The University of the State of New York

The State Education Department
State Review Officer
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No. 21-077

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

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

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the International Institute for the Brain (iBrain) for the 2020-21 school year. Respondent (the district) cross-appeals from the IHO's determination that iBrain was an appropriate unilateral placement for the student and that equitable factors favored the parent's request for relief. The appeal must be sustained in part. The cross-appeal must be sustained in part.

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 was the subject of a recent interim appeal concerning pendency during the underlying due process proceeding (Application of a Student with a Disability, Appeal No. 20-196). By way of background, the student attended ADAPT, a State-approved, nonpublic school, prior to the 2019-20 school year (Tr. pp. 73-74, 76; Parent Ex. K at p. 3; see Tr. p. 67). The student underwent a triennial psychological evaluation on January 4, 2018 (Dist. Ex. 6). A CSE convened on January 11, 2019 to create the student's IEP for the 2019-20 extended school year (Parent Ex. B). The CSE found the student eligible for special education with a classification of multiple disabilities, and recommended that the student be placed in a 12:1+4 special class in a

specialized school, with related services of occupational therapy (OT), physical therapy (PT), and speech-language therapy (id. at pp. 8, 11). The student attended iBrain for the 2019-20 school year (Tr. p. 74; Parent Ex. K at p. 3).

In correspondence dated March 10, 2020, the district provided the parents with notice that the CSE was scheduled to convene on May 27, 2020 (Dist. Ex. 1).[1] On April 9, 2020 the district conducted a classroom observation of the student at iBrain (Dist. Ex. 7).

On May 27, 2020, the CSE convened to create the student's IEP for the 2020-21 school year (Dist. Ex. 2). Attendees included, the parent, a school psychologist, a special education teacher, an interpreter, a physician, the parents' advocate, the student's physical therapist, occupational therapist, speech-language therapist, assistive technology therapist, vision educator, and social worker, as well as the iBrain special education manager and the iBrain special education director (Tr. p. 105; Dist. Exs. 3, 8 at p. 1). The CSE continued to find the student eligible for special education as a student with multiple disabilities, and recommended placement in a 6:1+1 special class in a specialized school, along with the related services of OT, PT, and speech-language therapy—all in 1:1, 60-minute sessions, five times per week and the support of a full-time 1:1 paraprofessional for health, ambulation, feeding, and safety; additionally, the parents were recommended to receive one, 60-minute session of parent counseling and training per month (Dist. Ex. 2 at pp. 24, 29-30). For transition service needs, the IEP contained a coordinated set of transition activities, primarily focusing on the student's ongoing development of activities of daily living (ADL) skills, contemplating that the student "ages out at 21" (id. at p. 27). The CSE postponed making recommendations for vision therapy services and assistive technology services until after evaluations in those areas were conducted (Dist. Ex. 8 at pp. 6, 7). It appears that the student's present levels of performance were derived from: teacher estimates and grades; a May 25, 2020 iBrain report, including the results of multiple evaluations conducted outside of the district's auspices; the January 2018 psychological evaluation; the student's iBrain educational progress report for the 2018-19 school year, which included information on the student's cognitive, language, social/emotional, and motor development, and his self-help skills (Dist. Ex. 2 at pp. 1-3).

On June 19, 2020, the parent signed a contract for the student's enrollment at iBrain for the 2020-21 school year (Parent Ex. E). In a June 26, 2020 letter, the parent notified the district of her intention to place the student at iBrain and to seek public funding for the placement (Parent Ex. H). On August 13, 2020, the parent signed a contract for special transportation services (Parent Ex. G).

For the 2020-21 extended school year, the student attended iBrain in a 6:1+1 special class, with direct instruction, and received related services, on a push in/pull out basis, consisting of five, individual 60-minute sessions of PT, OT, and speech-language therapy per week (Parent Ex. K at p. 3). The student also received three, individual 60-minute sessions of vision education services per week, and one, individual 60-minute session of assistive technology services per week (id.).

[1] In an unsigned and uncaptioned letter to the district, dated April 6, 2020, the student's physician provided the district with medical information on the student, as well as an opinion that the program developed by iBrain for the student's 2020-21 school year was the most appropriate program for the student (Parent Ex. I at p. 2). It is not clear when, or if, this letter was delivered to the district; although the letter is dated April 6, 2020, the medical forms included in the same exhibit as the letter were dated June 2, 2020 (id. at pp. 1, 3, 5, 7, 9, 11, 14).

The student was also provided with daily use of assistive technology devices, a 1:1 paraprofessional, and the services of a school nurse (id.). Additionally, the parent received a monthly, 60-minute session of parent counseling and training (id.).

A. Due Process Complaint Notice

In a July 6, 2020, due process complaint notice, the parent requested an impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 extended school year (Parent Ex. A).[2] The parent requested that the impartial hearing be consolidated with an ongoing impartial hearing which was filed concerning the 2019-20 school year, as the merits of that underlying due process complaint notice had yet to be fully adjudicated (id. at pp. 1-2).[3] With respect to the parent's claims concerning the 2020-21 school year, the parent asserted that the district: failed to implement all parts of the May 27, 2020 IEP by "not offering a seat to [the student] in a classroom that could implement the IEP"; failed to timely offer the student a specific assigned public school until after the start of the extended school year; failed to provide the parent with an copy of the IEP until after the start of the extended school year; failed to provide the parents with the opportunity to explore the appropriateness of the recommended setting; and, assigned the student to a school that was not available for the extended school year (id. at pp. 3-4). The parent also asserted that the May 2020 CSE failed to recommend appropriate types, frequencies, and/or durations of related services, including vision therapy and assistive technology devices and services, and failed to adopt multiple recommendations made by the student's then current related services providers and special education teachers (id. at pp. 4-5).

To remedy these asserted shortcomings, the parent requested that the district directly pay to iBrain the cost of the student's attendance, which included tuition, related services, and a 1:1 paraprofessional, and further requested reimbursement or direct funding for transportation, a new IEP meeting to address changes if necessary and an order to provide assistive technology services and devices to the student (Parent Ex. A at p. 6).

B. Impartial Hearing Officer Decision

An impartial hearing convened on September 18, 2020 and concluded on December 4, 2020 after six days of proceedings (Tr. pp. 1-336). The first four hearing dates were limited to the issue of pendency and evidence introduction (Tr. pp. 1-99), with the last two dates being held to hear the merits of the case (Tr. pp. 100-336). In a decision, dated January 25, 2021, the IHO found that the district offered the student a FAPE for the 2020-21 school year (IHO Decision at p. 18). The IHO noted she was "hesitant to find that iBrain was inappropriate" because the district appeared to have attempted to replicate the iBrain program, and therefore found that iBrain was an appropriate unilateral placement for the student (id. at pp. 20, 21). The IHO also discussed, without making a determination, whether equitable factors supported an award of tuition reimbursement, noting that the parent's notice to the district did not provide the district with notice

[2] The parent also requested an order on pendency, which was the subject of a prior SRO decision (see Application of a Student with a Disability, Appeal No. 20-196), and to the extent the parent appears to attempt to again raise the issue of the IHO's pendency decision (see Req. for Rev. at ¶14), I decline to address the issue.

[3] The IHO assigned to adjudicate the claims arising from the 2019-20 extended school year declined to consolidate the two due process proceedings (Order on Consolidation).

of specific inadequacies in the program offered, thus the district was not fully informed of the parent's concerns (id. at pp. 22-23). While the IHO did not make a determination, she stated that this equitable issue "should be considered if an award of funding were otherwise appropriate" (id. at p. 23).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in finding that the district offered the student a FAPE for the 2020-21 school year. The parent asserts that the IHO did not use the correct legal standard in determining that the district offered the student a FAPE. With respect to the conduct of the May 2020 CSE and the resultant IEP, the parent asserts that the IHO erred by not finding a denial of FAPE due to the district's: failure to provide the parent with prior written notice of the CSE recommendations and a school location letter prior to the start of the school year; failure to timely and sufficiently evaluate the student; recommendation that the student's related services be provided exclusively on a pull-out basis; and failure to recommend vision education services. The parent also asserts that the IHO improperly found that the parent's allegations that the district failed to provide the parent with a procedurally proper CSE meeting notice and misclassified the student as a student with multiple-disabilities were not raised in the due process complaint notice and therefore erred in not finding that those allegations resulted in a denial of FAPE. Finally, the parent asserts that the IHO erred by concluding that there was no reason to assume that the district's proposed class groupings would have been inappropriate, and by failing to address the unavailability of the district's proposed assigned public school site, which could not implement the proposed IEP as written, inasmuch as the proposed IEP provided solely for in-person services and the school building was closed, and even if the school were open, the district was not providing special education transportation to the site for the student.

In its answer, the district responds to the parent's allegations and argues in favor of upholding the IHO's determination that the district offered the student a FAPE for the 2020-21 school year. However, the district also acknowledges that it did not offer the student a placement until after the start of the 2020-21 school year.[4] In a cross-appeal, the district asserts that the IHO erred in finding iBrain an appropriate unilateral placement for the student and argues that equitable factors do not favor an award of tuition reimbursement. The district requests that in addition to upholding the IHO's FAPE determination, an SRO reverse the IHO and find that iBrain was inappropriate for the student for the 2020-21 school year and that equitable considerations favor a denial any relief.

In a reply to the district's answer, the parent denies each and every allegation contained in the district's answer and cross-appeal, and reiterates the arguments raised in the request for review. The parent also asserts that the cross-appeal fails to allege a cognizable claim since the district

[4] The district contends that additional evidence submitted by the parent should not be considered on appeal; however, neither the parent's request for review nor memorandum of law included additional evidence. The parent's memorandum of law references attachments A through C; it appears these references are to documents that were attached to the parent's post-hearing memorandum of law (IHO Exs. XII-XVIII). The IHO rejected these documents as being submitted after the close of the hearing (IHO Decision at p. 27); however, the IHO referenced one of the documents as indicating district schools were open for remote learning during the 2020 extended school year (id. at p. 18; see IHO Ex. XIII). In deciding this matter, I will only use the documents relied on by the IHO.

conceded it failed to recommend or offer the student a FAPE in a timely manner. The parent also asserts that equitable considerations favor a full award of tuition reimbursement and reimbursement for transportation costs.

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]).[5]

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).

[5] 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).

VI. Discussion

A. 2020-21 School Year

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, for the most part correctly determined that the district offered the student a FAPE for the 2020-21 school year (see IHO Decision at pp. 11-19), that iBrain was an appropriate unilateral placement for the student (see id. at pp. 19-21), and that equitable considerations warranted further consideration (id. 21-23). The IHO addressed the specific factual and legal claims raised by the parent and set forth and applied the proper legal standards to the evidence developed in the hearing record as to the parent's claims related to vision education services; assistive technology services; the sufficiency of evaluations; functional grouping; the recommendation for pull-out services; classification; and the adequacy of the CSE meeting notices (id. at 11-17).[6] The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that she weighed the evidence and properly supported her conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the determinations of the IHO other than as set forth below (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, the conclusions of the IHO with respect to the above issues are hereby adopted; however, the IHO's determination that the district's failure to notify the parent where the student's special education program would have been implemented did not result in a denial of FAPE is discussed more fully below.

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

In general, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).[7] The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 560 U.S. 904 [2010]; see also Deer Val. Unified Sch. Dist. v L.P., 942 F. Supp. 2d 880, 889 [D. Ariz. 2013]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the

[6] The parents assert the IHO erred in using an improper legal standard in determining the issue of FAPE, noting the IHO's use of the phrase "the program was reasonably developed to enable educational progress in light of the Student's circumstances" (see IHO Decision at p. 17). A review of the IHO decision reveals that the IHO cited to and applied the correct legal standards throughout the decision (id. at pp. 4-5, 11). While the parent is correct that, in one instance, the IHO appears to have "used an amalgam of the holdings in several cases," the IHO also wrote "In sum, I find that the [district] offered FAPE, and that the program was reasonably developed to enable educational progress in light of the Student's circumstances" (id. at p. 17).

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

student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). [13-150] Additionally, a district "must ensure that . . . [t]he child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation" (34 CFR 300.323[d][1]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *13 [S.D.N.Y. May 27, 2014]).

Although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format describing the "bricks and mortar" location to which a student is assigned and where the student's IEP will be implemented, once an IEP is developed and a parent consents to a district's provision of special education services, the IDEA is clear such services must be provided to the student by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 420; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6). To be clear there is no requirement in the IDEA that a student's IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Moreover, parents generally do not have a procedural right in the specific locational placement of their child (see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x. 1, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191-92 [finding that a district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection]).

However, although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016] ["a parent must necessarily receive some form of notice of the school placement by the start of the school year"]; Tarlowe, 2008 WL 2736027, at *6 [a district's delay does not violate the IDEA so long as a public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation, it nonetheless follows that it must be shared with the parent before the student's IEP may be implemented.

This analysis also fits within the concept that while a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]), there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

In addressing this issue, the IHO noted that the parent alleged in the due process complaint notice that she did not receive a copy of the school location letter until after the start of the extended school year and that she attempted to call the school but was unable to reach anyone (IHO Decision at pp. 17-18; see Parent Ex. A at p. 4). The IHO determined that the parent did not provide any support for these allegations and then concluded that because the parent could have cancelled her contract with iBrain until mid-July, the school location letter was not unduly late (IHO Decision at p. 18).[8, 9]

However, it is undisputed that the district did not provide the parent with a prior written notice or a school location letter prior to the start of the extended school year as both documents were dated July 7, 2020 (see Dist. Ex. 4). The district also acknowledges in its answer that "it did not offer the Student a placement before the beginning of the 2020-2021 school year" (Answer with Cross-Appeal ¶19).

There is some indication in the hearing record that the parent was aware of the program recommended by the May 2020 CSE. For example, the hearing record shows that the parent, an interpreter, the parent's advocate, and the student's special education teacher and related service providers from iBrain were present at the CSE meeting (Dist. Exs. 2; 3). Additionally, on June

[8] The IHO found that contrary to the allegation contained in the due process complaint notice that the parent never received a copy of the May 20, 2021 IEP, the parent testified that she received a copy of the IEP (IHO Decision at p. 18). However, the parent's testimony on this point is not clear. In response to a question asking the parent if she received "a copy of the proposed IEP document from the CSE," the parent responded that she "received the IEP from the school" (Tr. p. 312). The hearing record includes the district May 2020 IEP and a May 2020 iBrain IEP (Parent Ex. C; Dist. Ex. 2). Without further clarification, it is not entirely clear as to which IEP the parent is referring.

[9] The enrollment contract includes a provision that the parent "will be released from this Enrollment Contract without financial penalty or continuing responsibility for tuition payments . . . should the local school district offer a free appropriate public education to Student within two weeks of the commencement of the school year" (Parent Ex. E at p. 3). However, the contract is not entirely clear how that provision would have been exercised (see id.at pp. 3, 4).

26, 2020, prior to the start of the school year, the parent notified the district of her intent to place the student at iBrain, indicating "the [district's] program and placement offered cannot appropriately address [the student's] educational needs for the extended school year" (Parent Ex. H). However, the notice also provided that the "parent remain[ed] willing and ready to entertain an appropriate [district] program and an appropriate public or approved non-public school placement," but the parent "ha[d] no choice other than to enroll [the student] at [iBrain]" (id.).

Adding to the confusion as to where the student would have received instruction at the start of the school year due to the timing of the district's prior written notice and school location letter, review of the hearing record also indicates that the assigned school was closed for in-person instruction at the time of the May 2020 CSE meeting and the start of the 2020-21 school year. The district school psychologist testified that all of the district's schools were closed and the students in the district were learning remotely, meaning online (Tr. pp. 200-01). She further testified that each school was responsible for providing a remote learning plan (Tr. pp. 201-02). However, according to the witness, a remote learning plan was not developed for the student (Tr. pp. 203-04).

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

Having found that the district denied the student a FAPE, I turn next to the appropriateness of iBrain as a unilateral placement.[10]

B. Unilateral Placement

The district appeals from the IHO's determination that iBrain was an appropriate unilateral placement for the student. 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

[10] Although the parent has consistently argued that the lack of a prior written notice and school location letter at the start of the extended school year denied the student a FAPE (see Parent Ex. A), the district did not assert during the hearing, or on appeal, that the remedy for such a denial of FAPE should be limited to reimbursement for the cost of tuition for the extended school year (see IHO Ex. IX; Req. for Rev.). Accordingly, such an argument will not be addressed here; however, the Second Circuit has noted that if a violation only affected a students' summer services, tuition reimbursement may be warranted only for that period (T.M., 752 F.3d at 168).

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; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d at 364 [2d Cir. 2006], quoting Rowley, 458 U.S. at 207 [identifying exceptions]). 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, citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "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]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; see 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]; see also Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

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

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

In this case, the student received diagnoses of quadriplegic cerebral palsy, muscle hypotonia, developmental delay, coxa valga, mental retardation, dystonia, chorea, impaired

mobility, microcephaly and intellectual disability, and presents with significant academic, communicative, and social/interpersonal needs due to the extensive nature of his brain injury (see Parent Exs. C; D; Dist. Ex. 2). The hearing record also shows that the student has global developmental impairments, is nonverbal, is non-ambulatory, and is dependent on his caregivers for all activities of daily living (ADLs) (see Dist. Exs. 2; 5).

The May 2020 iBrain IEP recommended an extended school year placement for the student in a 6:1+1 class supported by a 1:1 paraprofessional (Parent Ex. C at pp. 1, 30, 32). The IEP described the student's present levels of performance in the areas of academics, speech-language/communication (including receptive and expressive language, augmentative and alternative communication, and feeding), OT, PT, vision education, and cognitive and social development (id. at pp. 2-11). The IEP also identified a number of management needs for the student and included annual goals in the areas of literacy, cognition, social skills, vision, receptive and expressive language, feeding, PT, OT, and assistive technology (id. at pp. 13-14, 16-25). In addition to the 6:1+1 class recommendation, the iBrain IEP also indicated that the student would receive five 60-minute sessions of individual OT per week; five 60-minute sessions of individual PT per week; five 60-minute sessions of individual speech-language therapy per week; and three 60-minute sessions of individual vision education services per week (id. at pp. 32-33). In addition, the IEP included a recommendation for one 60-minute session of individual parent counseling and training per month, assistive technology devices and services, and supports for school personnel (id. at pp. 33-34).

Initially, the IHO found that the May 2020 CSE recommended nearly identical services as those provided to the student at iBrain and that the CSE "based their recommendation on the information from iBrain" (IHO Decision at p. 20; compare Dist. Ex. 2, with Parent Ex. C). The IHO theorized that this similarity of services was a concession that the services were appropriate and the district offers no explanation as to how the IHO's determination on this point was in error. Instead, the district focuses solely on an assertion that the hearing record lacked evidence that the student made progress at iBrain. Indeed, the district is correct in that the hearing record lacks proof of progress, and instead includes anecdotal statements of the student's progress (see e.g., Tr. pp. 304, 315-16) rather than progress notes. Additionally, a comparison of the iBrain IEPs developed May 25, 2020 and September 19, 2019 does not provide meaningful evidence of progress between the two school years (compare Parent Exs. C; D). However, this is not a point that escaped the IHO's notice, as the IHO agreed with the district "that evidence of progress is lacking"; however, the IHO also determined that there were reasons why the student's lack of progress did not render iBrain inappropriate (IHO Decision at pp. 19-20).

A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, [2d Cir. Dec. 26, 2012]; L.K. v Northeast Sch. Dist., 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing

Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Based on the above, the district's cross-appeal does not provide a basis for finding that the IHO erred in determining iBrain provided the student with specially designed instruction to meet the student's needs.

C. Equitable Considerations

The district asserts several issues regarding equity and contends that the IHO identified concerns regarding equitable considerations and that they should weigh against granting the parent the requested award of tuition reimbursement. More specifically, the IHO noted that "the ten day notice did not recount any specific deficits in the program offered" (IHO Decision at p. 23). The district also contends that the parent did not provide ten business days notice as required, that the cost of tuition at iBrain is unreasonable, and that the parent did not establish that she had a legal obligation to pay for the student's tuition, for related services, or for transportation.

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., 758 F.3d at 461 [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. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [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 the parents did not provide notice, either to the CSE at the most recent CSE meeting prior to removing the student from public school or in writing to the public agency 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, 315 F.3d at 27); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

In this matter, the parent's notice to the district of her intention to unilaterally place the student at iBrain was dated June 26, 2020 (Parent Ex. H), the 2020-21 extended school year began on July 1, 2020, and classes at the district public school started on July 2, 2020 (Educ. Law § 2[15]; IHO Ex. XIII at p. 2). In addition, the student began attending iBrain on July 6, 2020 (Parent Ex. E at p. 1). Therefore, the parent did not provide the required 10 business days notice to the district. Additionally, given that the finding of a denial of FAPE in this matter is based on the district's failure to notify the parent of where and how the student would have received the special education program recommended in the May 2020 IEP, and that the district sent some of this information—the July 7, 2020 school location letter—within 10 business days from the date of the parent's notice, it would be inequitable to award the parent full tuition reimbursement. Further, as noted by the IHO, the parent's notice to the district did not provide the district with sufficient information to determine why the parent rejected the May 2020 IEP as the notice was overly vague indicating that the "program and placement offered cannot appropriately address [the student's] educational needs" for the 2020-21 school year (Parent Ex. H).

Turning to the district's allegations that the parent is not responsible for the cost of tuition, related services, or transportation, the hearing record includes the parent's executed enrollment contract with iBrain and an executed contract for the provision of transportation services (Parent Exs. E; G).[11] The contract with iBrain set out a base tuition that included the cost of academic programming, a school nurse, and a 1:1 paraprofessional for the student (Parent Ex. E at pp. 1-2). The contract further indicated that related services were not a part of the base tuition and would be billed monthly at a specified hourly rate (id. at p. 2). The hearing record does not include any bills for related services. With respect to transportation, the parent signed a contract for transportation services on August 20, 2020 (Parent Ex. G). The iBrain director testified that the student received special transportation accommodations during the 2020-21 school year (Parent Ex. K at p. 3); however, the hearing record is not clear as to how often this service was used by the student. Nevertheless, although the parent requested direct payment to iBrain, the parent has not demonstrated an inability to pay the cost of the student's attendance at iBrain and direct payment is an appropriate remedy only where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011]). As the parent has demonstrated an obligation to pay, but has not demonstrated a lack of financial resources, tuition reimbursement upon proof of payment for services delivered is the appropriate remedy.

Turning to the district's assertion that the cost of the tuition at iBrain was unreasonable, the district has not presented any evidence that the actual costs of the services provided by iBrain were excessive, i.e., by reference to actual evidence of lower-cost programs and/or services that were comparable to and available in the same geographic area or correlated to the length of the school

[11] As noted by the IHO, the parent's testimony regarding her execution and understanding of the enrollment contract was not entirely clear (IHO Decision at p. 11; see Tr. pp. 314-28).

day. The district also did not attempt to show if similar services to those being provided to the student at iBrain could have been provided at significantly lower cost by the district somewhere in its public schools. Further, the evidence does not support a finding that the student received services at iBrain that far exceeded the level that the student required in order to receive a FAPE such that a reduction of the amounts charged for each of the segregable costs would be warranted.

Given the above, particularly the late notice of the parent's intent to unilaterally place the student given the basis for finding a denial of FAPE in this matter, a 35 percent reduction in the total award of tuition reimbursement is warranted.

VII. Conclusion

Based on the above, while I agree with the IHO that the program and placement offered to the student was appropriate, the IHO erred in determining that the failure to provide the parent with notice of the school location where the student would receive services prior to the start of the school year did not result in a denial of FAPE for the extended 2020-21 school . In addition, iBrain was an appropriate placement for the student for the 2020-21 school year. However, equitable considerations warrant a 35 percent reduction in the relief awarded, including tuition and transportation costs.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that portion of the IHO's decision dated January 25, 2021 which found that the district offered the student a FAPE for the 2020-21 school year is reversed; and,

IT IS FURTHER ORDERED that the district shall reimburse the parent for 65 percent of the cost of the student's tuition at iBrain, as well as related services and transportation, for the 2020-21 school year, upon presentation of proof of payment.

Dated: **Albany, New York**
April 28, 2021

STEVEN KROLAK
STATE REVIEW OFFICER