required (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). Here, the district appears to fault the parents and iBrain for not providing it with current evaluative or progress information about the student's needs addressed by OT, PT, and speech-language therapy; however, the hearing record does not suggest that the parents would have thwarted the district's efforts to conduct its own related services evaluations, as the parents had previously consented to the district conducting other types of evaluations of the student prior to the June 2019 CSE meeting (see Dist. Exs. 4-7; 9; 14).[14]

Additionally, the district argues on appeal that the IHO erred in determining that the June 2019 CSE failed to recommend assistive technology services. Federal and State regulations describe an assistive technology device as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase,

[13] The school psychologist testified that the April 2018 comprehensive teacher report the June 2019 CSE reviewed "was part of the IEP from the 2017/'18 school year," yet neither that teacher report nor the IEP were entered into evidence and it is not clear whether the related services frequency recommendations the school psychologist referred to came from those documents (Tr. pp. 176-77; see Parent Exs. A-U; Dist. Exs. 1-15).

[14] The district also inconsistently argues that the CSE reached out to iBrain for certain related service evaluation reports but did not receive them, yet "it is evident that the CSE possessed sufficient evaluative material."

maintain, or improve the functional capabilities of a child with a disability" and assistive technology service as "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device" (34 CFR 300.5, 300.6; 8 NYCRR 200.1[e]; [f]). Furthermore, State regulations consider assistive technology services to be a related service defined as a "developmental, corrective, and other supportive services as are required to assist a student with a disability" (8 NYCRR 200.1[qq]). Review of the June 2019 IEP shows that the CSE recommended an assistive technology device for the student, namely an "IPAD-Go Talk Now Plus," which was not the same software she was using at iBrain during the 2018-19 school year or that was recommended following the April 2019 assistive technology evaluation (compare Dist. Ex. 9; with Dist. Ex. 11 at p. 12). Although the CSE recommended that the student be provided with an assistive technology device, it did not recommend that she receive assistive technology services (see Dist. Ex. 11). Therefore, as the June 2019 IEP reflected the parent's report that the student "mainly communicate[d] using an assistive device," and the CSE recommended a different software than she was currently using, the evidence in the hearing record supports the IHO's determination that the lack of assistive technology services in this instance contributed to a denial of a FAPE (IHO Decision at p. 21; Dist. Ex. 11 at p. 1).

As such, the evidence in the hearing record supports a finding that the district failed to obtain sufficient evaluative information regarding student's needs addressed by her related services to support the adequacy of the CSE's related service recommendations in the June 2019 IEP, which resulted in a failure to offer the student a FAPE for the 2019-20 school year (Endrew F., 137 S. Ct. at 1001; Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]). As a result, the hearing record does not support reversing the IHO's finding with respect to the district's failure to demonstrate that its related services recommendations for the student were appropriate.

B. Unilateral Placement - iBrain

In a cross-appeal, the district asserts that iBrain was not an appropriate unilateral placement for the student for the 2019-20 school year because the program was not tailored for the student's disability classification, iBrain did not conduct any related services evaluations prior to making the student's program recommendation and related services were provided in 60-minute intervals, the school offered very little academic instruction to the student, and the iBrain program was not individualized to meet her special education needs. For the reasons discussed below, these arguments are not persuasive, and the evidence in the hearing record supports the IHO's finding that "iBrain provided the student with specially designed instruction which addressed the student's unique individual needs and allowed her to make some educational progress" (IHO Decision at p. 24).

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., 459 F.3d at 364; 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).

Generally, the director of special education at iBrain (director) testified that iBrain is a "highly specialized education program" that was "created for children who suffer from acquired brain injuries or brain-based disabilities" ages 5 through 21 years old (Parent Ex. S at pp. 1, 2). She stated that iBrain offered a 12-month extended school-year calendar and services during an extended school day which ran from 8:30 a.m. to 5:00 p.m. (id. at p. 1). She continued that most students at iBrain were non-verbal and non-ambulatory, all required 1:1 paraprofessional and related services, and all received IEPs (id. at p. 2). According to the director, "most students at iBRAIN had a disability classification of" TBI and during the 2019-20 school year "had management needs that were either intensive or highly intensive and which required a significant or high degree of individualized attention and intervention" (id.).

Turning first to the district's argument regarding the appropriateness of the student's classification as a student with a TBI, as discussed above, the issue of the specific special education disability category selected for a student is not determinative of which special education supports and services are appropriate for that student, nor does it, as the district asserts and will be discussed below, demonstrate that the iBrain "program was not tailored for this [s]tudent." Although the June 2019 CSE may have determined that multiple disabilities was an appropriate disability category for the student, that determination did not necessarily rule out other appropriate categories, including TBI. Specifically, the hearing record shows that the student has received diagnoses including acquired brain injury and seizure disorder, which the student's physician reported resulted in "severe impairments" in the student's "cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, information processing and speech" (Parent Ex. Q at pp. 1, 3).

At the outset of the discussion on this topic at the impartial hearing, the director testified that the district's "classifications [were] not consistent" with iBrain's internal determinations, although for the purpose of iBrain "identification," all students were classified as students with TBI (Tr. p. 343). Although the classification of TBI informed the type of instruction iBrain gave to students, the director testified that "it doesn't mean that we give the same exact instruction to every student" (Tr. pp. 344-45). The director testified that the student presented with significant developmental delays due to her "brain-based disability" and during the 2019-20 school year had a disability classification of TBI on her iBrain IEP (Parent Exs. E at p. 1; S at pp. 1-3). She further testified that the student's acquired brain injury adversely affected her educational abilities and performance in that she exhibited limited communication abilities, required assistance for all daily living activities, and was easily distractible (Parent Ex. S at pp. 2-3). As such, the evidence in the hearing record shows that the student had an acquired brain injury with concomitant deficits, and does not support the district's assertion that iBrain was not an appropriate unilateral placement on the basis of the student's classification category.[15]

Turning next to the district's argument concerning the lack of iBrain's "independent related services evaluations," I first note as discussed above that it was the district's responsibility to evaluate or otherwise obtain information regarding the student's related services needs and not the private school's (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]). Second, the evidence in the hearing record shows that iBrain did conduct assessments of the student's related services needs, and had sufficient information upon which to develop recommendations for the 2019-20 school year. The director testified that prior to developing the iBrain IEP, the "process starts with the therapists doing reassessments of the students . . . in early

[15] When responding to a question regarding how a student's classification affects the program recommendation, the district school psychologist testified that "it would affect [the] type of services you would give a student" but also stated that "in general, we're looking at the severity of the [] disability more than just the classification" to inform what services the student would need (see Tr. p. 171). He further agreed that "classification mainly serve[d] to give the pedigree information for the student" (Tr. pp. 171-72).

spring" (Tr. p. 369). Based on the results, the therapists contact parents to discuss additional concerns, develop proposed goals, and discuss the goals amongst themselves "as a group to see how we can maximize the interdisciplinary approach" (Tr. pp. 369-71). The therapists then draft what they will "write into the IEP," which is approved by the department director (Tr. pp. 370-71).

Regarding skills addressed by speech-language therapy and assistive technology, in an iBrain IEP dated May 20, 2019, iBrain staff detailed the student's communication needs, including that she communicated through facial expressions, gestures, 1-2 word productions and approximations, and her iPad-based communication "tool" (Parent Ex. E at pp. 1, 3-4). According to the IEP, the student's recent assistive technology evaluation provided additional program recommendations and information about her skills using the device, which were reflected in the IEP (id. at pp. 3-6). The IEP reflected that the student's Communication Function Classification System level was a "4," indicating inconsistent sender and/or receiver roles and turn taking skills (id. at p. 4). Her receptive language skills were assessed using an understanding section of the Dynamic AAC Goal Grid (DAGG-2) and the auditory comprehension subtest of the Preschool Language Scale-Fifth Edition (PLS-5), and her expressive language skills were assessed using the DAGG-2 expression section together with the expressive communication subtest of the PLS-5 (id. at pp. 4-6). The student's oral motor and feeding skills were assessed using the Feeding and Swallowing Evaluation checklist and clinical observation and determined to be within functional limits (id. at p. 7). Overall, review of the iBrain IEP provided detailed information regarding the student's present levels of performance in the area of assistive technology use, receptive and expressive communication skills, and oral motor/feeding skills (see id. at pp. 3-7).

Next, the May 2019 iBrain IEP provided a detailed description of the student's needs related to OT, including that with the implementation of behavioral strategies, the student had demonstrated an improved ability to follow simple instructions, engage with peers in the classroom, and produce pre-writing strokes to improve her writing skills (Parent Ex. E at p. 7). Related to fine motor skills, the student presented with a "MACS level I for right and left hands" indicating that she was able to handle objects easily and successfully with most limitations resulting from decreased speed and accuracy (id. at p. 16). The IEP also reflected the student's specific skills and needs related to graphomotor ability, sensory needs, adapted equipment use and self-care (see id. at pp. 7-8, 11-13). Further, the IEP described the student's sensory processing skills and deficits in the areas of tactile, vestibular, proprioceptive, visual, and auditory processing (id. at pp. 13-14). According to the IEP, the student benefitted from 1:1 paraprofessional services and multimodal strategies to maximize attention to tasks (id. at p. 8).

As for the student's gross motor needs, the May 23019 iBrain IEP indicated that the student was ambulatory but required close supervision to maintain her safety due to limited safety awareness and frequent loss of balance (Parent Ex. E at p. 8). The IEP also indicated that the student's movement pattern was marked by impulsive decision making, decreased safety awareness, and need for sensory input (id. at p. 15). PT sessions focused on improving the student's dynamic balance, jumping, running, hip and core strength, gait training, and navigating her environment (id. at pp. 8-9, 15-16). The Gross Motor Function Measure (GMFM-88) was used to assess the student's functional mobility in the areas of lying and rolling, sitting, crawling and kneeling, standing, walking, running, and jumping, revealing continued needs in the areas of standing and walking/running/jumping (id. at p. 10).

The hearing record shows that during the 2019-20 school year iBrain recommended that the student receive three 45-minute individual sessions per week of PT, five 60-minute individual sessions per week of OT, four 60-minute sessions per week of individual speech-language therapy, and one 60-minute session per week of speech-language therapy in a small group (Parent Exs. E at p. 38; S at p. 3). The student also had daily use of assistive technology devices and services, 1:1 full time paraprofessional services, and the services of a school nurse (Parent Exs. E at p. 39; S at p. 3).

Regarding the district's argument that iBrain's 60-minute related services sessions were not appropriate for the student, I note that the director testified that related services were "usually" provided in 60-minute sessions, using a push-in and pull-out model to ensure that the student's therapeutic goals were addressed in multiple locations (Parent Ex. S at p. 2). Additionally, the director stated that students "generally" require 60-minute session due to needs such as additional transition time, and "repetition need[ed] to foster neuroplasticity" (id.). Review of the May 2019 iBrain IEP shows that the related services providers indicated rationales for their recommendations: the speech-language pathologist recommended 60-minute sessions to allow for adequate processing time and number of trials to learn concepts and use the student's assistive technology device, as well as for equipment set up, breaks, redirection, programming, collaboration, prompting, and repetition (Parent Ex. E at p. 28). According to the physical therapist, 45-minute sessions were "essential" as the student had demonstrated success with that model, and she required frequent rest breaks, as well as assistance for transfers and set-up for therapy sessions (id. at p. 30). Similarly, the occupational therapist indicated that the student required the recommended amount of OT to retain her current skills and to continue to make progress toward her goals (id. at p. 32). The director testified that the basis for her professional opinion regarding the appropriateness of the related services recommendations was that she participated in "eight or nine meetings," at which time she discussed with the student's therapists the reasons for the 60-minute session duration recommendations (Tr. pp. 357-58, 363). She further testified that her opinion was based on her observation of the student within those related services sessions and her training (Tr. pp. 363-64).

In the cross-appeal, as a basis to argue the 60-minute related service sessions at iBrain were not appropriate, the district cites to the district school psychologist's testimony that the CSE recommended related service sessions of 30 minutes in length because it was part of a prior CSE recommendation and due to his opinion that "anything longer" caused students to lose focus and become frustrated (see Tr. pp. 213-14). While it is possible that the school psychologist's opinion might be validly used to support district programming under a public school IEP that called for less time in related services (i.e. 30-minute related services sessions), it does not follow that 60-minute sessions in a private school would be per se inappropriate, merely because of a pedagogical difference in approach, especially without evidence of inappropriate levels of inattentiveness or frustration to support that assertion.[16] Additionally, as discussed above, there is no indication in the hearing record that the school psychologist had knowledge of the student's performance at

[16] The test for a public school IEP would similarly be whether the student was likely to make progress, not regression. Just because I find that 60-minute related service sessions were appropriate in the private school does not mean that a public school must, by definition, mirror the parents' preferred approach taken in the private school.

iBrain during the 2018-19 school year in related service sessions of 60 minutes in duration, nor did the district otherwise have sufficient information about the student's related services needs at the time of the June 2019 CSE meeting (see Tr. pp. 174, 215, 245-46). Furthermore, although not dispositive, review of the student's May 2019 iBrain IEP generally reflects that she made progress in related service areas during the 2018-19 school year (see Parent Ex. E at pp. 3-14). As such, review of the evidence in the hearing record does not support the district's assertion that iBrain failed to have sufficient evaluative information regarding the student's related service needs and that related service sessions of 60-minute duration were inappropriate.

Next, without elaboration or indicating what it determined to be an appropriate alternative, the district argues that iBrain was not appropriate because it offered "very little academic instruction to the [s]tudent," as she only received 8.5 hours out of a 40 hour instructional week. The director stated that iBrain students were provided instruction using evidence-based practices including direct instruction, cognitive strategies, diagnostic-prescriptive approaches, behavior management, physical rehabilitation, therapeutic intervention, social interaction, and effective transition services (Parent Ex. S at p. 2). Additionally, iBrain used a multisensory learning approach and an interdisciplinary team model (Tr. p. 346). She further testified that in addition to one period of direct instruction per day, "academic instruction was incorporated throughout the school day" (Parent Exs. M; S at p. 2).

According to the director, the student was on a "pre-k" academic functioning level for math and ELA (Parent Ex. S at p. 3). The May 2019 iBrain IEP indicated that the student had worked on goals focusing on literacy and math and had exhibited academic progress (Parent Ex. E at p. 2). Specifically, the student answered "wh" questions when presented with appropriate level books, pictures and materials, enjoyed browsing the pages of books, matched the correct quantity to corresponding symbols for numbers 1-10, and enjoyed working with manipulative materials during counting activities (id. at pp. 2-3). During the 2019-20 school year the student received instruction in a 12-month 8:1+1 special class extended school day program (Parent Ex. S at p. 3). Review of the student's 2019-20 weekly schedule showed that in addition to the 30-minute daily session of "1:1 Academics" instruction, the student received either one hour of literacy and/or math instruction per day, in addition to "Morning Meeting" and "Group Games" (Parent Ex. M).

The totality of the evidence in the hearing record, some of which is described above, reflects that iBrain provided the student with academic instruction that appropriately addressed her academic needs and that she exhibited progress. As such, the amount of academic instruction the student received at iBrain, even if she could have theoretically received more, is not a basis to overturn the IHO's finding that her placement there was appropriate.

Finally, the district argues that iBrain provides a "substantially similar" program to all students and that the hearing record is devoid of evidence that iBrain individualized the student's program to meet her needs. The director testified that she disagreed with the district's assertion that iBrain provided "homogeneous instruction to all of our students," implying that iBrain does "the same thing for every student in the building" (Tr. pp. 344-45). The primary question in evaluating whether iBrain was an appropriate unilateral placement for the student is not what the school provided to other students, but whether it provided special education supports that were commensurate with the student's academic, gross and fine motor, and communication abilities and needs, such that it can be said to have provided an specialized instruction to the student that

addressed her own particular unique needs. As discussed at length above, the evidence in the hearing record supports the IHO's finding that iBrain's provision of a small class size, as well as all of the related services the student required and 1:1 support to address her academic needs, constituted specially designed instruction which addressed her unique individual needs while allowing her to make some educational progress and, accordingly, I decline to disturb the IHO's determination in this regard (see IHO Decision at p. 24).

C. Equitable Considerations

The parents contend on appeal that the IHO erred in reducing the amount of the tuition reimbursement award by 35 percent due to equitable factors because he incorrectly determined that the parents never intended to send the student to a district placement. The district argues in the cross-appeal that the IHO should have reduced tuition reimbursement based on the parents' lack of cooperation in the IEP development process.

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

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

2004]; Berger, 348 F.3d at 523-24; 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).

To the extent the IHO reduced tuition reimbursement to the parents based on his finding that their actions demonstrated that they never intended to have the student attend a district placement, such rationale is misplaced. Even if the parents had no intention of placing the student in the district's recommended program, it is well-settled that it would not be a basis to deny their request for tuition reimbursement (see C. L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]).

With respect to the district's argument concerning cooperation, in arguing to uphold the IHO's reduction of tuition reimbursement, as noted above, it is the district's responsibility to evaluate the student and there is no indication from the record that the parents interfered with the district's ability to conduct evaluations of the student. While the district appears to have substantially complied with federal and State regulations that require school districts to take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]), the parents' failure to appear at the June 2019 CSE meeting and to secure the attendance of iBrain staff and submission of documentation from iBrain at the meeting did not contribute to the district's failure to offer the student a FAPE. Indeed, the hearing record supports a finding that the parents did cooperate with the CSE concerning evaluations by consenting to district evaluations of the student. Accordingly, based on the particular circumstances presented herein, I find that the hearing record does not support a finding that equitable considerations weigh against the parents to the extent that either a partial or full reduction of tuition reimbursement is warrant. As a result, the reduction of the tuition award as found by the IHO is hereby reversed.

VII. Conclusion

Based on the foregoing, I find that the district failed to offer the student a FAPE for the 2019-20 school year, however for different reasons than the IHO; that iBrain was an appropriate unilateral placement; and, equitable considerations favor a full award of tuition reimbursement (Endrew F., 137 S. Ct. at 1001; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65 ; E.M., 758 F.3d at 461).

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that that portion of the IHO decision dated January 2, 2021 which reduced the tuition reimbursement award by 35 percent is hereby reversed; and,

IT IS FURTHER ORDERED that the district is ordered to fund the cost of the student's tuition at iBrain for the 2019-20 school year.

Dated: **Albany, New York**
April 5, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER