The University of the State of New York

The State Education Department
State Review Officer
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No. 21-063

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by John Henry Olthoff, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Hae Jin Liu, 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 denied their request to be reimbursed for their son's tuition costs at the International Institute for the Brain (iBrain) for the 2019-20 school year. The 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 has been the subject of prior State-level administrative review proceedings, including an appeal involving the student's stay-put placement during the pendency of the present matter (see Application of a Student with a Disability, 20-178; Application of a Student with a Disability, Appeal No. 20-051; Application of a Student with a Disability, Appeal No. 18-139). The facts and procedural history preceding this case—as well as the student's educational history—will not be repeated here in detail, as the parties' familiarity with the same is presumed.

Relevant to the present matter, the district scheduled a CSE meeting for the student's 2019-20 school year for May 10, 2019, which was rescheduled at the parents' request for May 20, 2019 (see Dist. Exs. 6; 7; 10-15; 22 at pp. 3-11). The CSE meeting took place on May 20, 2019;

however, neither the parents nor staff from iBrain attended (Dist. Exs. 8-9; 16 at pp. 1, 8-9). Having found that the student remained eligible for special education as a student with multiple disabilities, the May 2019 CSE recommended a 12-month school year program in a 12:1+(3:1) special class in a specialized school, along with adapted physical education, individual paraprofessional services, assistive technology, special transportation, parent counseling and training, and the following related services on a weekly basis: three 30-minute sessions of individual occupational therapy (OT), three 30-minute sessions of individual physical therapy (PT), five 30-minute sessions of individual speech-language therapy, and two 30-minute sessions of individual vision education services (Dist. Ex. 9 at pp. 5, 16-17, 19; see Parent Ex. N at p. 1).

On June 19, 2019, the parents executed a contract for the student's attendance at iBrain for the 2019-20 school year (Parent Ex. F). In a letter to the district dated June 21, 2019, the parents provided notice of their intent to unilaterally place the student at iBrain for the 2019-20 school year and seek public funding for this placement (Parent Ex. J).

In a prior written notice and a school location letter, both dated June 26, 2019, the district summarized the May 2019 CSE's recommendations and notified the parents of the particular public school site to which the district assigned the student to attend for the 2019-20 school year (Dist. Exs. 2-3).

A. Due Process Complaint Notice

By due process complaint notice dated July 8, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year, and requested an interim order of pendency, asserting that the basis for pendency during the instant matter was an unappealed IHO decision issued on June 20, 2018 as part of an impartial hearing concerning the 2017-18 school year (Parent Ex. A at pp. 1-2). Specifically, the parent's pendency request was that the district prospectively pay for the student's full tuition at iBrain that included "academics, therapies, and a 1:1 professional," as well as special transportation accommodations including limited travel time, a wheelchair accessible vehicle, air conditioning, flexible pick-up and drop off schedule, and a 1:1 transportation paraprofessional (id. at p. 2).

Regarding the issue of the district's offer of a FAPE, the parents asserted that the district committed "many substantive and procedural errors" in the development of the May 2019 IEP and with respect to the "subsequent placement recommendation" at the assigned public school site (Parent Ex. A at p. 2). The parents noted that they rejected both the May 2019 IEP and the assigned public school site "in their entirety" (id.). The parents alleged that the May 2019 CSE failed to hold the "annual review meeting at a time that was mutually agreeable" with the parents and that complied with the parents' request for a "Full Committee" meeting that included a district school physician and parent member participating in person to discuss the student's needs for the "extended school year" (id.). Next, the parents asserted that the student would be "expose[d]" to substantial regression as a result of the "significant and unsubstantiated reduction in the related services mandates and the student-to-teacher ratio of the recommended class size" in the IEP (id.). With respect to the "recommended program and placement," the parents alleged that it failed to meet the student's "highly intensive management needs [that] requir[ed] a high degree of individualized attention and intervention," it did not constitute the student's least restrictive environment (LRE), and the student-to-teacher ratio of the special class placement—here,

"12:1+(3:1)"—was "too large a ratio to ensure the constant 1:1 support and monitoring" the student required to "remain safe" (id. at p. 3). The parents also alleged that the student-to-teacher ratio did not "offer the 1:1 direct instruction and support" the student required to make progress (id.). The parents further asserted that the May 2019 IEP was not based upon "any individualized assessment" of all of the student's needs and, thus, would fail to "confer any meaningful educational benefit" to the student during the 2019-20 school year (id. at p. 2).

The parents also alleged that the May 2019 IEP failed to adequately describe the student's present levels of performance and management needs and also failed to include measurable annual goals (see Parent Ex. A at p. 2). As a result, the parent contended that the June 2019 IEP did not reflect the student's "individual needs . . . as a student with a brain injury" (id.). The parents further asserted that the district's "specialized program" did not offer an "extended school day" that was "necessary" for the student "to make meaningful progress" (id. at p. 3).

As relief, the parents requested an order directing the district to directly pay iBrain for the costs of the student's full tuition for the 2019-20 extended school year, to pay the student's transportation costs including a 1:1 travel paraprofessional, and to reconvene a CSE meeting for the student (see Parent Ex. A at p. 3).

B. Impartial Hearing Officer Decision

On January 3, 2020, an impartial hearing convened, which concluded on November 19, 2020 after a total of 12 days of proceedings (see Tr. pp. 1-238).[1] In a decision dated January 12, 2021, the IHO found that the district offered the student a FAPE for the 2019-20 school year (see IHO Decision at pp. 8-10).[2] The IHO determined that the May 2019 CSE acted appropriately in holding the meeting without the parents and that the "parent[s'] failure to participate at the rescheduled CSE meeting was not the fault of the [district]" (id. at p. 8). The IHO also concluded that, given that the parents did not attend the CSE meeting, the lack of a physician at the meeting did not deny the student a FAPE (id. at p. 9). Regarding the evaluative information available to the CSE, the IHO found that although the district did not have an updated social history or a current psychoeducational evaluation, the fault for the deficiency lay with the parents who frustrated the district's attempts to obtain such information (id, at pp. 8-9). The IHO also noted that the timing of the assistive technology evaluation did not impact the offer of a FAPE since it was completed prior to the May 2019 CSE meeting (id. at p. 9).

Based on the information available to the CSE, the IHO concluded that the CSE developed an appropriate IEP for the student (IHO Decision at p. 9). The IHO indicated that the CSE's classification of the student as a student with multiple disabilities (instead of as a student with a traumatic brain injury) did not result in a denial of a FAPE since "the classification did not

[1] The IHO issued an interim decision on pendency on March 17, 2020, which was appealed (Mar. 17, 2020 Interim IHO Decision). In a decision dated May 4, 2020, an SRO determined that the district was not required to fund the student's attendance at iBrain during the pendency of the proceedings (Application of a Student with a Disability, Appeal No. 20-051).

[2] The IHO also issued three corrected decisions; however, the corrections appear to be limited to minor formatting changes and changes to the exhibit list attached to the IHO Decision.

determine the program" (id.). The IHO found the annual goals to be "measurable and appropriate" and "similar to the goals on [the iBrain] IEP for the subject school year" (id.). The IHO concluded that the 12:1+(3:1) special class, along with supports for the student's management needs and related services, "were sufficient to meet the student's needs" and to allow him "to obtain an educational benefit from instruction " (id. at p. 8). Specific to the recommended related services, the IHO determined that the amount and frequency were appropriate to meet the student's needs even though iBrain provided more (id. at p. 9).

Having found that the district offered the student a FAPE, the IHO indicated that he did not have to reach the question of the appropriateness of the unilateral placement or consider equitable considerations (IHO Decision at p. 10). However, the IHO did note that the parents' failure to participate in the CSE process impeded the district's ability to include the parent and prevented the district from evaluating the student (id.). Therefore, the IHO found that equitable considerations "would not justify reimbursement to the parent" (id.). Based on the foregoing, the IHO denied the parents' request for tuition reimbursement (id.).

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO erred by finding that the district offered the student a FAPE for the 2019-20 school year. Regarding the May 2019 CSE meeting, the parents argue that the IHO should have found a procedural violation based on the district not scheduling the CSE meeting at a mutually agreeable time; the parents contend the scheduled time was close to the time the parents had indicated they would be unavailable and that the IHO erred in finding the parents lack of participation in the meeting was not the fault of the district. The parents also assert that the IHO ignored the district's failure to have a physician present at the CSE meeting. In addition, the parents argue that the IHO erred in failing to find that the district predetermined the student's IEP. The parents further allege that the IHO erred in failing to find that the district did not conduct sufficient evaluations of the student and in faulting the parents for the district's failures.

As for the May 2019 IEP, the parents assert that the IHO erred in finding that the CSE's classification of the student as a student with multiple disabilities was not a denial of a FAPE. In addition, the parents contend that the IHO erred in finding the annual goals appropriate and assert that they were copied verbatim from the student's IEP for the 2018-19 school year. Next, the parents assert that the IHO erred in finding that the 12:1+(3:1) special class and the level of related services recommended by the CSE were appropriate.[3] Regarding the class ratio, the parents assert that the IEP failed to identify all of the student's management needs and that the student required a 6:1+1 special class to address his highly intensive management needs. As to the related services, the parents argue that the CSE reduced the frequency and duration compared to that provided at iBrain and that the evidence in the hearing record supported a finding that the student required related services on a push-in/pull-out basis.

[3] The parents object to the IHO's citation to an SRO decision regarding another student at the end of the sentence in which he determined that the district's recommended program met the student's needs; however, the IHO also cited to a Supreme Court case in the same sentence and these citations appear to relate more to the legal standard employed by the IHO than to the application of the facts in this matter to the relevant standard (see IHO Decision at p. 8). Accordingly, the parents' contention appears to be misplaced in this instance.

Finally, the parents assert that the IHO erred by not issuing a determination regarding the appropriateness of iBrain as the student's unilateral placement for the 2019-20 school year and in finding that equitable considerations did not weigh in favor of an award of tuition reimbursement. The parents include additional evidence with their request for review.[4]

In an answer, the district responds to the parents' allegations and argues that the IHO properly found that the district offered the student a FAPE for the 2019-20 school year.[5]

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,

[4] The additional evidence included with the parents' request for review consists of a copy of an IEP developed for the student on June 10, 2020 with an implementation date of June 25, 2020. Generally documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the proffered document was available at the time of the impartial hearing and, in any event, is not necessary to resolve the issues presented on appeal (see F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]). Therefore, I decline to exercise my discretion to consider the document as additional evidence.

[5] In addition, the district argues that the parents' request for review was not properly verified because it was executed by the student's father, whereas the due process complaint notice was filed by student's mother alone. The district asserts that the student's father does not have standing to appeal the IHO's decision. State regulation requires that "[t]he request for review shall be verified by the oath of at least one of the petitioners" (8 NYCRR 279.9[b]). The district cites no authority for the proposition that a parent who has the legal authority to make educational decisions for the student and exercise statutory rights under the IDEA (see 34 CFR 300.30[b]; 8 NYCRR 200.1[ii][3]-[4]) may not pursue an appeal of an IHO decision (particularly in conjunction with the original parent who pursued the hearing); accordingly, I decline to reject the parents' request for review on the ground that the student's father verified the request for review.

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 LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general

education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 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. May 2019 IEP

Although the analysis included in the IHO's decision is brief, upon careful review of the evidence included in the hearing record, I largely concur with the IHO's determinations. In particular, the hearing record supports the IHO's findings relating to the conduct of the May 2019 CSE meeting, including the scheduling thereof and the CSE composition. Further, there is no evidence in the hearing record to support the parents' claim that the May 2019 CSE predetermined the student's IEP. In addition, the hearing record does not provide a basis for modifying the IHO's determinations relating to the appropriateness of the student's eligibility classification, the recommended annual goals, or the recommended class size. However, with regard to the related services recommended in the May 2019 IEP, review of the evidence in the hearing record does not support the IHO's determinations.

Here, the parties do not dispute that the student required the related services of OT, PT, speech-language therapy, and vision education services during the 2019-20 school year. On appeal, the parents argue that the IHO erred in finding that the May 2019 CSE's related services recommendations were appropriate given the student's medical history and diagnoses. The parents note that the student received a total of 18 hours per week of related services during the 2017-18 school year at iHope (at district expense pursuant to a June 2018 IHO decision) and during the 2018-19 school year at iBrain, whereas the May 2019 CSE recommended a total of 6.5 hours of

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

related services. Additionally, the parents point to testimony at the impartial hearing that the student required 60-minute related services sessions, rather than the 30-minute duration recommended in the May 2019 IEP. Finally, the parents argue that the May 2019 CSE's recommendation for all pull-out services was not appropriate. The district argues that the IHO was correct in his determination and cites to a March 2019 classroom observation, as well as the testimony of the district social worker who conducted the classroom observation and the district school psychologist who served as the district representative at the May 2019 CSE meeting, to support its argument that the duration of the recommended related services sessions was appropriate.

Review of the hearing record indicates that the May 2019 CSE had before it and reviewed a January 2014 psychological report, a January 2015 teacher interview report, an April 2015 hearing and speech evaluation, a February 2017 school report, a June 2017 school progress update, a March 2019 classroom observation, and an April 2019 assistive technology evaluation (Tr. pp. 121-22; Dist. Exs. 2 at p. 2; 9 at pp. 1-5; 24 at p. 3; see Dist. Exs. 19; 20).[7] Additionally, the district psychologist who chaired the May 2019 CSE meeting testified that the CSE reviewed the June 2018 IEP (Tr. pp. 121-22; Dist. Exs. 16 at p. 6; 24 at p. 2; see Parent Ex. N).

The hearing record shows that during the 2018-19 school year while the student was at iBrain, he received the related services of OT, PT, and speech-language therapy each five times per week for 60 minutes, vision education services once per week for 60 minutes and assistive technology services once per week for 60 minutes, and that all services were provided individually (Parent Ex. D at pp. 21-26, 31). However, the hearing record does not indicate the extent to which the May 2019 CSE was aware that the student was receiving this level of related services during the 2018-19 school year.

When drafting the student's IEP for the 2019-20 school year, the May 2019 CSE relied heavily on the present levels of performance contained in the May 2017 IEP along with additional information provided by the March 2019 classroom observation and the April 2019 assistive technology evaluation (compare Dist. Ex. 9 at pp. 1-5, with Parent Ex. M at pp. 1-4, and Dist. Exs. 19-20). Furthermore, the district psychologist confirmed that the present levels of performance remained the same in the May 2019 IEP as in prior IEPs because the CSE did not have any of iBrain's then-current progress reports (Tr. pp. 121-22; Dist. Ex. 24 at p. 2).[8] She indicated that "outreach was made" in order to obtain updated evaluations and reports; however, since the district was unable to schedule or obtain such information, the CSE used what was available to it (Tr. pp. 112-13, 124; Dist. Ex. 24 at p. 2; see Dist. Exs. 7 at p. 2; 13 at p. 2; 16 at pp. 4, 6, 8-9; 22 at pp. 6, 7, 10).

A district social worker conducted the March 2019 classroom observation of the student during a pull-out speech-language therapy session at iBrain (Dist. Ex. 19; see Dist. Ex. 25 at p. 1).

[7] The evaluative information contained in the hearing record was limited to the April 2019 assistive technology evaluation and the March 2019 classroom observation (Dist. Exs. 19; 20).

[8] The district school psychologist also confirmed that the present levels of performance contained in the June 2018 IEP were the same as in the May 2019 IEP (Tr. p. 122; compare Dist. Ex.9 at pp. 1-5, with Parent Ex. N at pp. 1-4).

According to the social worker, during the therapy session, the student worked on an oral motor activity and using an eye gaze device (Dist. Ex. 19 at p. 1).[9] The social worker reported that the student required several verbal and physical prompts to turn his head towards the speech therapist, to open his mouth, and to bite on the "chewy" being offered (id. at pp. 1-2). The student fell asleep while the therapist was setting up the eye gaze device and she explained that the student "c[ould] not be woken if asleep" (id. at p. 2). Once the student awakened, the therapist worked on encouraging him to make a choice between two pictures using the eye gaze device and then subsequently to utilize the device to request "stop" or "more" (id.). The social worker observed that throughout the observation the student presented with a "low activity level" (id.).

According to the April 2019 assistive technology evaluation report, the student was non-ambulatory and used a manual wheelchair, and he was dependent on others for wheelchair mobility (Dist. Ex. 20 at p. 1).[10] The evaluator indicated that the student had voluntary movement of both his hands and feet and could reach and grasp; however, he presented with low muscle tone throughout his neck and body resulting in poor head, neck, and trunk control (id.). Additionally, the student required support and positioning when sitting to increase his head and trunk control (id.). The evaluator noted that the student exhibited good eye contact and was able to visually track an object and maintain visual fixation on it as it was moved through all visual fields and planes (id. at p. 2). She indicated that she trialed a jelly bean switch with the student, but he had difficulty operating the switch with his hands and, given the student's difficulty lifting his head and maintaining it in an upright position, it was not feasible to position the switch next to the student's head (id.). The evaluator reported that she also trialed eye-gazing technology with the student (id.). She indicated that the student had difficulty sustaining visual attention to the screen due to decreased head support while sitting in his wheelchair but his interest and head control improved greatly when transferred to a Rifton chair with head support (id.).[11] The evaluator concluded that the student demonstrated increased success and attention when positioned appropriately and provided the necessary support for his head, neck, trunk, and arms when sitting (id.). The evaluator recommended that the student receive an eye gaze device with speech generating software and pillow switches to augment his success when his eyes fatigued, as well as that the student be placed in his Rifton chair whenever possible as it provided much better positioning and support than his wheelchair (id.). She further recommended that the parents explore having a headrest added to the student's wheelchair (id.).

Based on a June 2017 progress report, the May 2019 IEP present levels of academic performance repeated information from the student's June 2018 IEP indicating that the student was

[9] It appears the March 2019 classroom observation was included verbatim in the May 2019 IEP (compare Dist. Ex. 9 at pp. 2-3, with Dist. Ex. 19).

[10] The May 2019 IEP contained the summary and conclusions section of the April 2019 assistive technology evaluation verbatim (compare Dist. Ex. 9 at pp. 1-2, with Dist. Ex. 20 at p. 2).

[11] The evaluator indicated that the student used a Rifton 850 activity chair in his classroom, and noted that his alertness, interest in activity, and head control greatly improved after being placed in the activity chair and reclined 10 degrees (Dist. Ex. 20 at p. 2). The evaluator further noted that the student maintained his head in an upright position and rotated his head left and right in command and that he demonstrated the ability to maintain visual attention on the eye gaze device to answer yes/no questions and play games (id.).

non-verbal and communicated via touch, smiling, laughing, and some vocalizing (compare Parent Ex. N at p. 2, with Dist. Ex. 9 at p. 2). Additionally, the IEPs noted that the June 2017 progress report identified that the student had made progress in both literacy and math goals as well as using his vision in functional tasks such as choice making (compare Parent Ex. N at p. 2, with Dist. Ex. 9 at p. 2).

The May 2019 IEP repeated the student's present levels of physical development from the June 2018 IEP (compare Parent Ex. N at pp. 2-4, with Dist. Ex. 9 at pp. 4-5). The May 2019 IEP stated that the student remained non-ambulatory and required full support for his activities of daily living (ADL) needs; experienced seizures for which he took mediation at home; required multiple positioning devices; required close observation during feedings as indicated in his most recent swallow study; was able to control his arm movements with some effort and would reach towards an object of interest; had significant delays in all motor skills; required full assistance to maintain upright postures such as sitting; required full assistance for all mobility; exhibited low muscle tone proximally, with increased tone in his arms and legs; and required frequent positioning changes due to an inability to change positions without assistance (Dist. Ex. 9 at pp. 4-5). The IEP described the student as having a significant head-lag, and noted that he did not keep his head in midline and when at rest his head was often tilted to the side and back which put strain on his neck muscles (id. at p. 4). The IEP further noted that the student did not have leg control and kept his legs in a butterfly like position when at rest; used an adaptive chair with padding and straps; and used a stander and side-lyer positioning device for periods throughout the day to strengthen his muscles (id.). As reported in a June 2017 progress report and reflected in the May 2019 IEP, through OT and PT, the student had increased his endurance to various positions and movements throughout the day, had increased tolerance to proprioceptive, vestibular, olfactory and auditory input, but was dependent in all activities of daily living (id. at p. 5). The May 2019 IEP indicated that the student tolerated his ankle foot orthoses, stander, side-lyer, adapted classroom chair, his wheelchair, and tumble forms floor sitting chair (id.). Additionally, the student was able to indicate through vocalizations when he was comfortable and when he needed to change position (id.). The IEP reflected a February 2017 school report that indicated the student was in the process of being toilet trained; was able to eat and drink thickened liquid during lunch and snack time with assistance; and was progressing well holding his head up and maintaining a stable posture during academics and circle time (id.). Finally, the May 2019 IEP included a statement from an OT report, copied directly from the June 2018 IEP, that therapy was to address fine motor skills, ADLs, executive cognitive functioning skills, and postural stability (id.).

In speech and language, the May 2019 IEP included the same information from the June 2018 IEP, which indicated that the student primarily communicated by occasional vocalizations or by smiling when spoken to and demonstrated awareness of communicative partners by establishing eye contact but had difficulty maintaining attention and often looked away (compare Parent Ex. N at p. 2, with Dist. Ex. 9 at p. 3). Additionally, the IEPs reflected that the student demonstrated the ability to momentarily glance at a person speaking to him, could express pleasure and displeasure through vocalizations, would smile and wiggle his arms and legs when happy or excited and whine or cry when upset or uncomfortable, and according to the present levels of performance there were no hearing concerns and the student demonstrated response to speech at normal conversation levels (compare Parent Ex. N at p. 2, with Dist. Ex. 9 at p. 3).

To address the student's management needs, the May 2019 IEP indicated that the student required a small highly structured environment that could address his global and medical needs; daily feeding guidelines and feeding logs; a barrier free environment; the assistance of a health paraprofessional - to address his feeding, seizures, non-ambulatory, and ADL needs; speech-language therapy to address delays; OT to address fine motor delays; PT to address gross motor delays; adaptive equipment in order to help the student maintain upright positioning, e.g. a supine stander, side-lyer, semi-upright seating for alternative positioning due to respiratory concerns, and a wheelchair; and close monitoring for seizures, especially after naptime (Dist. Ex. 9 at p. 5). To address the student's identified needs, the May 2019 CSE recommended the student receive the following related services individually for 30 minute sessions: OT and PT three times per week; speech-language therapy five times per week; and vision education twice per week (id. at pp. 16-17).[12]

The director of special education at iBrain (director) testified that the related services at iBrain and iHope were provided in 60-minute sessions because of transferring and repositioning needs, the need for additional transition time and rest, and the need for repetition to foster neuroplasticity (Parent Ex. O at p. 2). Additionally, the director testified that the school provided related services to students using a push-in and pull-out model to ensure each student's therapeutic goals were addressed in multiple locations (id.).[13] She opined that doing so was critical for students with brain injuries because they had a severe deficit in their ability to generalize skills (id.). With regard to the student in this case, the director testified that because of the student's limitations and challenges, he needed 60-minute therapy sessions (Tr. p. 198). She explained that if he had 30-minute sessions he would not be able to participate in the necessary preparatory activities such as "sensory, stretching, [and] processing time, and opined that he would not get the "beneficial aspects of the therapy itself because he wouldn't have the preparation time" (Tr. pp. 198-200). Furthermore, the director explained that, because of the student's challenges, he needed additional time within the therapy session to express himself and suggested that he would not be ready for activities within a 30-minute time frame, or that he might be ready but would not have time to participate in the activity (Tr. p. 198). Furthermore, the director explained that preparation activities had to be addressed within the therapy sessions before the student's goals could be addressed: for example, a student could not just "jump into" a gate trainer or a stander without having their limbs and joints properly prepared, their ankle foot orthoses presented properly, or without being strapped in and assessed for head stability (Tr. pp. 199-200). Finally, the director testified that because students who have brain injuries often experience fatigue or cognitive fatigue iBrain used extended sessions and explained that the extended sessions allowed them to pace skills appropriately and to allow the student time to respond and take a minute or two between activities

[12] The related services recommended in the May 2019 IEP were similar to the recommendations from the June 2018 IEP; however, the May 2019 IEP included a recommendation for 3 sessions per week of OT services, while the June 2018 IEP only recommended 1 session per week of OT (compare Dist. Ex. 9 at p. 16-17, with Parent Ex. N at p. 16).

[13] The director explained that push-in services allowed students to generalize skills to a wide range of environments or settings, allowed classroom staff to learn from the therapists, and enabled students to participate in more classroom activities while practicing their skills (repetition) (Tr. pp. 210-12).

(Tr. pp. 215-16). She further explained that because the therapists at iBrain had small caseloads, they learned the signs that a student was beginning to fatigue (Tr. p. 216).

Although not provided to the May 2019 CSE, the 2019-20 iBrain IEP, dated April 9, 2019, included additional information regarding the student's need for 60-minute sessions of related services (Parent Ex. E at pp. 22, 25, 27-29). For example, the iBrain IEP indicated that the student's vision education services were especially critical because the student relied on his vision as his primary means of communication and participation in many activities throughout his day and that the student needed increased repetition of skills and time for transition and processing as well as to take brief breaks during sessions which necessitated 60-minute sessions (id. at p. 22). The iBrain IEP indicated that, while the student had made steady gains towards the progression of his speech and language skills with the current mandate of five individual 60-minute sessions weekly, the inconsistent nature of his needs and skill level on a given day, in addition to time spent carrying out various tasks during a session, made it imperative that he continue to receive this mandate of intensive frequency and duration to support his continued progression (id. at p. 25). In PT, the physical therapist opined that the student demonstrated good potential to tolerate longer sessions and that he loved to participate in PT sessions (id. at p. 27). She suggested that it was very important for the student to receive a mandate of 60-minute individual sessions five times per week to help improve his ability to carryover and participate in various functional activities with his peers at school and opined that it was not possible to complete a functional session working on his goals in a shorter duration or frequency of sessions (id.). In OT, the iBrain IEP indicated that the student's brain injury impacted his participation in academic, play, and self-care activities; therefore, the student required a mandate of five times per week for 60-minute sessions in order to continue to make progress with his goals (id. at pp. 28-29). The occupational therapist explained that the full 60-minute session provided the necessary amount of rest breaks, multi-sensory activities, adaptive equipment, and caregiver training for the student's active and effective participation during his daily activities (id. at p. 29). Finally, the iBrain IEP indicated that, due to his low muscle tone, and decreased strength, endurance, and attention, the student required extended time to engage in activities, including motor planning for initiation, follow through and termination (id.).

The district psychologist stated in her written testimony that due to the student's "mental energy, physical, and mental stamina. . . 60 minutes of related services [wa]s too much service" (Dist. Ex. 24 at p. 3). She further opined that the student's related services sessions should be limited to 30 minutes so that he could meaningfully engage in sessions without causing unnecessary strain on his mind and body (id.). The district appears to rely on the classroom observation in support of the CSE's determination, noting that the student fell asleep for 13 minutes during the observed speech-language therapy session and that, according to the observation report, the student's paraprofessional stated that the student often fell asleep during related services sessions (Dist. Exs. 19 at p. 2; 25 at p. 3; see Answer ¶15).[14]

Based on the above, the May 2019 CSE had little evaluative information in order to make a reasoned determination as to a program, particularly as to the level of related services, necessary

[14] During the impartial hearing, the iBrain director testified that she remembered "a handful" of times where she observed the student asleep over the past three years (Tr. p. 202).

to meet the student's special education needs. Further, the hearing record does not sufficiently explain the CSE's rationale, based on information available to the CSE, for the recommended frequencies and durations of OT, PT, speech-language therapy, and vision education sessions included in the IEP. In cases such as this, I would expect testimony from related service providers and/or a special education teacher having experience with a district 12+1:(3+1) special class about the degree of benefit they would expect a similarly situated student to receive from the quantity of related services offered in the May 2019 IEP. Overall, as discussed more below, the CSE was in the unenviable position of crafting an IEP based on an limited amount of information, despite the district's efforts to gather more evaluations of the student and progress reports to determine his current functioning. Nevertheless, given the needs identified during the May 2019 CSE meeting, the record is insufficiently developed to support a finding that the related services recommendations were appropriate. Therefore, the district failed to meet its burden to show that the district offered the student a FAPE for the 2019-20 school year.

B. Unilateral Placement

Having determined that the district failed to offer the student a FAPE for the 2019-20 school year, the next issue to be discussed is whether iBrain was an appropriate unilateral placement for the student. Having found that the district's IEP offered the student a FAPE, the IHO did not make a determination regarding the appropriateness of iBrain. In its answer, the district argues that the evidence in the hearing record was insufficient to establish that iBrain was individualized to meet the student's unique needs.[15] Specifically, the district argues the progress reports did not demonstrate that the program was tailored to the student's needs and that the program included only 7 hours of academic instruction out of 42.5 hours per week.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see

[15] This district argues that the parents failed to present an argument in support of their request for a finding that iBrain was an appropriate unilateral placement. Contrary to the district's argument, given that the IHO did not make a determination regarding the unilateral placement, the parents' request for review sufficiently raises the issue of the appropriateness of iBrain for consideration on appeal.

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).

Contrary to the district's contentions, a review of the hearing record shows that iBrain addressed the student's identified special education needs.

1. Specially Designed Instruction

An iBrain program description, entered into evidence by the parents, indicated that iBrain's educational program focused on the development of academic, cognitive, and social skills aligned with each student's IEP designed by iBrain (Parent Ex. G at p. 5-12). The school provided conductive education that focused primarily on integrating neuroplasticity, a student's personality and lifestyle, and physiological and medical characteristics (id. at p. 7). Additionally, iBrain offered OT, PT, social work, speech-language therapy, and vision therapy (id. at pp. 9-12). The related services were provided using a push-in/pull-out model and were provided by licensed personnel and intended to be flexible to meet the needs of individual students (id. at pp. 5, 9-12). The program description indicated that iBrain offered an aquatic therapy program and a range of assistive technologies that were tailored to each student (id. at pp. 6-7). Finally, the program description indicated that iBrain offered health and nursing services and hearing therapy (id. at p. 8).

The iBrain director described the program as a private not-for-profit, highly specialized special education program created for children who suffer from acquired brain injuries or brain-based disabilities (Parent Ex. O at p. 2). She explained that it was an interdisciplinary program with an extended school day that ran on a 12-month extended school year (id.). The director noted that during the 2019-20 school year every student required a 1:1 paraprofessional to assist with ADLs, and to support access to and benefit from the program (id.). The director explained that iBrain provided students with IEPs focused on improving functioning skills appropriate to each students' cognitive, physical, and developmental levels, using a collaborative and multi-disciplinary approach by incorporating the most effective strategies with evidence-based practices from the medical, clinical, and educational fields including but not limited to: direct instruction, cognitive strategies, compensatory education (using diagnostic-prescriptive approach), behavior management, physical rehabilitation, therapeutic intervention, social interaction, and transition services (id.).

With regard to related services, the director confirmed that iBrain offered a variety of related therapy services including OT, PT, speech therapy, vision education, hearing education, assistive technology, and parent counseling and training (Parent Ex. O at p. 2). As discussed above, she explained that all of these therapy services were provided to the students, as needed, usually in 60-minute sessions using a push-in and pull-out model (id.).

The director testified that during the 2019-20 school year the student attended a 6:1+1 special class as part of an extended school day in a 12-month program and received the following related services: OT, PT, and speech-language therapy individually five times per week for 60 minutes per session; vision education services individually once per week for 60 minutes and once per week as a consultation for 60 minutes; and assistive technology services individually once per week for 60 minutes (Parent Ex. O at p. 3). Additionally, the student had a 1:1 paraprofessional daily to support his needs, the services of a school nurse, and daily use of assistive technology devices (id.). Also, the parent received parent counseling and training once per month for 60 minutes (id.). Finally, the director testified that the student had special transportation accommodations including limited travel time, air conditioning, a lift bus, a wheelchair, and the assistance of a transportation paraprofessional (id.).

The 2019-20 iBrain IEP indicated that the student received at least 30 minutes per day of individual academic instruction in addition to various therapies and group instruction (Parent Ex. E at p. 2). The IEP explained that due to the student's acquired brain injury his cognitive, psychosocial, and sensorimotor processing were compromised and the student required one-to-one assistance in order to participate in all activities throughout the day (id.). Additionally, the IEP indicated that the student was non-ambulatory, the majority of his movements were involuntary, and he fatigued easily (id.). With regard to communication, the iBrain IEP indicated that the student used assistive technology devices, picture communication cards, facial expressions, and touch with maximal adult assistance (id.).

The evidence in the hearing record shows that the student had a complex medical history resulting from a brain injury that significantly impacted his academic, fine motor, gross motor, pragmatic, social/emotional, and speech-language skills, which iBrain addressed. As such, the totality of the evidence in the hearing record shows that iBrain provided the student with special

education programming that was reasonably calculated to enable the student to make progress appropriate in light of his circumstances.

2. Progress

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

The hearing record shows that, on April 9, 2019, iBrain created a recommended IEP for the student for the 2019-20 school year (Parent Ex. E). The recommended 2019-20 IEP showed that the student had made progress in a similar program at iBrain during the 2018-19 school year (Parent Exs. D; E).

In addition, information in the hearing record shows that the student made progress at iBrain during the 2019-20 school year. The iBrain director explained that the student made progress across all disciplines during the 2019-20 school year, specifically noting progress in his endurance in biking and standing and improved independence in self feeding, requesting, visually tracking, making choices, and identifying his name in print (Parent Ex. O at p. 3).

A November 2019 goal progress report also detailed the student's progress during the 2019-20 school year (Parent Ex. L). According to the November 2019 progress report, the student met or was anticipated to meet approximately 46 out of 52 annual goals and short-term objectives (see generally id.). The remaining goals and objectives were identified as "will be addressed pending attainment of prior goal" or "goal could not be addressed" (id. at pp. 5, 8). The report indicated that the student was making inconsistent progress toward his vision objectives (id. at p. 5). Comments indicated that the student was visually locating objects with reflective qualities placed on his tray within 10 seconds, that he continued to demonstrate an upward gaze pattern but was learning to direct his gaze downward when presented with highly stimulating visual materials and low volume sound, and once he located the object he was maintaining his gaze for longer (id.). Additionally, the report indicated that the student was making steady gains and beginning to develop greater consistency visually tracking slow moving objects from right to left and left to right using both eyes together approximately one out of five times; however, tracking continued to be challenging and required frequent and consistent practice (id.).

In speech and language, the November 2019 goal progress report indicated that the student demonstrated slow steady progress toward objectives related to attending to preferred activities and participating in joint attention activities (Parent Ex. L at p. 6). The report noted that the student showed improvement in his ability to select a preferred task via head turn or eye gaze with moderate to maximal cueing; he could maintain attention to an activity for two to three minutes with cues; and he participated in joint attention tasks including greetings with moderate to maximal cueing and benefitted from visual, verbal and tactile cues (id.). Additionally, the report indicated that the student was making slow steady progress toward objectives related to requesting recurrence or requesting a preferred activity, action, or item using total communication (id. at p.

7). More specifically, the report noted that the student requested "more" via eye gaze and activating a switch to turn on a song, video, or toy with 50 to 70 percent accuracy with moderate to maximal cueing and chose a preferred activity with maximal cueing (id.). Finally, the progress report indicated that the student was demonstrating slow steady progress toward and oral motor objective and noted that he demonstrated a "munch chew" with presentation of oral stimulation (id. at p. 8). According to the report, the speech-language pathologist had not yet addressed goals targeting tolerance of nectar consistency thickened liquids and was waiting for the student's parents to provide thickener for school use (id.).

With regard to PT, the November 2019 goal progress report indicated that the student was making fast steady progress on an objective related to static standing in a gait trainer, slow steady progress toward objectives that targeted short ant tall knelling, and inconsistent progress toward an objective relating to pedaling an adaptive bicycle for one full rotation (Parent Ex. L at p. 9). The report stated that the student required minimal to moderate assistance to steer the bike and for initiating and continuing each revolution, specifically noting that he had made slow and steady progress with half revolutions but needed increased prompting and assistance for full revolutions (id.). Additionally, the report indicated that the student had greatly increased his tolerance in static standing in the Rifton gait trainer; however, he continued to require assistance for maintaining upright posture (id.).

In OT, the November 2019 goal progress report indicated that the student demonstrated fast steady progress toward a feeding objective and slow steady progress toward other self-care objectives (Parent Ex. L at p. 10). The report noted the student's ability to sustain a grasp on a toothbrush with maximum physical assistance to perform three to five lateral strokes with verbal reminders to maintain attention and his ability to feed himself at least 10 bites of food with moderate physical assistance and cueing, as well as the student's increasing tolerance for sitting on an adaptive toilet; and need for moderate assistance to initiate reach for a switch and sustain hold during meal preparation (id.).

Based on the foregoing, the evidence in the hearing record indicates that the student made progress in the program provided, which factors in favor of a finding that the private school was appropriate.

C. Equitable Considerations

Without directly addressing the IHO's finding that equitable considerations weighed against awarding relief because the parents impeded the CSE process by not attending the May 2019 CSE meeting and prevented the district from having current evaluative information, on appeal, the parents generally assert that equitable considerations weigh in favor of an award of tuition reimbursement. However, related to the IHO's findings regarding equitable considerations, the parents appeal from the IHO's determination that the scheduling of the May 2019 CSE meeting was not a procedural violation. The parents contend they requested the district convene a full-committee CSE meeting and that the district failed to schedule the meeting at an agreeable date

and time.[16] The parents also note that the parents gave timely notice of their intent to unilaterally place the student at iBrain for the 2019-20 school year.

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

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

[16] In their memorandum of law, the parents assert that they gave consent for an evaluation of the student but that the district failed to re-schedule a psychoeducational evaluation and that there is no indication in the hearing record that the parents refused to consent to an evaluation or cooperate with the CSE (Req. for Rev Mem. of Law. at p. 24). Initially, this allegation is not contained in the request for review and to the extent that the parent argues additional grounds for reversal of the IHO's decision solely within the memorandum of law, it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; Davis v. Carranza, 2021 WL 964820, at *13 [S.D.N.Y. Mar. 15, 2021]; see, e.g., Application of a Student with a Disability, Appeal No. 19-021; Application of the Bd. of Educ., Appeal No. 16-080). Moreover, as discussed in detail below, the parents' assertion is not factually accurate as the hearing record supports the IHO's finding that the parents prevented the district from obtaining current evaluative information regarding the student.

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).

Review of the hearing record shows that the district made several attempts to schedule appointments in order to obtain updated evaluative information (Dist. Exs. 18; 22). On January 3, 2019, the district sent a "notice of social history meeting" to notify the parents of an appointment scheduled on January 25, 2019 (Dist. Exs. 18; 22 at p. 22; 25 at p. 2). According to the hearing record, the parents missed this appointment, and the district made several attempts to contact the parents and complete the social history over the phone (Tr. pp. 152-53; Dist. Ex. 22 at p. 21; 25 at p. 2).

On January 31, 2019, a letter was sent informing the parents that a reevaluation was required and notifying them of an appointment for a psychoeducational evaluation scheduled on February 26, 2019 (Dist. Ex. 22 at p. 21). Additionally, on February 6, 2019, the district sent a letter requesting the parents' scheduling preferences in order to schedule the student's CSE meeting for the 2019-20 school year (id. at p. 20). The parents responded via email, dated February 14, 2019, notifying the district of their availability, to which the district responded that it updated the scheduling preferences and reminded the parents of the upcoming appointment for the psychoeducational evaluation (Dist. Exs. 22 at p. 18-19; 25 at p. 2). As the parents indicated they could not attend the February 26 appointment for the psychoeducational evaluation because it was between a Tuesday and a Thursday, the district offered the parents a weekend appointment, and in an email dated February 14, 2019, the parents accepted an appointment for March 10, 2019 (Dist. Ex. 22 at pp. 17-18).[17] The district then sent the parents an appointment letter, notifying them of the rescheduled appointments for a social history update and a psychoeducational evaluation on March 9, 2019 (Dist. Exs. 22 at p. 17; 25 at p. 2). The district social worker testified that, to the best of her knowledge, the parents did not appear on March 9, 2019, for the social history or the psychoeducational evaluation appointments (Dist. Ex. 25 at p. 2). According to the SESIS events log, the student did not show for either evaluation appointment (Dist. Ex. 22 at p. 3). The student's father testified that, in February 2019, he contacted the district to confirm an appointment for an evaluation but was told his name was not in the district's file and he would have to contact the student's mother (Parent Ex. P at p. 3). He further testified that he contacted the student's mother and thought he would start receiving notices from the district, but he never received any notices from the district (id.). However, he also testified that the student's mother informed him of the rescheduled appointment for the student's evaluations (Tr. pp. 221-23).

In a letter dated February 19, 2019, the parents acknowledged receiving an email regarding scheduling the student's 2019-20 CSE meeting and requested that this meeting be a full committee meeting consisting of a district school psychologist, social worker, school physician, and a parent member, and that all members attend in person (Dist. Ex. 5 at p. 1). In addition, the parents informed the district that they were "available to schedule this meeting on Monday or Friday between the hours of 9am-1pm" and requested that the student's special education teacher and related service providers from iBrain be included on any IEP meeting notice (id.). Furthermore, the parents requested the CSE consider a placement in a non-public school and that any necessary

[17] In the February 14, 2019 email the parents were offered times on either March 10th or 16th and accepted an appointment on March 10, 2019; however, a subsequent email to confirm the scheduled date indicated that the evaluations were scheduled for March 9, 2019 (Dist. Ex. 22 at pp. 17-18).

evaluations for such consideration be completed prior to scheduling a meeting (id. at pp. 1-2). Finally, the parents indicated that once "a mutually agreeable" meeting time was scheduled, they would provide the student's most recent progress reports and any other documentation for consideration and requested that the meeting be recorded (id. at p. 2).

The district performed a classroom observation on March 20, 2019 and an assistive technology evaluation on April 17, 2019; copies of both evaluations were sent via email to the parents on May 8, 2019 and on May 17, 2019 (Dist. Exs. 7; 12 at pp. 1-2; 19; 20).

On May 8, 2019, a CSE meeting notice (dated April 23, 2019) was sent to the parents indicating that a CSE meeting had been scheduled for May 10, 2019 (Dist. Exs. 6; 22 at pp. 10-11). Additionally, in an email sent to the parents on May 8, 2019, the district attached copies of the available evaluations of the student and required medical forms and further reminded the parents that their assistance was necessary to obtain the student's progress reports prior to the CSE meeting (Dist. Ex. 7). In an emailed letter, dated May 9, 2019, the parents' advocate responded indicating that because the parents were given only two days' notice, the parents were not available, and the meeting could not proceed (Parent Ex. K at p. 1; Dist. Ex. 22 at p. 8).[18] Additionally, the letter indicated that the parents did not have enough time to have updated medical accommodations and special transportation forms completed prior to the meeting on May 10, 2019 (Parent Ex. K at p. 1). The letter also reiterated the parents' request that the meeting consist of a full committee and that the district physician and a parent member attend in person (id. at p. 2).

On May 13, 2019, the district notified the parents of a new CSE meeting date, May 20, 2019 (Dist. Exs. 11; 22 at p. 8). The meeting notice indicated that the CSE meeting must be held no later than February 11, 2019 and included the names and titles of the persons who would attend the meeting including a district physician, a parent member, and the student's special education teacher and related service providers as requested by the parents (Dist. Ex. 11). An email was sent containing the same information to the parents in both English and Spanish on May 13, 2019 (Dist. Ex. 22 at p. 7). On May 16, 2019, an email was sent to the parents indicating that the district had rescheduled the CSE meeting for May 20, 2019 at the parents' request (id. at p. 6). The email included copies of the most recent assessments to be reviewed at the CSE meeting and informed the parents that the CSE would consider any reports that they submitted, including progress reports (id. at p. 6).

In a letter dated May 17, 2019, the parents' advocate acknowledged that the parents received the May 13, 2019 meeting notice and subsequent email (Dist. Ex. 15 at p. 1). The advocate indicated that the parents had the medical accommodations form completed by the student's physician but that they did not yet have the completed special transportation forms and preferred to have all of the forms completed and submitted to the district prior to any CSE meeting (id.). The advocate further indicated that the parents had not yet received a copy of a psychoeducational evaluation or the social history and referred to the February 19, 2019 letter requesting that all the necessary evaluations be completed and provided to the parents prior to scheduling a CSE meeting (id.). Finally, the advocate requested the district propose a new date

[18] The parent's letter regarding rescheduling the May 10, 2019 CSE meeting appears to be duplicated in the hearing record, for the purpose of this decision the parents' exhibits are cited (see Parent Ex. K; Dist. Ex. 10).

and time for this meeting, or alternatively the parents would schedule the CSE meeting once the medical forms were returned to them (id.). The advocate indicated that the parents did not consent to proceeding with the CSE meeting without them being present (id.).

In a prior written notice dated May 18, 2019, the district responded to the parents' advocate's May 17, 2019 letter, informing the parents' that all available reports had been mailed and emailed on May 8, 2019 and emailed on May 13, 2019, and further indicated that the parents could submit the transportation forms when completed (Dist. Ex. 13 at p. 1).[19] Additionally, the prior written notice indicated that this meeting had initially been scheduled on May 10, 2019 but had been cancelled by the parents, and noted that the CSE needed to conduct the CSE meeting on May 20, 2019 to ensure a timely recommendation and placement (id.). The prior written notice offered to provide any accommodations so that the parents or any other CSE members could participate and indicated that accommodations had already been made for the district physician and parent member to attend the May 20, 2019 CSE meeting (id.). The prior written notice provided a brief history of the attempts to schedule the CSE meeting and the accommodations made at the parents' request and indicated that the CSE must proceed with the rescheduled meeting on May 20, 2019 (id. at p. 2). Finally, the prior written notice indicated that the CSE would convene on May 20, 2019 to review all updated assessments and progress reports for the purpose of determining the student's current functioning levels and educational needs and requested that the parents assist in obtaining teachers' and providers' progress reports, attendance records, the student's schedule and any updated assessments prior to the scheduled CSE meeting (id.).

On May 20, 2019, the CSE convened for the student's annual review and to develop his 2019-20 IEP; however, the parents did not attend the meeting nor did any of his teachers or related service providers from iBrain (Dist. Ex. 16 at p. 1). The May 2019 CSE meeting minutes indicated that the CSE called the student's mother, who told the CSE that "the school" sent her an email canceling the meeting and that their legal team would reschedule (id. at p. 8).[20] The CSE then attempted to contact iBrain twice, leaving voicemails both times (id.). The CSE called the parents again and left a voice mail informing them that they were moving forward with the CSE meeting (id. at pp. 8-9). The CSE then proceeded with the meeting with the district physician in attendance by telephone (id.).

On June 19, 2019, the parents executed a contract for the student's attendance at iBrain for the 2019-20 school year (Parent Ex. F). In a letter to the district dated June 21, 2019, the parents provided notice of their intent to unilaterally place the student at iBrain for the 2019-20 school year and seek public funding for this placement (Parent Ex. J). As a reason for rejecting the IEP, the parents indicated that the district had not offered a program or placement that could meet the student's educational needs and further indicated that the CSE had not properly responded to the parent's request to conduct a CSE meeting with the district physician present in person (id.). The parents requested that the CSE "schedule an appropriate IEP meeting at a mutually agreeable date and time" (id.). In a prior written notice and a school location letter, both dated June 26, 2019, the

[19] The May 18, 2019 prior written notice was provided to the parents in both English and Spanish (Dist. Exs. 13; 14).

[20] There is no copy of the referenced email in the hearing record.

district summarized the May 2019 CSE's recommendations and notified the parents of the particular public school site to which the district assigned the student to attend for the 2019-20 school year (Dist. Exs. 2-3). The prior written notice also provided contact information for who to contact if the parents wanted to request a CSE meeting to discuss the information contained in the prior written notice (Dist. Ex. 2 at p. 3).

Based on the above, the parents' actions impeded the process leading up to the May 2019 CSE meeting and prevented the district from having recent evaluative information regarding the student. As the lack of evaluative information available to the May 2019 CSE contributed to a finding of a denial of FAPE in this matter, the parents actions, in withholding that information from the district—both in not producing the student for scheduled evaluations and in not assisting in getting updated progress reports from iBrain—must be considered unreasonable. Moreover, the evidence in the hearing record shows that the parents refusal to attend the May 2019 CSE meeting after it was re-scheduled to meet their scheduling preferences was also unreasonable. In essence, the parents prevented the district from meeting its obligations under the IDEA and therefore, based on equitable considerations, the parents are not entitled to receive reimbursement for the cost of the student's tuition at iBrain for the 2019-20 school year.

VII. Conclusion

In summary, in light of the evidence regarding the May 2019 CSE's related services recommendations and the lack of updated evaluative information available to the May 2019 CSE, the hearing record does not support the IHO's determination that the district met its burden to prove that it offered the student a FAPE for the 2019-20 school year. In addition, the evidence in the hearing record supports a finding that iBrain was an appropriate unilateral placement for the student. However, I agree with the IHO that equitable considerations do not weigh in favor of an award of tuition reimbursement. Ultimately, therefore, the IHO's denial of an award of tuition reimbursement is upheld.

I have considered the parties' remaining contentions and find they need not be addressed in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 14, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER