The University of the State of New York

The State Education Department
State Review Officer
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No. 21-125

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., attorney for petitioners, by John Henry Olthoff, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Cynthia Sheps, 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 by respondent (the district) for their 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 equitable considerations did not bar an award of tuition reimbursement to the parents. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student has been the subject of prior State-level administrative appeals and the parties' familiarity with the detailed facts and procedural history is presumed and will not be recited in detail here (see Application of the Dep't of Educ., Appeal No. 21-060; Application of the Dep't of Educ., Appeal No. 19-117; Application of a Student with a Disability, Appeal No. 14-049). At the time of school year at issue (2020-21), and for the previous two school years, the student attended iBrain, which is self-described as a private not-for-profit special educational program for students with brain injury and brain-based disorders (Parent Exs. G at p. 2; K at p. 2). According to a

description by the district, the student has a history of sustained brain injury at birth resulting in hypoxic damage to the basal ganglia and the thalamus while also presenting with severe gastrointestinal disorder, spastic quadriplegia, cerebral palsy, dystonia, microcephaly, bilateral congenital dislocated hips, bilateral congenital foot deformities, global developmental delays, cortical visual impairment, strabismus, hyperopia, and astigmatism (see Parent Ex. D at p. 1).

A CSE convened on June 3, 2019, and found the student was eligible for special education services as a student with multiple disabilities and in an IEP recommended 12-month services in a 6:1+1 special class in a special school with adapted physical education two periods per week, a full time 1:1 paraprofessional, and special transportation (Parent Ex. I at pp. 1, 22-23, 25-26). The June 2019 CSE also recommended related services including individual occupational therapy (OT) for three forty-minute sessions per week, individual physical therapy (PT) for five forty-minute sessions per week, individual speech-language therapy for five forty-minutes sessions per week, individual vision education services for two 40-minute sessions per week, and individual/group parent counseling for one 40-minute session per month (id. at p. 22). The June 2019 IEP also provided for an assistive technology device, accompanying software, and wheelchair mount (id. at p. 23).

On April 30, 2020, iBrain created its own private IEP for the student which also identified the student's present levels of performance, recommended goals, management needs, transition goals, program recommendations, as well as related services and supports (Parent Ex. C at pp. 1-39). A CSE convened on May 7, 2020 and found the student remained eligible for special education services as a student with a traumatic brain injury and recommended that the student be placed in an 8:1+1 special class in a special school with a full time individual health paraprofessional (Parent Ex. D at pp. 1, 30-31). Additionally, the May 2020 CSE recommended related services consisting of individual OT for four 60-minutes sessions per week, 1:1 school nursing services full time, group parent counseling and training for one 60-minute session per month, individual PT for five 60-minute sessions per week, individual speech-language therapy for four 60-minutes sessions per week, speech-language therapy for one 60minute session per week, and individual vision education services for three 60-minute sessions per week (id. at p. 30). The May 2020 IEP recommended individual assistive technology services for two 60-minutes sessions per week and included supports for school staff on behalf of the student including two-person transfer training, training for vision adaptations and functioning, seizure safety training, and training for assistive technology (id. at p. 31). The May 2020 CSE recommended that all the student's services and program be provided on a twelve-month basis (id. at pp. 31-32). The IEP also included postsecondary goals, transition needs, and detailed a coordinated set of transition activities (id. at pp. 13, 33).

By letter dated June 29, 2020, the parents notified the district via their attorney of their intent to unilaterally place the student at iBrain for the 2020-21 school year seek public funding for the placement (Parent Ex. H). The parents' stated reason for placing the student at iBrain was their belief that the student's needs were "multifaceted and complex" and the district's program and placement offered "to date" could not appropriately address the student's education needs "for the extended school year 2020-[]21" (id.).

Although the May 2020 CSE recommended 12-month services and indicated a May 23, 2020 implementation date for the services, the district did not send the parents a prior written

notice summarizing the recommendations of the May 2020 CSE meeting or a school location letter notifying the parents of the specific school location where the IEP was to be implemented, until July 7, 2020 (Parent Exs. D at p. 1; L at pp. 1-5).

A. Due Process Complaint Notice

By letter dated July 6, 2020, the parents sent the district a due process complaint notice alleging that the district procedurally and substantively denied the student a free appropriate public education (FAPE) for the extended 2020-21 school year (Parent Ex. A at p. 1).[1] The parents contended that the student's acquired brain injury resulted in severe impairments in cognition, language, memory, attention, reasoning, abstract thinking, judgement, problem solving, sensory perceptual and motor abilities, psychosocial behavior, physical functions, information processing and speech that adversely impacted the student's educational performance (Parent Ex. A at pp. 2-3). The parents maintained that the severe nature of the student's disability as a non-verbal and non-ambulatory student with intensive management needs required a "significant degree of individualized attention and intervention" (id. at p. 3). To address the student's needs, the parents contended that the student required a small, structured classroom offering 1:1 direct instruction, a 1:1 full time paraprofessional to assist with daily activities, a modified environment reducing visual and sound distractions, two person transfers, periodic breaks, additional processing time for tasks, purposeful repetition of tasks, and educational instruction to accommodate the student's intensive needs (id.).

Specifically, the parents alleged that the district did not offer the student a FAPE because it failed to offer the student a "seat in a classroom that could implement the IEP" (Parent Ex. A at p. 3). The parents indicated that the district's failure to provide a seat for the student in a school where the IEP could be implemented on the first day of the extended school year was a denial of a FAPE (id.). They contended that the district failed to recommend a placement within the mandated timelines because the placement offer was made after the start of the school year which did "not comport with the requirements of the law" (id.). Further, the parents alleged that the recommended 8:1+1 program in a special school was not available for the 2020-21 extended school year, leaving the student without an educational program or placement (id. at p. 4).

The parents also argued that the district's public school assignment for the student for the 2020-21 school year was not appropriate because the classroom environment would not have met functional grouping requirements related to student's academic, behavioral/social, physical, and management needs (Parent Ex. A at p. 4). The parents indicated that after receiving the school location letter they attempted to reach the school and the CSE's placement officer to no avail (id.). The parents rejected the recommended placement based on their "prior bad experience with that type of program and placement" and believed that it could not meet the student's intensive

[1] The due process complaint notice also included a request for consolidation of the current school year with a due process complaint for the previous (2019-20) school year which was denied by an impartial hearing officer (Parent Ex. A at p. 1-2; IHO Interim Decision dated July 26, 2020). The parents also requested an interim decision regarding the student's pendency placement which was deemed moot because the student only attended the summer session of the extended school year and the case went forward on the merits (Tr. pp. 17-18; Parent Ex. A at p. 2).

management needs alleging that the student would not learn in an environment with peers possessing dissimilar needs (id. at p. 4).

Further, the parents contended that the May 2020 CSE failed to recommend sufficient related services and supports by ignoring the parents' request that the student receive all the related services, supports and devices as indicated in the iBrain school report that had been provided to the CSE (Parent Ex. A at p. 5). The parents argued that the district improperly modified the language of the iBrain school report by eliminating critical supports, services, management needs, goals and location for services (all pull-out sessions instead of push-in) resulting in an IEP that failed to address all of the student's needs and "would expose [the student] to regression" (id.). Additionally, the parents contended that by refusing to provide the student with an assistive technology device and denying assistive technology programming services the CSE denied the student a FAPE (id.). They argued that programming sessions were intended to update the student's device with new software and programs based on his progress and to assist his teacher and related services providers in understanding how to integrate the devices into his special education and therapy sessions (id. at p. 5). The parents asserted that the programming sessions would therefore provide meaningful educational benefit to the student by augmenting his ability to use assistive technology and allowing him to make progress in his academic curriculum (id.).

As relief for the district's alleged denial of a FAPE to the student, the parents requested that the district pay iBrain directly for the full cost of tuition for the 2020-21 extended school year including related services and a 1:1 paraprofessional; reimburse or provide prospective funding of special transportation with limited time travel and a transportation paraprofessional, nurse or porter services as required; prospective funding for a 1:1 school nurse during the school day; a new IEP meeting to address changes if necessary; and an order compelling the district to provide AT services and devices, and AAC to assist the student with his communication needs (Parent Ex. A at p. 6).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 27, 2021, and concluded on April 13, 2021, after three days of proceedings (see Tr. pp. 1-33). In a decision dated May 1, 2021, the IHO found that the district offered documentary evidence, failed to appear at the impartial hearing, did not provide the student a FAPE for the summer of the 2020-21 school year, and that the unilateral placement, iBrain, was not appropriate (IHO Decision at pp. 2, 4-8).[2] Accordingly, the IHO denied the parents requested relief in its entirety and dismissed the due process complaint notice (IHO Decision at p. 8).[3]

As relevant to the disputed issues in this appeal involving the unilateral placement of the student at iBrain, the IHO found that the student's "classification is important because it forms the

[2] The student only attended iBrain for the 2020 summer session during the extended 2020-21 school year because the student relocated out of state thereafter and stopped attending iBrain (Tr. pp. 4, 18, 25, 26-27; Parent Ex. K at p. 3; Dist. Ex. 4 at p. 1).

[3] The IHO made a finding that the district did not provide the student a FAPE despite the district conceding FAPE on Prong I (IHO Decision at p. 4; Tr. p. 25).

basis of the iBrain program" (IHO Decision at p. 5). The IHO reviewed the student's diagnoses, as well as the underlying components of a classification of traumatic brain injury versus multiple disabilities (IHO Decision pp. 5-7). The IHO determined that the hearing record was "devoid of any medical diagnosis that supported a diagnosis of [traumatic brain injury" for the student and thereby found that the "'direct instruction model and (that) informs the clinical approach taken throughout the interdisciplinary program' [wa]s not specially designed to meet the unique needs of a handicapped child, as he [wa]s not a [s]tudent with a BI[traumatic brain injury]" (IHO Decision at p. 7). Accordingly, the IHO determined that the program at iBrain did not meet its responsibility to provide the student with specially designed instruction, but rather "it imposed a baseless and inappropriate classification of traumatic brain injury on this [s]tudent in order to fit the [s]tudent into the iB[rain] program" (IHO Decision at p. 8).

Further, the IHO found that, despite the iBrain director of special education's affidavit and documentary evidence submitted by the parent, iBrain was deficient because the program provided "limited academic instruction to its enrolled students"(IHO Decision at p. 7). The IHO determined that during the 2019-20 school year the student received only "30 minutes per day of '1:1 academic[]' instruction per week and 30 minute 'academics' 3 times per week" for a grand total of four hours per week of academics (id.). The IHO noted that the remainder of the student's schedule was dedicated to related services and activities of daily living, which amounted to five to seven hours out the eight and a half hours the student attended iBrain (id.). Finding that the amount of academic instruction at iBrain was less the 90 precent of what was required by the student's peers in public schools, the IHO found that iBrain failed to provide sufficient academic instruction (id. at pp. 7-8).

Additionally, the IHO indicated that the hearing record provided no evidence that the student made progress at iBrain (IHO Decision at p.8). Based on the above, the IHO determined that the parents did not meet their burden in the Burlington/Carter unilateral placement criteria for tuition reimbursement (id.). With respect to equitable considerations, the IHO found that "the equities disfavor[ed] neither side" (id. at p. 9).

Finding that the district did not provide the student with a FAPE for the summer portion of the extended 2020-21 school year and that iBrain was not an appropriate unilateral placement for the student, the IHO denied the parents' requested relief and dismissed the due process complaint notice (IHO Decision at p. 9).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by failing to find the student's placement at iBrain for the 2020-21 school year was appropriate and failing to find that equitable considerations favored the parents' claim for reimbursement of tuition and all related services.

The parents argue that they satisfied their burden to demonstrate that iBrain was an appropriate placement for the student and initially the IHO's determination that traumatic brain injury for the student. The parents contend that the student's diagnoses of cerebral palsy and spastic quadriplegia, of which seizures are a side effect, are associated with brain injuries and since the

student's disabilities are connected to his brain injury, [4] is an appropriate classification not multiple disabilities, as the IHO claimed without legitimate medical basis.[5]

The parents noted that a previous SRO decision that found that "the IEP classification is not determinative of the program" noting the IEP is required to be tailored to the "student's specific needs and that a label such as a disability classification is immaterial in many cases." Lastly, with respect to the student's classification, the parents contend that the student is diagnosed with cerebral palsy and spastic quadriplegia, of which seizures are a common side effect and all are brain injuries concluding that because "all of [the student's] disabilities are a function of his brain injury, his appropriate classification is [traumatic brain injury]".

The parents argue that the IHO erred in holding iBrain's academic programming to inapplicable standards of law by misapplying the requirements of 8 NYCRR 175.5 which applies to schools that take and use federal funds. The parents maintain that iBrain, as a private, non-state approved program, is not subject to the requirements of section 175.5. They specify that as a private non-state approved school they must establish that the unilateral placement provides '"educational instruction specifically designed to meet the unique needs of the student.' (Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112 [2d. Cir. 2007]). However, the private school placement 'need not meet the IDEA definition of a free and appropriate public education' or 'state education standards or requirements'" (Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d. Cr. 2006]). The parents contend the standard requires that the private school placement "must be reasonably calculated to enable the child to receive educational benefits, and must be likely to produce progress, not regression".

The parents maintain that the IHO mischaracterized iBrain's academic programming erroneously stating that the program was deficient because the student received only 30 minutes of 1:1 academic instruction per day. The parents argue that the 1:1 academic instruction is in addition to the other academic instruction he receives with the whole class and that the related services are provided through a push-in and pull-out model during instructional time in the classroom which is essential for the student to carryover skills in new environments. The parents also indicate that the student attends instructional academic periods in his class, in small pairs and in groups.

With respect to the IHO's comments regarding remote learning the parents argue that there was no request for testimony regarding such and further state that it should not be considered in the discussion of appropriateness of iBrain because it is only relevant as to what is offered or recommended to the student at the time of placement not what the student ultimately received.

In the request for review the parents contend that the IHO erred in applying an incorrect legal standard in regard to academic progress noting that the law does not require a student to demonstrate progress in order to show that a placement is appropriate. Further, the parents argue

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[5] The parents note in the request for review that the student's iBrain IEP for 2020-21 and the district's IEP for the same year, both indicated that the student was eligible for special education services as a student with a traumatic brain injury (Req. for Rev. at p. 4).

that the IHO incorrectly stated that there was a lack of evidence that the student made progress alleging that it was factually incorrect as well as holding the parents to an incorrect standard for determining appropriateness of a private placement. The parents maintain that the student's iBrain IEP demonstrates that the student made progress citing his movement to an 8:1+1 special class, gains in academics, increasingly independent ability to communicate using his device, progress in literacy and mathematics goals, progress in communicating his wants/needs/feelings and communication in a social conversation, as well as progress related to receptive language and OT goals, goals related to academics, leisure, self-care, use of his device, sentence complexity, driving his power chair, and increased independence relative to mobility. The parents also point out that the hearing only covered two months of schooling which is too short of time period to demonstrate that the student made significant progress.

The parents also cite to the IHO's past findings that iBrain was an appropriate placement for similarly situated students.

The parents assert that the IHO erred in failing to find that equities fully favor them as they always made the student available for requested evaluation and assessments and attended the IEP meeting and actively participated. The parents note that the district's placement letter was untimely so the parents had no other placement than iBrain and that the district was aware that the student had been attending iBrain and was likely to do so again in the coming year despite the timing of the 10-day notice. Lastly, the parents indicated that they were unable to visit the proposed placement due to COVID related closures and the untimely placement notice made it impossible to investigate the appropriateness of the recommended placement.

Base on the foregoing the parents request that that the Office of State review grant their requested relief by reversing the IHO's April 27, 2021 findings in its entirety.

In an answer and cross appeal, the district denies the allegations set forth in the request for review except admits that the student is classified with a disability. The district requests that additional evidence that was attached to the parents' memorandum of law should be rejected as unnecessary for the SRO to render a decision. The district does not cross appeal the IHO's determination that the district did not offer the student a FAPE for the time period at issue in this appeal but refutes the IHO's statement that the district did not appear at the hearing and stipulates that the district conceded FAPE on Prong I.

The district argues that the IHO erred by opining on the appropriateness of the student's classification as there was no challenge to the student's classification in the due process complaint notice and, accordingly, the parents were not aggrieved on the issue and the IHO's finding should be vacated.

The district argues that the IHO properly determined that the parents failed to meet their burden to prove that iBrain was appropriate for the student's special education needs citing that the record is devoid of evidence that the iBrain program was individualized to meet the student's unique needs, and noting the iBrain director of education's testimony that "iBrain's program was substantially similar for all of its enrolled students." The district contends that the iBrain program does not distinguish between the individual students' needs and abilities noting the similarity for

all students receiving an extended school day, related services in sixty-minute increments, and limited academic instruction (only 7.5 hours devoted to academics).

The district argues progress is a relevant factor and the record is devoid of progress reports to support a finding that the student made progress at iBrain. Regarding remote learning, the district argues that the record lacks clarity regarding where the student was educated during the summer of 2020 and there was no direct evidence that the student was actually attending iBrain during the time period at issue.

The district cross appeals the IHO's finding regarding equities, arguing that the IHO erred in failing to find that equitable considerations do not favor the parents, and maintains that the record supports a total bar to tuition reimbursement. The district argues that the parents' notice of their intention to unilaterally place the student was dated June 29, 2020, and the extended school year began July 1, 2020, with classes at the district public school starting on July 2, 2020 while the student began attending iBrain on July 6, 2020. As such, the parents did not provide the 10 business days notice to the district nor did the parent's notice provide sufficient information that allowed the district to determine why the parents rejected the May 2020-21 IEP as the 10-day notice was "overly vague indicating that the 'program and placement offered c[ould]not appropriately address [the student's] needs' for the 2020-21 school year." Therefore, the parents failed to comply with statutory provision under the specific facts of this matter. Additionally, the district maintains that equitable considerations warrant denying or reducing a parent's request for relief where there is no proof that parents have a legal obligation to pay for the services for which they seek reimbursement.

The district requests that the SRO reverse the IHO's finding on equities and that the equites warrant a bar to the award of tuition reimbursement. The district requests that the SRO dismiss the parents appeal with prejudice in its entirety and sustain the district's cross appeal.

In a reply and answer to the district's answer and cross-appeal, the parents assert that the district's contention that they did not meet their burden to show that iBrain was appropriate is without merit and they further argue that the evidence shows that equitable considerations favor the parents.

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]).[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).

VII. Discussion

A. Additional Evidence

Initially a procedural matter must be addressed. The parents submit two pieces of additional evidence that are referenced solely in their memorandum of law, namely decisions by the same IHO in other proceedings involving other children at iBrain. 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]). In this case the parents argue that the IHO's other decisions show that the IHO

[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).

engages in conflicting reasoning with regard to iBrain. I decline to consider this evidence as it relates to different students and is wholly irrelevant to the student in this case. Moreover, the parents' point is not even factually accurate—the IHO's analysis of iBrain in the proceedings involving the other students is cursory at best and there is no indication in those decisions that she was even asked by the parties to rule upon the type of arguments present in this case, such as an inappropriate disability categorization, an alleged lack of adequate academic instruction or a purported lack of progress.

B. Unilateral Placement—iBrain

Turning to the merits of the parties dispute, in this case the district conceded that it did not offer the student a FAPE for the 2020-21 school year; therefore, that determination has become final and binding on the parties and shall not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]).[7] Consequently, the next issue is whether the parents' unilateral placement of the student at iBrain during the summer of 2020 was appropriate. The parents contend that the IHO erred in finding that iBrain was not an appropriate unilateral placement= For reasons set forth below, the evidence in the hearing record sufficiently supports a finding that iBrain provided the student with instruction and services specially designed to meet the student's unique needs and, therefore, was an appropriate unilateral placement for the student for the summer of the 2020-21 school year. As such the IHO determination to the contrary must be reversed.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20

[7] As for the district's cross-appeal, the hearing record shows that the district appeared during two out of three hearing dates, and it is irrelevant to the outcome of this proceeding.

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).

1. The Student's Special Education Needs

In this instance, although the student's needs are not directly in dispute, a discussion thereof provides context for the discussion of the remaining issue; namely whether the student's unilateral placement at iBrain met the student's educational needs thus establishing it as an appropriate placement.

According to the April 12, 2021 affidavit of the iBrain director of special education, the student had diagnoses of cerebral palsy, spastic quadriplegia, dystonia, microcephaly, cortical vision impairment, global developmental delays, strabismus, hyperopia, bilateral congenital dislocated hips, and astigmatism (Parent Ex. K at p. 3). Additionally, the director stated that the student sustained a brain injury at birth resulting in hypoxic damage to the basal ganglia and thalamus (Parent Ex. K at p. 3). The student's needs are set forth in the April 2020 iBrain IEP and district May 2020 IEP (Parent Ex. C at pp. 1-11; Parent Ex. D at pp 2-10). While the April 2020 iBrain IEP and the May 2020 district IEP are not identical they are substantially similar with a significant portion of the present levels of performance contained in the district IEP taken directly from that of the Brain IEP (compare Parent Ex. C at pp. 1-11, with Parent Ex D at pp. 2-10).[8] According to the iBrain April 2020 IEP the student had severe impairments in cognition, language,

[8] Given the similarity of the 2020-21 IEPs the student's needs will be taken primarily from the April 2020 iBrain IEP in establishing the appropriateness of the unilateral placement (compare Parent Ex. C at pp. 1-11, with Parent Ex D at pp. 2-10).

memory, attention, reasoning, abstract thinking, judgement, problem solving, speech and information processing, sensory, perceptual and motor abilities, psycho-social behavior, and physical functions (Parent Ex. C at pp. 3, 11). The iBrain IEP described the student as highly distractable and noted that it was challenging for him to attend to academic tasks in a large group setting (id. at p. 2). The student required constant redirection during classroom activities and additional time and assistance to complete tasks (id. at p. 2-3). According to the iBrain IEP, the student was non-verbal and presented with severe delays in expressive and receptive language skills, which affected his ability to communicate functionally (id. at p. 2). The student used an augmentative/alternate communication device to support his communication with others (Parent Ex. C at p. 4-5).[9] The iBrain IEP stated that the student was non ambulatory and fully dependent for all activities of daily living (id. at p. 14). He received occupational and physical therapy to support access to his communication device and improve his mobility; in addition intervention prepared his muscles and joints for work on strengthening, postural, and motor control (Parent Ex. C at pp. 5-7, 11, 14). The iBrain IEP indicated that the student required increased time to perform multiple repetitions of a task for motor learning, with extended time to process verbal prompts, and intervention to improve strength and control for the development of functional skills (Parent Ex. C at pp. 5-7, 11).

The iBrain IEP indicated that due to the student's cortical visual impairment, which was impacted by his impaired ability to maintain head and neck control, the student needed vision education services to develop consistent visual behaviors that would allow him to use his vision functionally (Parent Ex. C at pp. 7-8, 11). The student used a wheelchair as his primary means of mobility and required maximum physical assistance and was dependent for self-care tasks due to reflexive patterns and hypertonicity in upper extremities and lower extremities and his decreased range of motion in the lower extremities (Parent Ex. C at pp. 9-11). The iBrain IEP indicated that although the student was social with familiar individuals he needed cues and prompts to greet novel individuals (id. at pp. 9-10). In addition, given required cues, prompts, redirection, and navigational support the student was able to engage in turn taking conversations for 2-3 turns (id. at p. 10). According to the iBrain IEP, at times the student demonstrated difficulty in being engaged or refused to participate in conversational exchanges (id.).

The iBrain IEP indicated that the student required numerous accommodations of his management needs, enumerated below, to support his academic achievement, and social and physical development as well as nursing support for his health needs (Parent Exs. C at pp. 12-18; D at pp.10-12).

2. Specially Designed Instruction

Notably, the IHO largely determined that iBrain was an inappropriate unilateral placement for the student because iBrain's educational program was developed for students with a traumatic brain injury diagnosis and there was no evidence in the hearing record that the student had been diagnosed with a traumatic brain injury. Accordingly, the IHO opined that iBrain had "imposed a baseless and inappropriate classification of traumatic brain injury on this [s]tudent in order to fit

[9] According to the iBrain April 2020 IEP the student received all nutrition, hydration, and medication via G-tube (Parent Ex. C at p. 5). The IEP noted that the student had challenges imitating, planning, and producing the precise and specific movements of the jaw, lips, and tongue that are necessary for speech and feeding (id.).

[her] into the iBRAIN program" which was inappropriate for the student absent evidence that she had ever received that diagnosis (IHO Decision at p. 8). Given the IHO's reliance on the presumed salience of the traumatic brain injury classification with respect to the overall appropriateness of iBrain as a unilateral placement for the student, it is useful at the outset to review the relevance of classification in IDEA claims.

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

Accordingly, the IDEA requires that CSEs do not merely rely upon the disability category of a student to determine the needs, goals, accommodations, and special education services in his or her IEP, but instead utilize the information gleaned from the evaluation process. To wit, the evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (see 34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Once a student has been found eligible for special education, the present levels of performance sections of the IEP derived from the relevant evaluations and assessments becomes the operative focus with respect to the student's needs and not the "label" that is used when a student meets the criteria for one or more of the disability categories. Moreover, where neither the student's eligibility for special education nor the student's needs are in dispute, the significance of the disability category label is more relevant to the local education agency (LEA) and State reporting requirements than it is to determine an appropriate IEP for the individual student.[10] As a result,

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

the IHO's analysis of iBrain's appropriateness placed undue weight on the precise identification of underlying causes of the student's global and severe impairments and an overarching framework that focused on the classification of the student as opposed to how the student's disability manifests in the educational environment and whether iBrain provided her with instruction specially designed to meet her unique needs (see C.L., 744 F.3d at 836; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365). The opinions in the debate of brain injury verses congenital defects with respect to this student yields little assistance in addressing the student's deficits in cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psychosocial behavior; physical functions; information processing; and speech—such areas that affect a student's educational experience must be addressed through special education programming regardless of whether a medical diagnosis indicates that cause was an acquired brain injury after birth or a congenital condition since birth. Consequently, the IHO's insistence on a medical diagnosis was misplaced. Accordingly, I turn to the evidence in the hearing record and the question of whether iBrain was an appropriate unilateral placement for the student with this standard in mind.

According to testimony by the iBrain's director of special education, the student was enrolled at iBrain at during the period at issue (Parent Ex. K at p. 3). The director reported that iBrain is a private, not-for-profit, specialized special education program for students ages five through 21 with acquired brain injuries or brain-based disabilities (id.at p. 2). iBrain offers a 12-month extended school-year calendar and offers all services during its extended school day that operates from 8:30 a.m. to 5 p.m. (id.). The program is interdisciplinary and many of the students it serves are non-ambulatory and non-verbal (id.). The director indicated that every student at iBrain requires a 1:1 paraprofessional to assist them with activities of daily living and to help them access and benefit from the educational program (id.). The school has classrooms with 6:1+1 or 8:1+1 ratio for students who have either intensive or highly intensive management needs and who require a significant degree of individualized attention and intervention (id.).

iBrain's director of education also testified that the school provides its students with individualized education plans aimed at improving functioning skills appropriate to their cognitive,

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with the following procedure:

> (1) If a child has only two disabilities and those disabilities are deafness and blindness, and the child is not reported as having a developmental delay, that child must be reported under the category "deaf-blindness."
>
> (2) A child who has more than one disability and is not reported as having deaf-blindness or as having a developmental delay must be reported under the category "multiple disabilities"

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

physical, and developmental levels through a collaborative and multi-disciplinary approach incorporating best practices from the medical, clinical, and educational fields (Parent Ex. K at p. 2). The practices include direct instruction, cognitive strategies, compensatory education, behavior management, physical rehabilitation, therapeutic interventions, social interaction, and transition services (Parent Ex. K at p. 2).

With respect to related services, the iBrain director of education testified that the school provides OT, PT, speech-language therapy, vision education, assistive technology services, parent counseling and training, and services for the deaf and hard of hearing (Parent Ex. K at p. 2). She indicated that the therapy services were designed to support the student's education and were provided generally in 60-minute intervals using a push-in and pull-out model to address the student's therapeutic goals in multiple locations as a means to encourage generalization of skills (id.at pp. 2-3).

Specifically, to address this student's needs the April 2020 iBrain IEP detailed the student's plan for the 2020-21 school year and recommended that the student attend a 12-month 8:1+1 class with a 1:1 paraprofessional and a 1:1 nurse (Parent Ex. C at pp. 35-36). Additionally, the student's program included one group and four individual speech-language therapy sessions per week for 60 minutes per session, five individual sessions of PT per week for 60-minutes per session, four individual sessions of OT per week for 60-minutes per session, one individual session of assistive technology per week for 60-minutes per session, three individual sessions of vision education services per week for 60-minutes per session, and one session of individual/group parent counseling per month for 60-minutes (Parent Ex. C at pp. 36-37). Speech-language therapy, OT, PT, assistive technology, and vision education services were recommended to be both push-in and pull-out services based on the activity (id.). The iBrain IEP also recommended the use of individual assistive technology devices, daily, throughout the day across all environments and adaptive seating (id. at pp. 37-38). Supports for school personnel on behalf of the student included two person transfer training as well as training for vision adaptations and functioning, seizure safety, and assistive technology (id.).

The April 2020 iBrain IEP identified the student's management needs with respect to the human, environmental and material resources needed to support the student's academic achievement, social development, and physical development (Parent Ex. C at pp. 12-13). More specifically, the iBrain IEP recommended the student be provided the following human resources to address his management needs: a 1:1 paraprofessional, aided language stimulation, repetitive/additional processing time, repetition of verbal clues to increase comprehension, opportunities for engagement in age-appropriate leisure activities, two-person transfers, physical prompts to facilitate movement activities, autonomy over his schedule, frequent breaks to meet sensory needs, positive reinforcement and encouragement, and choices to engage in meaningful activities (Parent Ex. C at pp. 12-13). The iBrain IEP also recommended environmental modifications to address the student's management needs including: 1:1 instruction using a direct instructional model, highly structured environment with limited auditory and visual stimuli, padded treatment floor, benches, wedges, pillows for positioning, and a mirror for visual feedback (id.). In addition, the iBrain IEP indicated that the following material resources were necessary to address the student's management needs: an iPad-based communications tool, AAC assessment, incorporation of the student interests into school day for motivation, instructional laptop with resources and software about literacy and mathematic skills, switches, access to AAC, panel

switch, adapted tools and games, bilateral AFOs, supine stander, adaptive tricycle, left hand orthosis, right upper extremity orthosis, and various age appropriate toys (id.). Additionally, the iBrain IEP included an individualized health plan (IHP) that addressed the student's g-tube feeding and risk for aspiration, risk for physical injury, self-care deficits and risk for impaired skin integrity, and impaired verbal communication and social interaction (id. at pp. 12-17). The IHP detailed the student's nursing needs, goals, interventions, and expected outcomes (Parent Ex. C at pp. 14-17).

The student's recommended iBrain program included 15 annual goals with accompanying short-term objectives/benchmarks (Parent Ex. C at pp. 18-30). The IEP included one goal for literacy, one cognitive goal, one goal for social development, two vision education goals, three language goals, two PT goals, three OT goals, one AT goal, and one parent counseling and training goal, all with multiple benchmarks (id.). Additionally, the IEP included two goals that described the role of the paraprofessional (Parent Ex. C at p. 31). Specifically, the student's goals addressed reading comprehension, letter and shape recognition, self-awareness, visually attending to arrange activities through an object-based calendar, and search and scan for requested items (Parent Ex. C at pp. 18-21). The iBrain April 2020 IEP also include goals to address the student's needs with respect to core language knowledge, use of multimodal means of communication, pragmatic skills, activities to develop upper trunk strength for head control, lower extremity strength, increased academic participation, increase independence in functional mobility, increase accuracy and speed using an AAC device, carryover of skills to the home and the family's social needs (Parent Ex. C at pp. 22-30). The student was working on vocabulary development including categories and complex concepts, as well as expressive communication using multimodal means (Parent Ex. C at pp. 22-23).

The iBrain IEP also identified a coordinated set of transition activities and a transition annual g goal, along with 12 corresponding short-term objectives, that targeted the student's ability to develop compensatory, functional communication and mathematic skills in area of money (Parent Ex. C at pp. 32-34). The IEP outlined the student's needed activities relative to instruction, related services, community experiences, employment/post-school adult living, acquisition of ADLs, and functional vocational assessment (Parent Ex. C at pp. 32-34).

In sum, the hearing record reflects that the student required a small, highly-structured special education setting due to severe intellectual, communication, and adaptive delays and health needs that affected all areas of his daily living. While the IHO seems to suggest that iBrain was not able to individualize the student's program to meet his needs because the school was structured and programmed for students with a traumatic brain injury and there was no evidence that the student had received that diagnosis, the primary question in evaluating whether iBrain was an appropriate unilateral placement for the student is not what the school provided to other students based on their presumed classification, or what classification iBrain (or the district) used for the student, but whether iBrain provided special education supports that were commensurate with the student's level of ability and current functioning in the areas of academics, gross and fine motor skills, communication and health such that it can be said to have provided specialized instruction to the student that addressed his own particular unique needs. As discussed above, the evidence in the hearing record supports a finding that iBrain's provision of a small class size, as well as all of the related services the student required, academic instruction commensurate with his abilities,

nursing services and 1:1 support, constituted specially designed instruction which addressed his unique individual needs while providing him with educational benefit.

3. Limited Academic Instruction

Turning to the parents' assertion that the IHO erred in finding that iBrain was not appropriate due to limited academic instruction, the student's class schedule indicates that the student receives 1:1 academic instruction for a half hour five periods a week, literacy instruction for one hour four periods per week, and mathematics instruction for one hour once a week (Parents Ex. F at p. 1). The April 2020 iBrain IEP included academic goals related to increasing the student's readiness skills in reading comprehension and developing letter recognition skills, including the recognition and identification of upper case letters (Parent Ex. C at p. 18). The iBrain IEP also included an academic goal that targeted the student's ability to recognize, identify, and compare two-dimensional shapes (id. at p. 19). The iBrain 2020-21 program description explained that during push-in related services the therapist and special education teacher worked together in close collaboration in the classroom setting, with therapists providing the student the support they needed to practice their skills during a classroom activity (Parent Ex. G at p. 5). The description indicated that "[f]rom read alouds to art to math" every student participated in the educational lessons while incorporating goals from therapeutic disciplines, which ensured the student had maximum participation in the educational curriculum and developed the ability to generalize skills (Parent Ex. G at p. 5).

The parent's appeal the IHO's finding that the program at iBrain provided limited academic instruction and therefore was not an appropriate unilateral placement. The IHO cites to State regulation which asserts that a full-day session means a school day "'not less than 5.5 hours of instruction for students whose chronological ages are equivalent to those of students in grades 7 through 12 '" (8 NYCRR 200.1[q]); 8 NYCRR §175.5). However, the express purpose of section 175.5 is "intended to provide school districts with flexibility in meeting the 180-day requirement in order to receive state aid pursuant to Education law ....." and not as a means to ward off private school placements made by parents of students with disabilities when a school district has already denied the student a FAPE. Thus, in this case, a finding that the student did not receive 5.5 hours of instruction per day is an unpersuasive argument because iBrain is not a school district, but is a unilateral placement and, therefore, generally "need not meet state education standards or requirements" to be considered appropriate to meet a student's educational needs under IDEA (Frank G., 459 F.3d at 364; see Carter, 510 U.S. at 13-14). Rather, the question that the parties and the IHO should have focused on is whether iBrain provided the student with special education supports that were commensurate with his academic abilities and needs, such that it can be said to have provided an appropriate education to the student in this particular case. As described above the student presented with severe global delays in cognition, language development, social skills and motor abilities which impacted his access to the general education curriculum and that the services and instruction the student received at iBrain appropriately addressed the student's needs. As such, the amount of academic instruction the student received at iBrain by a special education teacher, even if it could have theoretically been more, is not a basis to conclude that iBrain was not an appropriate unilateral placement. Although chronologically, the student would be a high school student, the district's argument that too much of the school day at iBrain was focused on related services ignores the fact that the student is, in many respects, appropriately working on basic developmental and preacademic and academic readiness skills in virtually all of his special

education programming. Some of the student's skill deficits in his activities of daily living are appropriately addressed by a licensed related services provider such as a physical therapist or occupational therapist, but in many other instances in this case, such as communication and expressive language goals, either a related service provider such as a speech language therapist or a special education teacher could implement the student's goals.[11] Therefore, the IHO's finding that iBrain lacked sufficient academic instruction cannot weigh against the appropriateness the student's iBrain program and the IHO's finding must be reversed.

4. Progress

The parents also argue that the IHO erred by finding that the student did not make progress at iBrain. Without further elaboration, the IHO found "[a]bsolutely no evidence of the [s]tudent[']s progress was shown" (IHO Decision at p. 8). 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"]).

With respect to the student's progress at iBrain, the April 2020 iBrain IEP, contains some limited statements related to the student's progress at iBrain during the 2019-20 school year (Parent Ex. C at pp. 1-6)[12] but there are no actual progress reports in the hearing record from that school year and no evidence of progress concerning the student's attendance at iBrain during the summer portion of the 2020-21school year. However, given the student's enrollment at iBrain during the summer session was of brief duration, the lack of evidence concerning the student's progress for that portion of the 2020-21 school year is understandable. Accordingly, under the circumstances of this case, the lack of evidence in the hearing record concerning the student's progress during summer 2020 is not a factor that weighs against a finding that iBrain was an appropriate placement for the student during the 2020 school year. As a result, based on the totality of the evidence in the hearing record, iBrain was an appropriate unilateral placement for the student for the 2020-21 school year and the IHO's denial of tuition reimbursement to the parents must be reversed.

[11] For example, some of the skills that iBrain decided to allocate to the occupational therapist could also be performed by another provider or a special education teacher (see, e.g. Parent Ex. C at p. 27).

[12] The parents point to the April 2020 IEP as evidence of the student's progress at iBrain citing references such as a statement that the student was recommended to move to an 8:1:1 because of his high degree of social interest, his consistent academic progress, and increasingly independent ability to communicate using his device, the student's progress in literacy and mathematics IEP goals, progress in communicating his wants and needs, feelings, responding and communicating in social conversation as well as beginning to understand more abstract picture symbols (Parent Ex. C at pp. 1-4). The iBrain IEP also indicated that student made progress toward his goals related to academics, leisure exploration and self-care skills, improved participation in academics, used his device with minimal assistance to caption up to eight photos with moderate cues, and improved complexity of sentence and enjoyed "engaging" in familiar and motivation writing activities (Parent Ex. C at p. 5-6). It was noted that the student " made fast progress towards meeting his goal of driving his power chair" for a city block and demonstrated increased independence in improving mobility (Parent Ex. C at pp. 5-6).

C. Equitable Considerations

The IHO's sole finding with respect to equitable considerations was that "the equities disfavor[ed] neither side" (IHO Decision at p. 9). Such an equivocal finding, standing alone with no factual analysis at all, was not a productive use of time. The district raised this argument in its closing brief, and since the IHO erred in failing to address the argument when proceeding to address equitable considerations. The district continues its argues in its cross-appeal that the IHO should have found that equitable considerations weigh against an award of tuition reimbursement to the parents because they failed to comply with the 10-day notice requirement. The district also argues that the parents are not entitled to direct funding of the tuition costs for iBrain because although the parents demonstrated a financial contractual obligation to iBrain they did not establish an inability to pay the tuition costs.

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.

Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, there is no indication from the hearing record that the parents impeded the CSE process. However, the hearing record establishes that the district's extended school year began on July 1, 2020 with classes starting on July 2, 2020 (Req. for Rev. at p. 7). The program at iBrain for the 2020-21 school year commenced on July 6, 2020 (Parent Ex. E at p. 1). As the parents did not notify the district of their intention to unilaterally place the student at iBrain for the 2020-21 school year until June 29, 2020, their notice was untimely and failed to comply with the 10-day notice provision. In this case, the parents' due process complaint notice had already made clear that they had placed the student in at iBrain for the 2019-20 school year and were expecting a new placement by the beginning of the 2020-21 school year. Had their 10-day notice been timely, thereby notifying the district of their intention to unilaterally place the student, the district may well have corrected the defects of failing to issue a timely prior written notice and school location letter (and thus forestalled any reasonable chance of informing the parents of where the public school services could be obtained when the school year began). Under the circumstances of this case and as a matter within my discretion, the parents lack of compliance regarding the 10-day notice provision warrants a small but meaningful reduction of $2,000 in the tuition reimbursement award in light of their failure to comply with the IDEA's notice requirements.

With respect to the parents' request for direct funding, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) equitable considerations favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M., 758 F.3d at 453 [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]). Since the parents selected iBrain as the unilateral placement, and their financial status is at issue, it is the parents' burden of production and persuasion with respect to whether they have the financial resources to "front" the costs of iBrain and whether they are legally obligated for the student's tuition payments (Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).Here, it is undisputed that the parents executed an enrollment contract with iBrain that included tuition costs, as well as the cost of a school nurse and 1:1 paraprofessional for the student, and further indicates that related services would be billed monthly at a specified hourly rate (Parent Exhibit E). The hearing record does not include, however, any reliable evidence related to the parents' inability to "front" the costs of the student's attendance at iBrain during the summer of the 2020-21 school year. Accordingly, the parents are entitled to tuition reimbursement from the district upon the submission of proof of

receipt of the services and payment therefore but are not entitled to direct funding of the tuition costs to iBrain.

VIII. Conclusion

Having determined that the evidence in the hearing record establishes that the parent's unilateral placement of the student at iBrain for the 2020-21 school was appropriate and that the equitable considerations largely favor the parents' request for relief, with the exception of their noncompliance with the 10-day notice provision, the parents are entitled to the requested reimbursement in part for the student's attendance at iBrain for the time period at issue upon proof of attendance and delivery of related services as well as receipt of payment, less $2,000 due to the untimeliness of the parents 10 day notice.

I have considered the parties' remaining contentions and find it unnecessary to address them in light of my determination above.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated, May 1, 2021, is modified reversing that portion that which found that the student's unilateral placement at iBrain was not appropriate for the 2020-21 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the cost of the student's tuition and related services at iBrain for the 2020-21 school year, less $2,000 due to the parents noncompliance with the 10-day provision, upon the parents' submission to the district proof of the student's attendance and delivery of related services at iBrain as well as proof of payment for the time period when the student attended iBrain during the 2020-21 school year.

Dated: **Albany, New York**
July 9, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER