



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-197

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

**Appearances:**

Liz Vladeck, General Counsel, attorneys for petitioner, by Sarah M. Pourhosseini, Esq.

The Cuddy Law Firm, PLLC, attorneys for respondent, by Mark Gutman, Esq.

### DECISION

#### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son for the 2019-20 and 2020-21 school years, awarded compensatory educational services, and ordered it to directly fund her son's tuition costs at the International Institute for the Brain (iBrain) for the 2020-21 school year. The 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 has been the subject of prior administrative proceedings. As part of a prior impartial hearing, the parent obtained independent educational evaluations (IEEs) of the student consisting of a June 24, 2019 bilingual neuropsychological evaluation, a July 29, 2019 physical therapy (PT) evaluation and an August 3, 2019 speech-language therapy evaluation (Parent Exs. J; K; L; see Parent Ex. A at p. 2). The June 24, 2019 bilingual neuropsychological evaluation report reflected that the independent neuropsychologist conducted a record review of the student's educational history, which included a February 2019 parent hearing request, three IEPs dated between March 2016 and February 2018, occupational therapy (OT), PT, speech-language therapy, and auditory evaluations, and a functional vision assessment report, all dated between October 2015 and May 2018, as well as additional records about the student (Parent Ex. J at pp. 1-9). The June 2019 neuropsychological evaluation report reflected that the Developmental Assessment of

Young Children-Second Edition (DAYC-2), was "administered for descriptive purposes" with the parent and the student's nurse serving as informants for the assessment (*id.* at p. 10). At the time of the evaluation the student was eight years and four months old, and the student's cognitive, receptive and expressive communication, social/emotional, physical (gross motor and fine motor), and adaptive skills were found to be at the less than a one month age equivalent (*id.* at pp. 10-12).<sup>1</sup> The neuropsychologist noted that while the DAYC-2 was "normed for children to age five years 11 months, age equivalents of areas of functioning (when less than this age level) can give an estimate of how problematic these difficulties are"(*id.* at p. 10). The neuropsychologist further noted that "[t]hese age equivalent[s] are not normalized for children with the extent of [the student's] physical delays, but does not give an indication as to the extent of his difficulties" (*id.*). The neuropsychologist also reported that the student had received diagnoses of hypotonia, global development delay, seizures, obstructive sleep apnea, callosal agenesis, colpocephaly, mega cisternal magnum with static encephalopathy, cortical blindness, bradycardia, epilepsy, and asthma (*id.* at p. 12). The neuropsychologist offered a diagnosis of profound intellectual disability and indicated that the student presented with "markedly delayed skills in all areas of functioning due to genetic conditions affecting many key brain functions" (*id.* at p. 13).

The parent commenced a prior proceeding by due process complaint notice dated August 8, 2019, alleging that the district denied the student a FAPE for the 2019-20 school year (Dist. Ex. 7 at p. 3). While that proceeding was pending, the parent wrote to the district on January 15, 2020, stating that she had received a telephone call from "the unit teacher" to schedule a CSE meeting for the 2018-19 school year (Parent Ex. D at p. 1). The parent advised that the 2018-19 school year had passed and that she would agree to meet for the 2019-20 school year, provided that any IEP developed "be effective starting July 2020" because she "was waiting on a decision from an impartial hearing regarding the 2019-2020 school year" (*id.* at pp. 1, 2).

A CSE convened on February 5, 2020 and developed an IEP with an implementation date of February 26, 2020 (Parent Ex. B at pp. 1, 20-21). The February 2020 CSE recommended a 12-month school year program, including a 12:1+(3:1) special class placement in a specialized school with the related services of adapted physical education, OT, PT, parent counseling and training, school nurse services, speech-language therapy, vision education services, assistive technology consisting of a static display speech generating device, and special transportation (*id.* at pp. 19-22, 24, 25-26).

On February 8, 2020, an IHO issued a decision in the prior proceeding (Dist. Ex. 7). The IHO, in the prior proceeding, ordered the district to convene a CSE to develop an IEP that incorporated the recommendations of the June 2019 independent neuropsychological evaluation including placement in a nonpublic school (NPS) or clinic-based setting (*id.* at pp. 10, 11). The February 8, 2020 decision also directed the district to defer the student to the central based support team (CBST) to locate a State-approved NPS within 15 days or the parent was authorized to enroll the student in an NPS at district expense for the remainder of the 2019-20 school year (*id.* at p. 11). The February 8, 2020 decision further directed that if the parent was unable to find a school placement for the student, the district must "fund at-home or clinic-based ABA services and

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<sup>1</sup> The June 2019 bilingual neuropsychological evaluation incorrectly lists the student's age as four years and nine months in the body of the report and correctly lists the student's age as eight years and four months on the first page (compare Parent Ex. J at p. 12; with Parent Ex. J at p. 1).

therapies as recommended by the [n]europsychologist" (id.). The February 8, 2020 decision also awarded 276 hours of compensatory speech-language therapy (id.). Neither party appealed the February 8, 2020 IHO decision.

By letter dated March 18, 2020, the parent requested a CSE meeting to review the IEEs in accordance with the February 8, 2020 IHO decision (Parent Ex. F). By letter dated March 24, 2020, the parent advised the district that she did not want to wait until schools reopened for a CSE meeting and further stated that she was available to meet by telephone (Parent Ex. G at p. 1). In the same correspondence, the parent notified the district that the student needed a device to "access the online learning" and a battery for the student's "communication device (grip switch)" (id.).<sup>2</sup> In a response dated March 31, 2020, the district's unit coordinator advised the parent that according to the student's speech-language therapist, the student's grip switch had a working battery and was being used during the student's remote sessions (Parent Ex. I at p. 1). The district's unit coordinator further advised the parent that she had requested a tablet for the student's use during remote learning and that a CSE meeting had been scheduled for April 24, 2020 pursuant to the parent's request (id. at pp. 1, 2).

A CSE convened on April 24, 2020 for the purpose of amending the student's IEP "to reflect changes ordered by the impartial hearing office" (Parent Ex. C at pp. 3, 12). Additional notes on the IEP indicated that a CSE meeting was also held on June 2, 2020, to add a 1:1 paraprofessional "to implement the ABA or BIP" as per the impartial hearing decision" (id. at p. 7). The April 24, 2020 IEP reflected an implementation date of June 16, 2020 (id. at pp. 1, 19-20).

The parent obtained a July 31, 2020 functional behavioral assessment (FBA) as recommended in the June 24, 2019 independent bilingual neuropsychological evaluation (Parent Ex. M; see Parent Ex. J at p. 13).<sup>3</sup>

The parent executed an enrollment contract with iBrain on September 8, 2020 (Parent Ex. N at pp. 1, 7). According to the enrollment contract, students were deemed enrolled beginning ten days "after the [p]arent's attorney sends the 10-day notice" to the district and "ending on June 25, 2021" (id. at p. 1). By letter dated September 15, 2020, the parent notified the district of her intention to unilaterally enroll the student in iBrain and seek "payment of all tuition costs, any and all related services, and . . . transportation" for the 2020-21 school year (Parent Ex. H at pp. 1-2). The hearing record reflects that the student continued to receive PT and OT services from district providers through October 2, 2020 (Parent Ex. BB at pp. 5, 10). The student began attending iBrain on October 5, 2020 (Parent Ex. T at ¶ 13).

### **A. Due Process Complaint Notice**

By due process complaint notice dated October 2, 2020, the parent alleged that the student was denied a FAPE for the 2019-20 and 2020-21 school years (Parent Ex. A at p. 8). The October 2, 2020 due process complaint notice referenced prior proceedings, in which the parent was

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<sup>2</sup> The parent's letter was emailed to the district on March 30, 2021 (see Parent Ex. G at p. 2).

<sup>3</sup> Although the report is titled as including both an FBA and a behavioral intervention plan (BIP), no BIP was developed (Parent Ex. M). For purposes of this decision, the report will be referred to as an FBA.

awarded several IEEs and, as noted above, a decision was rendered regarding the 2019-20 school year on February 8, 2020 (*id.* at pp. 2-3). The parent invoked pendency at iBrain and asserted that the student's pendency placement "stems from" the February 8, 2020 IHO decision, which awarded the parent, among other things, deferral to the district's CBST for placement in an NPS (*id.* at p. 2). The parent further alleged that the district failed to comply with the awarded deferral to CBST within the timeframe allotted by the IHO and, as a result, the parent was permitted to locate an NPS and enroll the student at iBrain in July 2020, "as ordered by the [IHO]" in his February 8, 2020 decision (*id.*).<sup>4</sup>

The parent alleged that the February 2020 IEP failed to recommend the appropriate class size and services requested by the parent and recommended in the IEEs, thereby depriving the parent of meaningful participation in the development of the student's IEP (Parent Ex. A at p. 6). In addition, the parent argued that she was denied meaningful participation in the development of the student's IEP due to the district's failure to provide independent, simultaneous interpretation in the parent's native language "so that she could participate in real time" (*id.*).

In addition, the parent alleged that the February 2020 CSE failed to recommend an appropriate program and related services in a timely manner, failed to recommend a class size and ABA services consistent with the recommendations of an independent neuropsychological evaluation, and failed to follow the recommendations included in the other IEEs (Parent Ex. A at pp. 5, 6). Specifically, the parent asserted that an independent speech-language evaluation recommended three 45-minute sessions of speech-language therapy per week, while the February 2020 CSE only recommended two 30-minute sessions and one 45-minute session per week (*id.* at p. 6). Next, the parent asserted that she requested that the CSE reconvene following the issuance of the February 8, 2020 IHO decision (*id.* at p. 5). The parent contended that the CSE failed to reconvene despite several requests until April 24, 2020 (*id.*). The parent also alleged that the April 24, 2020 CSE failed to follow the directives of the IHO and failed to develop an appropriate IEP (*id.*).

The October 2, 2020 due process complaint notice further stated—without specifying which IEP or school year was at issue—that "[d]espite the IHO's order and a new IEP, the [district] failed to locate an appropriate placement for the [s]tudent," which denied the student a FAPE (Parent Ex. A at p. 6).<sup>5</sup>

Without specifying the IEP or school year, the parent claimed that the district failed to implement the student's IEP (Parent Ex. A at p. 6). The parent further alleged that the student "[wa]s absent due to his severe medical needs" and when absent, "he does not receive his services he is entitled to" (*id.*). The parent also asserted that the district failed to provide an appropriate program during remote learning; specifically, the parent alleged that she advised the district that the student was given work that he was not capable of completing and that he slept during some

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<sup>4</sup> The February 8, 2020 decision of the IHO from the prior proceeding awarded enrollment in an NPS for the remainder of the 2019-20 school year—not the 2020-21 school year, which was when the student was unilaterally enrolled in iBrain (*compare* Dist. Ex. 7 at p. 11; *with* Parent Ex. A at p. 2).

<sup>5</sup> The paragraphs above and below this section of the due process complaint notice assert claims related to the February 5, 2020 IEP. However, the "IHO's order and a new IEP" language cannot logically relate to the February 5, 2020 IEP, as the IHO's decision was not issued until February 8, 2020, after the February 2020 CSE meeting.

of his services (id. at p. 7). Next, the parent claimed that the district's "historical inability to appoint a hearing officer in a timely manner" impeded the parent's due process rights and denied the student a FAPE (id.).

With regard to the 2020-21 school year, the parent argued that iBrain was an appropriate placement for the student and equitable considerations weighed in favor of the parent's requested relief (Parent Ex. A at p. 7). As a proposed resolution, the parent requested a pendency order establishing iBrain as the student's pendency placement, a finding of a denial of a FAPE for the 2019-20 and 2020-21 school years, the provision of attendance records for the 2019-20 school year and for the period of July 2020 through October 2020, funding for make-up services for all mandated services not provided to the student to be delivered by independent providers of the parent's choosing, funding for 10 hours per week of home-based applied behavior analysis (ABA) services to be delivered by a Board Certified Behavior Analyst (BCBA) or Licensed Behavior Analyst (LBA) of the parent's choosing, funding for 184 hours of compensatory parent counseling and training delivered by an independent provider of the parent's choosing, funding for 920 hours of compensatory ABA services delivered by an independent provider of the parent's choosing, an independent assistive technology evaluation at public expense and the provision of recommended supports, direct funding of the student's tuition and transportation costs at iBrain, and a finding that the district's failure to immediately appoint a hearing officer impeded the parent's right to due process (id. at pp. 8-9).

## **B. Impartial Hearing Officer Decision**

A prehearing conference was held on February 26, 2021, wherein the parent's counsel reported that the parties had reached an agreement with regard to the student's pendency (Tr. p. 3).<sup>6</sup> The substantive portion of the impartial hearing took place on June 25, 2021 and June 28, 2021 (Tr. pp. 28-180). In a decision dated August 27, 2021, the IHO found that the district "did not present any witnesses . . . to defend the student's programs" for either the 2019-20 or 2020-21 school years and, on that basis, the IHO found the student was denied a FAPE "for the subject school years" (IHO Decision at pp. 6-7). Specific to the 2019-20 school year, the IHO noted that the district's claims of res judicata were without merit and the parent's claims related to the 2019-20 school year were not addressed in the prior due process complaint notice (id. at p. 9). The IHO found that the student was required to participate in remote learning without having received a learning device until April 8, 2020, and further, the student was given inappropriate work that he was not capable of completing (id. at p. 4). The IHO also found that the district failed to provide all of the student's mandated related services during the remote learning period of the 2019-20 school year (id.).

The IHO found that the district did not present any evidence to rebut the parent's request for compensatory education and that the requested relief was appropriate to address the denial of a FAPE during the 2019-20 school year "and to meet the student'[s] educational needs going forward" (IHO Decision at pp. 8-9). As compensatory relief for the failure to provide mandated related services during the 2019-20 school year, the IHO awarded (10) 30-minute sessions of PT, (18) 30-minute sessions of speech-language therapy, (9) 30-minute sessions of OT, (10) 30-minute

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<sup>6</sup> In addition to the prehearing conference on February 26, 2021, status conferences were also held on April 16, 2021 and on May 18, 2021 (Tr. pp. 1-27).

sessions of "vision services", and (24) 45-minute sessions of parent counseling and training (*id.* at pp. 4-5, 9). The IHO also awarded 920 hours of compensatory ABA services, which represented ten hours per week for 46 weeks for two school years (*id.* at pp. 5, 10). The IHO noted that the student required compensatory ABA services because the district did not provide him with "the appropriate supports, and ABA would help instill the behaviors of communication, [and] assist with communication in all environments" (*id.* at p. 5). The IHO further found that the district failed to provide the parent with parent counseling and training for two years and awarded 184 hours of compensatory relief which represented two hours per week for 46 weeks for two school years (*id.* at pp. 5, 9).

With regard to the parent's unilateral placement, the IHO found that iBrain was appropriate and provided direct and specialized educational instruction that was specifically designed to meet the student's unique educational needs (IHO Decision at p. 7). The IHO further found that iBrain provided an individualized instructional program with the related services of OT, PT, speech-language therapy, music therapy, "vision services", parent counseling and training and that "the student made progress in various areas during remote instruction learning" during the 2020-21 school year (*id.* at p. 5). Concerning equitable considerations, the IHO found that the parent provided the district with a ten-day notice and cooperated with the CSE process and that, therefore, a reduction in tuition reimbursement was not warranted (*id.* at pp. 6, 8). The IHO awarded tuition reimbursement and/or direct payment of the student's tuition at iBrain for the 2020-21 school year (*id.* at pp. 7, 10). The IHO further ordered the district to conduct an assistive technology evaluation within 45 days of his decision (*id.* at pp. 9, 10).

#### **IV. Appeal for State-Level Review**

The district appeals and argues that the IHO erred in finding that the student was denied a FAPE for a portion of the 2019-20 school year and for the 2020-21 school year, that the parent met her burden of establishing the appropriateness of her unilateral placement of the student at iBrain, and that equitable considerations weighed in favor of granting the parent's requested relief. The district further argues that the IHO erred by denying its motion to dismiss the parent's claims related to the 2019-20 school year on the ground of res judicata. The district alleges that the IHO's decision issued in the prior proceeding on February 8, 2020, awarded relief for the entirety of the 2019-20 school year. The district further argues that the CSE reconvened on April 24, 2020, and on June 2, 2020, to implement the February 8, 2020 IHO decision. The district contends that the parent alleged in the prior proceeding that the district failed to convene a CSE meeting and develop an IEP for the 2019-20 school year and thus, according to the district, denied the student a FAPE for the entirety of the 2019-20 school year. The district argues that all of the elements of res judicata have been met and the parent was awarded relief for the entire 2019-20 school year. The district alleges that the parent conceded that the prior proceeding concerned the entire 2019-20 school year when she requested that a proposed January 2020 CSE meeting develop an IEP that must be effective starting July 2020, because the parent was "waiting on a decision from an impartial hearing regarding the 2019-2020 school year." In addition, the district asserts that the parent was awarded prospective relief for the entire 2019-20 school year, consisting of a CSE meeting with translation in the parent's native language, an IEP that implemented the recommendations of the IEEs, an increase in the amount of speech-language therapy the student was receiving, and a deferral to the CBST for placement in an appropriate NPS for the remainder of the 2019-20 school year. The district further alleges that the IHO in the prior proceeding also ordered that, if the district failed to locate an NPS for the student within 15 days, the parent was

entitled to unilaterally enroll the student in an NPS at public expense for the remainder of the 2019-20 school year, and if the parent was unable to locate a placement for the student, the district was required to fund home-based ABA. The district argues that the parent failed to avail herself of the awarded relief and her claims related to the 2019-20 school year are barred by the doctrine of res judicata.

Alternatively, the district alleges that the parent was improperly seeking enforcement of the IHO's decision in the prior proceeding and any failure to utilize the relief awarded in the prior proceeding does not entitle the parent to additional compensatory education in a second proceeding. The district further argues that the parent's procedural claims regarding the February 5, 2020 CSE meeting and delay in appointing an IHO to hear this matter did not amount to a denial of a FAPE, especially in light of the relief awarded in the prior proceeding on February 8, 2020. The district also contends that the parent's implementation claims must fail as the district's inability to provide services to a student who is absent does not amount to a denial of a FAPE. The district asserts that any relief awarded for a denial of a FAPE for a portion of the 2019-20 school year "should bear a nexus to the additional FAPE violation and be awarded for a time period that reflects when the FAPE violation occurred, no earlier than February 5, 2020 (Req. for Rev. ¶ 12).

The district next argues that the IHO erred by finding that the parent demonstrated that iBrain was an appropriate unilateral placement for the 2020-21 school year because iBrain did not provide ABA services, the parent failed to demonstrate that the remote learning program was appropriate for the student, and that there was no evidence in the hearing record to show what the student was actually receiving in the remote learning program. Additionally, the district asserts that there was no evidence that make-up sessions were provided to the student, a 1:1 paraprofessional was not provided to the student, and the student's private 1:1 nurse provided all of the services the student received in iBrain's remote learning program.

The district requests reversal of all compensatory relief awarded for the 2019-20 school year and argues that many of the missed sessions were due to the student's absences or erroneously marked as missed when the student was present. The district argues that the number of sessions the student missed did not result in a denial of a FAPE.

With regard to the 2020-21 school year, the district alleges that the parent was not entitled to an award of compensatory ABA services or compensatory parent counseling and training. The district asserts that iBrain did not provide ABA services to the student and the parent did not obtain ABA services for the student and therefore did not incur a financial risk that would entitle her to both tuition reimbursement and compensatory relief. The district also contends that the parent received parent counseling and training at iBrain. Further, the district argues that although it conceded a denial of a FAPE for the 2020-21 school year, the parent is not automatically entitled to all of her requested relief. Additionally, the district asserts that the two years of compensatory education awarded by the IHO in this matter were for school years not at issue and for a time period that was less than two school years.

As to equitable considerations, the district argues that the cost of the student's attendance at iBrain was unreasonable because the student did not attend a full year of school at iBrain, did not receive a 1:1 paraprofessional, and the cost of base and supplemental tuition included services the student did not receive. The district further asserts that the student has a history of excessive absences and the hearing record did not include proof of attendance. Lastly, the district contends



that the parent requested direct payment of tuition to iBrain but failed to demonstrate an inability to pay the cost of the student's attendance.

In an answer, the parent generally responds to the district's allegations with denials and argues in favor of the IHO's determinations that the district failed to offer the student a FAPE, that iBrain was appropriate, and that equitable considerations weighed in favor of the parent's requested relief. The parent also asserts that the district's answer was not verified by a party and should be dismissed for failing to comply with the practice regulations. The parent has annexed two documents to her answer for consideration as additional evidence.

In a reply, the district asserts that it has complied with the practice regulations and included an exhibit for consideration as additional evidence. The district also contends that the parent has failed to comply with the practice regulations by exceeding the page limit for a pleading and requests that any part of the parent's answer that exceeds the page limitations not be considered.

## 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]).<sup>7</sup>

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.

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<sup>7</sup> 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).

Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Compliance with Practice Regulations**

The parent argues in her answer that the district's request for review should be dismissed for failing to comply with the requirement that a pleading must be verified by a party. In its reply, the district asserts that it has complied with State regulation.

Contrary to the parent's assertion, the district's request for review—as verified by the district's attorney—complies with practice regulations. State regulations provide that all pleadings shall be verified. The request for review shall be verified by the oath of at least one of the petitioners, except that when the appeal is taken by the trustees, the board of trustees, or the board of education of a school district, the request for review shall be verified by any person who is familiar with the facts underlying the appeal, pursuant to a resolution of such trustees or board authorizing the commencement of such appeal on behalf of such trustees or board (8 NYCRR 279.7[b]). Accordingly, an attorney for the district may verify a request for review if the above conditions are met. Statements to the contrary included in a footnote in Application of a Student with a Disability, Appeal No. 21-118 were incorrect.

The request for review in this matter has been verified by an attorney, who averred that she was familiar with the facts underlying the appeal and that she had read the request for review. In addition, with its reply, the district provided a copy of a 2011 delegation of authority to appeal from the decisions of IHOs on behalf of the Chancellor. Contrary to the assertion of the parent, the district has complied with the practice regulations.

In its reply, the district argues that the parent's answer should be rejected for failing to comply with form requirements for pleadings. In particular, the district asserts that the parent's answer exceeds the regulatory page limit.

State regulation provides that a "request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length" (8 NYCRR 279.8[b]). In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents (8 NYCRR 279.8[a]-[b]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments

rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at \*4-\*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Here, the parent's answer was 12 pages long, in excess of the 10-page maximum set forth in State regulation (8 NYCRR 279.8[b]). Viewing the answer as a whole, it appears that the page limitations violation could have been avoided had the parent's attorney refrained from repeatedly citing well-settled case law and by combining her general denials rather than devoting one or more paragraphs to respond to each paragraph of the district's request for review (see, e.g., Answer ¶¶ 7-8, 9-12, 14-16). In addition, the parent was authorized to submit a memorandum of law of up to 30 pages in length (8 NYCRR 279.4[g]; 279.8[b]), but elected not to do so. A memorandum of law may be utilized to further argue the relevant facts in the hearing record and legal authority to support the contentions raised in the answer (8 NYCRR 279.8[d]) but may not be used to circumvent the page limitations.

While I decline to exercise my discretion to reject the parent's pleading due to this irregularity in this instance (see 8 NYCRR 279.8[a]), the parent's attorney is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject an answer, an SRO may be more inclined to do so after a party or an attorney's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 21-102; Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

## **2. Additional Evidence**

The parent has annexed two exhibits related to a prior proceeding to her answer for consideration as additional evidence. 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]).

The parent has submitted transcript pages and her closing brief from a prior proceeding. The resultant February 8, 2020 IHO decision from this proceeding was admitted into evidence in this matter (Dist. Ex. 7). The parent's proffered additional evidence was available at the time of the hearing in this matter and is not necessary in order to render a decision in this matter. Therefore, I decline to consider the parent's proposed exhibits.

## **3. Res Judicata**

The district argues that the IHO erred in failing to dismiss the parent's claims alleging a denial of a FAPE and requesting compensatory education for the 2019-20 school year based on the doctrine of res judicata. According to the district, the parent's August 8, 2019 due process

complaint notice underlying the prior proceeding raised allegations regarding the 2019-20 school year and the parent was awarded relief for the entire 2019-20 school year in the unappealed February 8, 2020 IHO decision concluding that matter.

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at \*6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at \*5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at \*6 [N.D.N.Y. Dec. 19, 2006]). The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at \*4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at \*6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at \*4; Grenon, 2006 WL 3751450, at \*6).<sup>8</sup> Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]).

Here, I find that the IHO correctly denied the district's motion to dismiss the parent's allegations related to the 2019-20 school year, as the claims raised in this proceeding relate to a February 5, 2020 IEP. Specifically, res judicata does not apply to the parent's claim for compensatory education for services that were not implemented pursuant to the February 2020 IEP because this claim could not have been raised in the prior proceeding.

At the time the parent filed the due process complaint notice initiating the first 2019-20 proceeding, in August 2019, the district had last developed an IEP for the student at a CSE meeting held on February 14, 2018 (SRO Ex. 1 at p. 4).<sup>9, 10</sup> According to the August 2019 due process complaint notice, an IEP had not been developed for the 2018-19 school year or for the 2019-20

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<sup>8</sup> While the IDEA allows a parent to file "a separate due process complaint on an issue separate from a due process complaint already filed" (20 U.S.C. § 1415[o]; 34 CFR 300.513[c]), "consolidation of multiple issues into a single complaint where such issues are known at the time of the filing of the initial complaint" are encouraged (Due Process Procedures for Parents and Children, 70 Fed. Reg. 35782 [June 21, 2005]). It has been noted in IDEA jurisprudence that "[a]lthough courts were initially hesitant to use res judicata in the administrative setting, the doctrine has consistently been applied to administrative hearings that reach a final judgment on the merits" (Theodore v. Dist. of Columbia, 772 F. Supp. 2d 287, 293 [D.D.C. 2011]).

<sup>9</sup> After the initiation of the appeal in the present matter, the undersigned sought and received as additional evidence a copy of the parent's August 8, 2019 due process complaint notice, which commenced the prior proceeding related to the 2019-20 school year. For purposes of this decision, the August 2019 due process complaint notice will be cited as SRO exhibit 1.

<sup>10</sup> A June 24, 2019 independent bilingual neuropsychological evaluation indicated that a February 2018 IEP was part of the evaluator's record review (Parent Ex. J at p. 3). The IHO in the prior proceeding also noted in his February 8, 2020 decision that the last IEP developed for the student as of the time of that impartial hearing was February 14, 2018 (Dist. Ex. 7 at p. 4).

school year (*id.* at p. 5). According to the February 8, 2020 IHO decision in the prior proceeding, the hearing was held on December 17, 2019 (Dist. Ex. 7 at p. 3). Thereafter, a CSE convened on February 5, 2020 and developed an IEP (Parent Ex. B). Accordingly, the parent could not have amended the due process complaint notice that initiated the first 2019-20 proceeding to challenge an IEP that did not yet exist. Given that the district had failed to develop an IEP for the 2018-19 and 2019-20 school years (until February 2020), the parent had no reason to anticipate that the district would develop an IEP during the prior proceeding and instead had every incentive to seek a favorable decision in the prior matter.

The hearing record reflects that the student received special education and related services from the district through October 2, 2020 (Parent Ex. BB at pp. 5, 10). Thereafter, the parent submitted a due process complaint notice dated October 2, 2020, which initiated this proceeding raising among other claims, the appropriateness and implementation of the February 5, 2020 IEP (Parent Ex. A at pp. 4, 5, 6, 7). In light of the above, the parent was suffering from a new injury, the district's alleged failure to recommend and implement an appropriate program in the February 5, 2020 IEP for the remainder of the 2019-20 school year. These claims could not have been asserted in the due process complaint notice initiating the first proceeding regarding the 2019-20 school year, as the February 2020 CSE meeting was held while that proceeding was pending.

The district's argument that the parent was awarded relief for the entirety of the 2019-20 school year is not relevant to the determination of whether or not *res judicata* applies, although such relief may be taken into account in evaluating the relief to be awarded in the present matter. Accordingly, the IHO correctly concluded that the parent's claims raised in the October 2, 2020 due process complaint notice were not barred by the doctrine of *res judicata* and there appears no basis in the hearing record to disturb that determination.

#### **4. Scope of Review**

Turning to which claims are properly before me on appeal, in the opening of the request for review, the district indicated its intention to appeal the IHO's finding that it failed to meet its burden of proving that the student was offered a FAPE for a portion of the 2019-20 school year.

The regulations governing practice before the Office of State Review require that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Further, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]).

Furthermore, the practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]).

The district argues that "with respect to [the p]arent's procedural claims regarding the February 5, 2020 IEP meeting... [and] with respect to [the p]arent's implementation claims," that

the district's inability to provide services when the student was absent does not amount to a denial of a FAPE (Req. for Rev. ¶11). However, the district did not raise this assertion during the hearing, focusing the entirety of its opening statement on its *res judicata* argument and submitting no evidence regarding the implementation of the February 2020 IEP (*see* Tr. pp. 46-49; Dist. Exs. 1-7). Additionally, in its closing brief, the district affirmatively stated that it "did not demonstrate it provided a [FAPE] to the student for the school years in question" (Dist. Post-Hr'g Br. at p. 2). Accordingly, as the district conceded, during the hearing, that it did not offer the student a FAPE during the 2019-20 school year, the district cannot now, on appeal, introduce a new argument in support of a finding that it provided the student with a FAPE for the 2019-20 school year.

Further, the district does not dispute the parent's allegations that the student frequently missed related services. Rather, the district requests that I sift through all of the student's missed services and determine whether the missed service should be attributed to the district—without the district citing to or introducing any evidence to support a finding either way (*see* Req. for Rev. ¶11). The district's argument is an impermissible attempt to shift the burden of proof to the parent when it is allocated to the district under State law (*see* Educ. Law 4404[1][c]). Accordingly, I will not delve further into the reasons why the student missed his related services' sessions.

Notwithstanding the above, the district has valid arguments regarding the amount of compensatory relief awarded by the IHO; those arguments will be addressed below.

## **B. Compensatory Education**

The IHO awarded the student compensatory educational services consisting of (10) 30-minute sessions of PT; (18) 30-minute sessions of speech-language therapy; (9) 30-minute sessions of OT; (10) 30-minute sessions of vision therapy; and (24) 45-minute sessions of parent counseling and training (IHO Decision at pp. 4-5). The IHO then stated that "it was recommended that the student receive 920 hours of compensatory ABA therapy (2 years x 10 hours x 46 weeks)" and that "[t]he [p]arent should be provided 184 hours of compensatory [parent counseling and training] (2 years x 2 hours x 46 weeks) since the [district] failed to provide the [p]arent [parent counseling and training] services for over two years" (*id.* at p. 5). Later in the IHO's decision in a section discussing compensatory education, the IHO stated that the district "did not present any evidence to rebut the parent's request for comp[ensatory] ed[ucation]" and found that the relief requested was "appropriate to address the denial of FAPE for the relevant portion of [the] 2019-2020 school year at issue and to meet the student'[s] educational needs going forward" (*id.* at pp. 8-9).

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (*Wenger v. Canastota*, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (*see E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 451 [2d Cir. 2014]; *Newington*, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; *see also E. Lyme*, 790 F.3d at 456; *Reid v. Dist. of Columbia*, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory education services to students who remain eligible to attend school and

have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. of City Sch. Dist. of Buffalo v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for an SRO to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

### **1. Timeframe for Award**

As an initial matter, the IHO erred in ordering compensatory education to remedy a denial of FAPE for two full school years. The award of compensatory education services covered the beginning of the 2019-20 school year even though the due process complaint notice in this matter specifically made allegations directed at the February 2020 IEP and, for this reason—as discussed above—the doctrine of *res judicata* did not apply to completely bar the parent's allegations related to the 2019-20 school year as a result of the prior proceeding involving the 2019-20 school year. Indeed, regarding the parent's implementation claims, prior to the February 2020 IEP, there was no IEP in place to implement—which was an issue before the IHO in the prior matter. Thus, any award of compensatory education covering the period of time prior to the implementation date of the February 2020 IEP (i.e., February 26, 2020) was outside of the scope of the impartial hearing.

As for the period of time prior to the student's attendance at iBrain (October 5, 2020) but after the June 16, 2020 implementation date of the April/June 2020 IEP, the April/June 2020 IEP represented the district's implementation of the February 2020 IHO decision arising from the prior proceeding (Parent Ex. C at pp. 3, 19-20; see Dist. Ex. 7). The April/June 2020 IEP replaced the February 2020 IEP as the operative IEP (M.P. v. Carmel Cent. Sch. Dist., 2016 WL 379765, at \*5 [S.D.N.Y. Jan. 29, 2016] [concluding that a later-developed IEP was the operative IEP as the operative IEP is the IEP the district chooses to defend at the end of the resolution period]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at \*8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP"]; see also M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at \*25 n.3 [S.D.N.Y. Sept. 28, 2018] [finding the later developed IEP to be operative even though it was developed during the first weeks of school]; Application of the Dep't of Educ., Appeal No. 12-215). The parent did not take issue with the April/June 2020 IEP in her due process complaint notice (see generally Parent Ex. A). However, the parent's claim relating to implementation of the student's related services does appear to overlap with that period of time that the April/June 2020 IEP was in effect. Generally, to the extent that the parent's dispute surrounding implementation of the April/June 2020 IEP could be deemed an



allegation directed at the implementation of the February 2020 IHO decision from the prior administrative proceeding, it is well settled that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at \*7, \*9-\*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). There may be instances where an IHO's order for a prospective IEP with a specific program and related services may preclude a parent from seeking relief for a district's failure to implement the IEP developed consistent therewith through the impartial hearing process based on the IHO or SROs enforcement authority. However, under the circumstances of this matter, where the IEP implementation claim is focused on related services and the IEP developed in compliance with the IHO's decision contains related service mandates that are almost identical to the IEP that preceded it (compare Parent Ex. B at pp. 19-21, with Parent Ex. C at pp. 19-20), I decline to find that the parent's claim is foreclosed in this forum.<sup>11</sup>

Finally, the IHO erred in awarding compensatory ABA services and parent counseling and training for the 2020-21 school year in addition to funding for the cost of the student's attendance at iBrain. As noted above, the student began attending iBrain on October 5, 2020. Some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; but see I.T. v. Dep't of Educ., State of Hawaii, 2013 WL 6665459, at \*7-\*8 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education for services the student received at the nonpublic school]). The Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with E. Lyme, 790 F.3d at 456-57 [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Accordingly, unlike the Third Circuit, the Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington/Carter analysis (see

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<sup>11</sup> The April/June 2020 IEP included a recommendation for music therapy that was not included in the February 2020 IEP (compare Parent Ex. C at p. 19, with Parent Ex. B at pp. 19-21); however, there is no allegation related to the district's failure to implement music therapy or a request for compensatory music therapy services. In addition, some of the service recommendations are different with respect to the contemplated location for delivery and session duration but the differences are subtle and do not support a finding that they arose only due to the IHO's order, such that the implementation of the services could be equated with enforcement of the order rather than an effectuation of the district's obligation to deliver special education to a disabled student under the statute.

Application of a Student with a Disability, Appeal No. 16-050). However, if permitted, it would be the rare case where a unilateral placement is deemed to provide instruction specially designed to meet the student's unique needs but the student is also deemed entitled to compensatory education to fill gaps in the services provided by such unilateral placement.

A parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "private placement furnishes every special service necessary" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). However, for the outside services to represent a portion of the unilateral placement, the parent must undergo the financial risk associated with unilateral placements (see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] ["Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test"] [first emphasis added] [internal quotations marks and footnotes omitted]; see also Carter, 510 U.S. at 14). To the extent a parent cannot afford to front the costs of the services, the district may be required to directly fund the services, but only if it is shown that the parent was legally obligated to pay for the services but, due to a lack of financial resources, had not made payments (see Mr. & Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school 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]).

Here, the parent was not seeking funding for private related services she secured for the student; instead, the IHO ordered district funding of compensatory education services to make up for alleged gaps in both the student's IEP and the unilateral placement. And there is no basis to find that this matter represents a unique or rare circumstance such that it would warrant an order requiring the district to fund the unilateral placement, as well as prospective compensatory education to make-up for deficiencies in the placement chosen by and arranged for by the parent. To do so would amount to double relief, which I decline to order, and accordingly, I will sustain the district's appeal.

In summary, a review of the hearing record shows that the IHO appropriately determined that the student should be awarded compensatory education, particularly given the district's failure to address its burdens in the due process hearing context by describing its views, based on a fact-specific inquiry set forth in an evidentiary record, regarding an appropriate compensatory education remedy that most reasonably and efficiently could place the student in the position that he would have been but for the denial of a FAPE (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 457 [2d Cir. 2015], cert. denied, 136 S. Ct. 2022 [2016], quoting Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [noting that the "ultimate award [of compensatory education] must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]). However, the IHO erred in awarding compensatory education services to remedy a denial of FAPE for two full school years. Instead, to remedy the district's uncontested failure to implement all of the

student's related services, the student is entitled to compensatory education services to make up for services missed from the implementation date of the February 2020 IEP (February 26, 2020) through October 2, 2020 when the district stopped delivering services to the student due to his enrollment at iBrain. I turn now to the substance of these awards.

## 2. Related Services

As compensatory education to make-up for missed related services, the IHO calculated an hour-for-hour award based on evidence regarding the number of services missed.<sup>12</sup> However, based on evidence in the hearing record and given that the IHO erred in awarding compensatory education services for a timeframe broader than warranted, the award of compensatory related services will be modified. As discussed above, the timeframe for the award of related services will be limited to the dates falling between February 26, 2020 and October 2, 2020.

As proof of missed related services, the parent submitted what appears to be a spreadsheet downloaded from the district's "ENCOUNTER" database (Parent Ex. BB). When reduced to a standard size sheet of paper, the text of the document is approximately two and one-half point font size, rendering the document illegible. The document can only be read electronically by enlarging it to more than twice its size. The document has been sorted by related service and not further sorted by service date. The session notes describing the student's condition, the therapy provided, and the student's progress are therefore presented to the reader in random order.

Nevertheless, while unnecessarily burdensome, review of the entire document establishes that the district attempted to provide related services to the student from January 17, 2020 through October 2, 2020 (Parent Ex. BB at pp. 3, 5, 10). Further review reflects that the number of requested compensatory missed sessions asserted by the parent included sessions that were not missed and sessions that were missed prior to implementation of the February 2020 IEP.

For PT, the parent requested and the IHO awarded ten 30-minute sessions (IHO Decision at pp. 4, 9; Parent Post-Hr'g Br. at p. 15). According to the hearing record, PT was offered by the district from January 17, 2020 through October 2, 2020 (Parent Ex. BB at pp. 1-7).<sup>13</sup> The student missed nine sessions during that time period (*id.* at pp. 2, 3, 4, 5, 7). April 24, 2020 was marked as a missed PT session, however review of the session notes reveals that the student received 15 minutes of services due to the provider attending a meeting related to the student (*id.* at p. 1). Of the nine sessions the student missed, only six sessions were identified as being missed during the relevant time period from February 26, 2020 through October 2, 2020 (*id.* at pp. 1-7).

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<sup>12</sup>A review of the service delivery records in the hearing records shows occasional missed services, largely as a result of the student's absences, which ordinarily might not be found to amount to a material or substantial deviation from the student's IEP (see *A.P. v. Woodstock Bd. of Educ.*, 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; *M.L. v. New York City Dep't of Educ.*, 2015 WL 1439698, at \*11-\*12 [E.D.N.Y. Mar. 27, 2015]). However, as discussed above, during the hearing the district did not contest the parent's assertion that the district did not implement the February 2020 IEP and I will not opine further on the implementation violations underlying the related services compensatory award.

<sup>13</sup> The February 2020 IEP recommended that the student receive three 30-minute sessions of PT per week, beginning February 26, 2020 (Parent Ex. B at p. 20).

The parent requested and the IHO awarded nine compensatory 30-minute sessions of OT (IHO Decision at pp. 4, 9; Parent Post-Hr'g Br. at p. 15). The student was offered OT by a district provider from January 29, 2020 through October 2, 2020 (Parent Ex. BB at pp. 7-11).<sup>14</sup> The hearing record reflects that the student missed seven sessions during that time period (id. at pp. 7, 8, 9, 10, 11). March 23, 2020 was marked as a missed session, however the student received 26 minutes of OT (id. at p. 7). March 30, 2020 was also marked as a missed session, however the student received 28 minutes of OT (id. at p. 11). Of the seven sessions that the student missed, only five sessions occurred during the relevant time period from February 26, 2020 through October 2, 2020 (id. at pp. 7-11).

The parent requested and the IHO awarded 18 compensatory 30-minute sessions of speech-language therapy (IHO Decision at pp. 4, 9; Parent Post-Hr'g Br. at p. 15). A district provider offered the student speech-language therapy from February 10, 2020 through August 13, 2020 (Parent Ex. BB at pp. 11-14).<sup>15</sup> The hearing record reflects that the student missed a total of 12 sessions during that time period (id. at pp. 11, 12, 13, 14). April 21, 2020, April 23, 2020, April 28, 2020, May 7, 2020, July 13, 2020, and July 14, 2020 were marked as missed speech-language therapy sessions; however, the record reflects that services were offered to the student on those dates (id. at pp. 11-14).<sup>16</sup> On April 21, 2020, and April 23, 2020, the student was sleeping during the 30-minute sessions and the district's speech-language provider engaged with the student's nurse for 25 minutes and 27 minutes, respectively (id. at pp. 11, 12). On April 28, 2020, the student's nurse experienced technical difficulties and the student received 20 minutes of speech-language therapy during the 30-minute session (id. at p. 12). On May 7, 2020, the session notes indicated that the student was awake while the therapist played music and received therapy for 25 minutes; however, the student did not activate his switch to request more music when given ten opportunities during the 30-minute session (id. at p. 11). Based on the above, it appears that the student missed nine sessions of speech-language therapy during the relevant time period from February 26, 2020 through October 2, 2020 (id. at pp. 11-14). Of the missed sessions, six were scheduled as 45-minute sessions and three were scheduled as 30-minute sessions (id.). Accordingly, as a compensatory award, and in part to ease the delivery of services, the award will be for nine 45-minute sessions of speech-language therapy.

The parent requested and the IHO awarded ten compensatory 30-minute sessions of "vision services" (IHO Decision at pp. 5, 9; Parent Post-Hr'g Br. at p. 15). The student was offered vision education services by a district provider from February 12, 2020 through September 30, 2020 (Parent Ex. BB at p. 14).<sup>17</sup> The hearing record reflects that the student missed ten sessions;

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<sup>14</sup> The February 2020 IEP recommended that the student receive three 30-minute sessions of OT per week, beginning February 26, 2020 (Parent Ex. B at p. 20).

<sup>15</sup> The February 2020 IEP recommended that the student received two 30-minute sessions and one 45-minute session per week of speech-language therapy (Parent Ex. B at p. 21).

<sup>16</sup> Missed sessions were indicated for April 17, 2020 and July 2, 2020; however, these were not scheduled as speech-language therapy sessions for the student and were instead categorized as phone consultations between the provider and the student's nurse (Parent Ex. BB at p. 12).

<sup>17</sup> The February 2020 IEP recommended that the student receive one 30-minute session of vision education services per week, beginning February 26, 2020 (Parent Ex. B at p. 21).

however, of the ten sessions that the student missed, only nine sessions occurred during the relevant time period from February 26, 2020 through October 2, 2020 (*id.*).

As relief for the denial of a FAPE from February 26, 2020 through October 2, 2020, the parent is entitled to receive related services that were not provided by the district as compensatory education consisting of six 30-minute sessions of PT; five 30-minute sessions of OT; nine 45-minute sessions of speech-language therapy; and nine 30-minute sessions of vision education services.

### **3. ABA and Parent Counseling and Training**

The district appeals from the IHO's awards of compensatory ABA and parent counseling and training for the 2019-20 and 2020-21 school years. The district argues that the parent's evaluator recommended two years of compensatory ABA and parent counseling and training in a July 2020 evaluation to remedy "the last two school years," which would have been the 2018-19 and 2019-20 school years which were outside the scope of the impartial hearing (Req. for Rev. ¶18). The district also asserts that the parent's evaluator was unable to explain in her testimony why the student required 10 hours per week of ABA, what the basis of the two-year compensatory award recommendation was, and what communication need ABA would address that the student's compensatory speech-language therapy award would not address.

For the 2019-20 school year, the IHO awarded ten hours per week of ABA and two hours per week of parent counseling and training for 46 weeks to remedy a denial of a FAPE. The IHO determined that the district "did not present any evidence to rebut the parent's request for comp[ensatory] ed[ucation]" and found that the relief requested was "appropriate to address the denial of FAPE for the relevant portion of [the] 2019-2020 school year at issue and to meet the student[s] educational needs going forward" (IHO Decision at pp. 8-9).

While the district failed to present evidence or its view of an appropriate compensatory education award, the IHO was not required to award all of the relief that the parent sought. Such an outright default judgment awarding compensatory education—or as in this case, any and all of the relief requested without question—is a disfavored outcome even where the district's conduct in denying the student a FAPE and in failing to actively participate in the impartial hearing process is egregious (*see Branham v. Govt. of the Dist. of Columbia*, 427 F.3d 7, 11-12 [D.C. Cir. 2005]). Indeed, an award ordered so blindly could ultimately do more harm than good for a student (*see M.M. v. New York City Dep't of Educ.*, 2017 WL 1194685, at \*8 [S.D.N.Y. Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). As discussed below, the hearing record does not fully support the IHO's award of compensatory ABA and parent counseling and training.

Among the recommendations included in the June 2019 independent neuropsychological evaluation was a referral for an FBA, "which could include applied behavior analysis methodology," performed by a BCBA (Parent Ex. J at p. 13). According to the neuropsychologist, an FBA was "indicated to accurately ascertain measurable skills in functional areas and reinforcers that c[ould] be used to improve them" (*id.*). The neuropsychologist also stated in his recommendations that "[c]ommunity agencies that ha[d] the resources and expertise to work with

students with [the student]'s medical and cognitive delays need[ed] to be an essential part of his overall IEP" (*id.* at p. 14). He opined that these agencies should have certified special education teachers, BCBA or LBA staff who could provide intensive behavioral treatments to children with Autism Spectrum Disorders (ASD) and/or other developmental disabilities (*id.*). He noted that these agencies serve children of various ages including infants, toddlers and school-aged students as well as adolescents and young adults with ASD and/or other developmental disabilities who may be exhibiting severe delays in their cognitive functioning, speech/language and communication skills, social-emotional functioning, motor abilities, and self-help skills/adaptive functioning (*id.*). The neuropsychologist also suggested that the agencies provided services for parents to implement ABA instructional methods and behavior modification techniques during naturalistic learning opportunities in the course of daily familial routines to help promote socially significant behavior change across important developmental domains (*id.*). Further, the neuropsychologist also opined that the student's class size should be no greater than 6:1, and if it was not in an NPS, "a 1:1 paraprofessional [wa]s needed to implement the [ABA] or [BIP]" (*id.*).

In the parental concerns section of the February 2020 IEP, it was noted that the parent "would like the recommendations" listed in the June 2019 neuropsychological evaluation including intensive instruction provided by professionals who are experienced with assistive technology, an FBA performed by a BCBA to accurately ascertain measurable skills in functional areas and reinforcers that can be used to improve them, ABA instruction, and a class size of 6:1 with a 1:1 paraprofessional (Parent Ex. B at p. 26). The February 2020 IEP also noted that the parent expressed an interest in ABA and was advised that "this behavioral approach is used to modify existing behaviors that are targeted for being maladaptive or inappropriate, which [the student] does not exhibit. Rather, teacher and service providers all apply behavioral techniques including reinforcement, and consistently using stimuli that [the student] finds reinforcing in his instruction in the classroom" and related services (*id.* at p. 27).

The July 2020 written FBA report reflected that the assessment was conducted at the request of the independent neuropsychologist (Parent Ex. M at p. 1). The July 2020 FBA report further indicated that the student was assessed on July 20, 2020 and July 29, 2020, while attending a district specialized school and receiving home-based services due to the Covid-19 pandemic (*id.*). The student was observed during a speech-language therapy "telehealth" session and the BCBA also reported that she conducted interviews with the parent and the student's nurse as well as a document review (Parent Exs. M at p. 1; CC ¶¶ 4, 6). The July 2020 FBA report indicated that the student had diagnoses of cerebral palsy, unspecified type, and intractable Lennox-Gastaut syndrome with status epilepticus (Parent Ex. M at p. 1). The BCBA who prepared the July 2020 FBA report described the student as non-ambulatory and nonverbal and noted that the student used a wheelchair for mobility and a supported standing chair when in therapy session at home (*id.* at p. 2). The BCBA also reported that the student made a few sounds, but had no other form of communication, received all nutrition via a gastrojejunostomy (G-J) tube and was dependent on his nurse for all other activities of daily living including bathing, dressing, and brushing his teeth and hair (*id.*). The BCBA further described the student as capable of moving both arms with a left-side preference, and as accepting being physically guided (*id.*). The BCBA also noted that the student had difficulty understanding and interpreting spoken language, was unable to follow directives, identify any presented item, or answer questions (*id.*). The BCBA reported that the student would intermittently respond to his nurse calling his name by opening his eyes, however due to the side effects of some of the student's antiseizure medication, the student had "difficulty

staying awake for any length of time which cause[d] challenges during therapy sessions" (*id.*). The BCBA also noted that the student was completely dependent on his nurse and parent to provide and meet all of his needs and to communicate for him with outside providers (*id.*).

The BCBA described target behaviors as behaviors the student engaged in that prevented him from "functionally engaging in his environment" (Parent Ex. M at p. 4). The student's identified target behavior was being "[o]ff-task: [e]ngaging in a task when prompted" (*id.*). The July 2020 FBA report noted that the student did not comply with any task demands presented by the speech therapist during the observation and did not respond to any prompts by family members (*id.* at pp. 4-5). The July 2020 FBA report reflected that the BCBA utilized indirect and direct assessment measures to collect data and determined that the student's behaviors were mostly maintained by his inability to communicate and that the student "has learned that the people around him will determine what he wants and needs" (*id.* at p. 5). The BCBA further reported that the student was on a schedule that was strictly followed, which decreased "his anxiety of the unknown but left no room for [the student] to select another activity" (*id.*). The BCBA stated that the student's communication device was a "more" switch, which only allowed the student to request more of a preselected activity and did not offer the student the option to decline an activity (*id.*).

During the July 20, 2020 observation, the BCBA noted in a summary that the student received a 45-minute speech-language therapy telehealth session (Parent Ex. M at p. 5). The student was noted to be "in his stand-up chair with his 'more' switch in his left hand" (*id.*). During the session, the student's nurse was instructed by a district speech therapist to shake a maraca to the left and right sides and to the center of the student's face (*id.*). The BCBA noted that no response from the student was observed (*id.*). The July 2020 FBA report also reflected that the district speech therapist verbally prompted the student to activate the switch to request more of the music she was playing ten times during the session "with 0% success" (*id.*). According to the BCBA's observation summary, the district speech therapist prompted the nurse to use hand-over-hand to assist the student with activating the switch so the therapist "could reinforce the behavior with more of the music and verbal praise" (*id.*). The BCBA further noted that during the observation on July 20, 2020, the student moved his left arm on two occasions during the 45-minute session; however, it was unclear to the BCBA if the movement was initiated by the student or was a twitch (*id.* at p. 6).

During the afternoon of July 20, 2020, the BCBA observed the student in the stand-up chair while the nurse brushed his teeth, noting that the student "slept during the entire brushing" (Parent Ex. M at p. 6). The BCBA also observed that after 20 minutes in the stand-up chair, the nurse moved the student to his bed and "[a]ll other services were performed in his bed while he was sleeping" (*id.*). The BCBA further reported that the student's parent entered the room and "there was recognition when mom was talking" (*id.*). The BCBA noted that the student moved his hand twice and responded with a small smile when the parent "rubbed his belly" (*id.*).

The BCBA observed the student a second time on July 29, 2020 (Parent Ex. M at p. 6). The BCBA reported that the student was awake and gave a partial smile when she was talking (*id.*). During this observation, the student's nurse fed the student via the G-J tube, moved the student to the stand-up chair to administer medications and brushed the student's teeth (*id.*). According to the BCBA's summary, the nurse reported that he played different types of music for the student during the day when the student was not receiving remote instruction (*id.*). The BCBA noted that the student did not respond to any prompts but did move his left hand or arm three times

during the 20-minutes he was in the stand-up chair (id.). According to the summary, the student's nurse indicated that this was a twitch, not a movement by the student (id.).

For frequency data, the July 2020 FBA reflected that during the speech-language therapy session, the student provided "0% independent responses" to the more switch, and "0% independent responses" during the home observation (Parent Ex. M at p. 6). For duration data, the BCBA reported that during the speech-language therapy session, the student was "0% on task, frequently prompted to stay awake" and during the first home observation, the student was "sleeping 75% of the observation" and during the second home observation, the student was "awake 100% of the observation [b]ut [exhibited] no independent responses" (id.).

In the conclusions and recommendations of the July 2020 FBA report, the BCBA hypothesized that the function of the student's target behavior was "automatic" (Parent Ex. M at p. 7). The BCBA opined that the student engaged in behaviors "because there was something inherently satisfying about not engaging — the behavior alone [wa]s enjoyable for him," and was something that did "not require a social presence or the reaction of others to occur or be maintained" (id.). Further, the report indicated that the student's target behavior was maintained by his inability to effectively communicate (id.). The BCBA described the student as nonverbal, easy-going, and a quiet boy who was "attempting to overcome the side-effects of his current medication" (id.). The BCBA also noted that according to the student's nurse, a few of his current medications made the student sleepy, which was directly impacting his ability to stay on-task throughout the day (id.). The BCBA further opined that "Covid-19 and [the student]'s absences during the past school year might have impacted the effectiveness of the training he received on the use of the switch" (id.). The BCBA indicated that "[d]uring the speech observation the criteria for use, prompt level and reinforcement was not clearly defined" (id.). The BCBA also stated that the student had "no criteria for not wanting something to continue or to select something else" and had not been given an appropriate method to communicate his wants or needs and opined that a preference assessment needed "to be given to determine things that [the student] would like to request in the future" (id.). The BCBA recommended that the student enroll in a nonpublic, full time ABA program with 25 hours per week of full time, 1:1 ABA support (id.). The BCBA further stated that public school did not meet the student's educational needs and had not been able to provide proper behavioral intervention to reduce off-task behaviors while increasing his ability to effectively communicate (id.). According to the BCBA, the student required ongoing oversight by a BCBA to collect and assess behavioral data to design and implement functional communication training to facilitate reliable reduction of interfering behaviors (id.). The BCBA stated that "[t]his program should be targeted to specific skills that [the student] needs to develop, including communication, independence, compliance, listener skills, requesting, and play skills" (id.). The BCBA further recommended ten hours per week of home-based ABA provided by a BCBA or LBA, two hours per week of parent counseling and training, and 920 hours of compensatory ABA and 184 hours of compensatory parent counseling and training (id. at pp. 8, 9). In addition, the BCBA recommended regular meetings between the student's family and school staff, as well as a technology assessment and a preference assessment (id. at p. 8).

The BCBA testified by affidavit and averred that her recommendation of compensatory ABA and parent counseling and training was based on the student's "inappropriate program during the 2019-2020 school year and services provided during the beginning of the 2020-2021 school year" and that the family should have been receiving parent counseling and training for at least two years "in order to reinforce the behavior plan" (Parent Ex. CC ¶ 11).



During cross-examination, the BCBA testified that she determined the student's 2019-20 program was inappropriate because the student was not given the supports that he needed in communication and that from the speech session that she observed, "he was not getting the - - the supports that he needed to be able to effectively communicate his wants and his needs" (Tr. p. 143). When asked how ABA would assist the student in ways not addressed by his existing related services, the BCBA testified that ABA "will help instill the behaviors of communication. So for example, helping him in multiple areas of his life, in his environment, be able to effectively communicate" (Tr. p. 147). When asked why ABA was recommended for the student, the BCBA testified that "[b]y adding ABA to his current services, it will help him in increasing his ability to be on task because off task is one of his behaviors that were observed during the observations" (Tr. p. 148).

The district's attorney then asked the BCBA to explain what she meant by off task and on task, at which point the IHO interjected that the terms were self-explanatory indicating that on task was when "you're doing what you're supposed to be doing" and "off task, you're not doing it" and told the district's attorney to ask his next question (Tr. p. 148). The district's attorney then addressed the IHO, "[w]e're talking about ABA for a non-verbal, non-ambulatory student. So to me, it's not clear how a behavior[] analysis for this type of student profile works." (Tr. pp. 148-49). The attorney then indicated he did not think the BCBA's testimony was clear on this point but he moved on (Tr. p. 149).

Generally, the BCBA's response to this line of questioning might have clarified some of the district's concerns with the award of ABA services, in that the BCBA might have explained how ABA could have addressed the student's communication needs in a way that they were not being addressed through speech-language therapy or other services. Nevertheless, it is clear from the BCBA's testimony that the student had a need in the area of functional communication, and she believed that a BCBA could provide training to address that need (Tr. pp. 143, 147; Parent Ex. CC ¶ 9). Additionally, the recommendations from the June 2019 neuropsychological evaluation report included a BCBA "to accurately ascertain measurable skills in functional areas and reinforcers that can be used to improve them" as well as implementation of ABA or a BIP (Parent Ex. J at pp. 13-14). Nevertheless, upon review it does not appear that a specific recommendation for ABA services or ABA methodology was a necessary component to the student's educational programming.<sup>18</sup> Finally, although ABA services may not be required, the district conceded FAPE in this matter, for both the 2020-21 school year and the second half of the 2019-20 school year. Accordingly, the focus should be on what services could address the student's identified delays, and, as described above, the hearing record points to basic functional communication as being a significant need for this student. Any award of compensatory education should be designed to address this need.

In addition to the district's objection to the award of ABA services, the district asserts that the method used in computing the compensatory award was not proper. More specifically, the BCBA testified that her supervisor at Manhattan Psychology Group told her how the agency made its calculations (Tr. pp. 143-44). The BCBA testified that she multiplied ten hours of ABA services per week by the 46 weeks of a school year, by a two-year period—as she was advised to do—to

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<sup>18</sup> This becomes more apparent in considering the program provided to the student at iBrain during the 2020-21 school year, which is discussed in more detail below.

arrive at her recommendation of a total of 920 hours (T. p. 145). However, the BCBA also indicated that her recommendation for compensatory services was based on "an inappropriate program during the 2019-2020 school year and services provided during the beginning of the 2020-21 school year" (Parent Ex. CC ¶11). As explained above, the time period for which compensatory education is an available remedy for a denial of FAPE in this proceeding is from February 26, 2020, the implementation date of the February 2020 IEP, through October 5, 2020, when the student began attending iBrain. Further confusing matters, while the ABA services, as a remedy, were designed to make up for the CSE not recommending ABA services for the student, the April 2020 CSE included a recommendation for a 1:1 paraprofessional for behavior support who "was added 'to implement the ABA or BIP' as per impartial hearing decision" (Parent Ex. C at pp. 7, 20). Accordingly, the overall compensatory award must be modified downwards to reflect the approximately four-month denial of FAPE as opposed to the two full school years used by the BCBA.

Based on the foregoing, the IHO erred by awarding the parent all of her requested relief without considering the scope of the FAPE deprivations at issue and whether the evidence adduced at the impartial hearing supported an award of the services the parent requested. Upon review, an appropriate compensatory award for this student, for the denials of FAPE at issue, is 160 hours of 1:1 instruction by a certified special education teacher or a BCBA of the parent's choosing, reflecting an award based on ten hours per week of instruction over a four-month period.

With respect to parent counseling and training, the hearing record does not include any evidence that the district provided the student with or recommended the provision of parent counseling and training (see Parent Exs. B; C; BB). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's [IEP]" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). In this instance, the BCBA testified that she recommended parent counseling and training because having "the parent [] do what we do in the ABA setting, helps their child across all environments" (Tr. p. 140). Based on this, it appears the recommended parent counseling and training was an additional support for the ABA services. Accordingly, the award for compensatory parent counseling and training is adjusted downward to align with the adjustment to the award for 1:1 instruction. Based on a denial of a FAPE from February 26, 2020 through June 16, 2020, the parent was entitled to no more than (32) 60-minute sessions of compensatory parent counseling and training.

## **C. Tuition Funding**

### **1. Appropriateness of Unilateral Placement**

The district also appeals the IHO's determination that iBrain was an appropriate unilateral placement for the student for the 2020-21 school year. The district first argues that iBrain was not appropriate because it did not provide ABA services. The district's remaining arguments related to the appropriateness of iBrain are that the parent failed to demonstrate that the remote learning program was appropriate for the student, and that there was no evidence in the hearing record to show what the student was actually receiving in the remote learning program. Additionally, the district asserts that there was no evidence that make-up sessions were provided to the student, a

1:1 paraprofessional was not provided to the student, and the student's private 1:1 nurse provided all of the services the student received in iBrain's remote learning program.

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 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).

Although not in dispute in this case, discussion of the student's special education needs will provide the background to evaluate the appropriateness of the parent's unilateral placement of the student at iBrain for the 2020-21 school year. A December 11, 2020 bilingual social history update report indicated in part that it was conducted via telephone in Spanish, with the student's nurse answering some questions at the parent's request (Dist. Ex. 3 at p. 1). The social history update report reflected that the parent provided consent for the reevaluation process and that the student began attending iBrain in September 2020 (*id.* at pp. 1, 2).<sup>19</sup>

The parent testified by affidavit and indicated that her native language was Spanish and that she understood minimal English (Parent Ex. Y at ¶¶1, 2).<sup>20</sup> The parent averred that the student was medically fragile and significantly impaired, functioned as an infant and required 24-hour care (*id.* at ¶4). The parent described the student's multiple diagnoses as congenital brain defects that caused intellectual disability, movement delays, and seizures (*id.*). The parent also reported the student was non-verbal and wheelchair bound (Parent Ex. Y at ¶4).

A December 10, 2020 IEP drafted by iBrain described the student's needs in detail (Parent Ex. R).<sup>21</sup> The iBrain IEP indicated, in part, that in addition to the diagnoses previously mentioned, including global developmental delay, the student was diagnosed with chronic sleep apnea (Parent Ex. R at p. 1; *see* Parent Ex. Y at ¶4).<sup>22</sup> The iBrain IEP noted that the student enjoyed music and light up toys (Parent Ex. R at p. 1).<sup>23</sup> According to the iBrain IEP, the student communicated through vocalizations, facial expression and was learning to use assistive technology (*id.*). The student required a two-person transfer and had a Vagus Nerve Stimulator (VNS) implanted, that necessitated handling precautions under his underarms (*id.*). The student required total assistance and cueing to participate in activities due to low arousal and his seizures affected his arousal, endurance, and attention to tasks (*id.*). The December 2020 iBrain IEP indicated that due to the student's highly intensive management needs he required a small 6:1+1 class size that was highly

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<sup>19</sup> The iBrain director of special education testified by affidavit that the student began attending iBrain remotely on October 5, 2020 (Parent Ex. T ¶13). Related services session notes also reflect that the district provided services to the student through October 2, 2020 (Parent Ex. BB at pp. 5, 10).

<sup>20</sup> An interpreter joined the proceedings by either video or telephone on June 25, 2021 and June 28, 2021 (Tr. pp. 28, 53-54, 133). On both of these hearing days, the parent waived simultaneous translation and indicated that she would only require interpreter services if she was asked questions (Tr. pp. 53-54; *see* Tr. p. 133). The IHO excused the interpreter on each of these days, as the interpreters were called for translation of the district's cross-examination of the parent, but the district had no questions for the parent (Tr. pp. 54, 133).

<sup>21</sup> A duplicate copy of the December 10, 2020 iBrain IEP is attached to the iBrain interim director's testimony by affidavit (*see* Parent Ex. U at pp. 1, 16-53).

<sup>22</sup> The June 2019 bilingual neuropsychological evaluation report indicated that according to an eye exam conducted on February 1, 2018 at Weill Cornell Ophthalmology, the student had been diagnosed with cortical visual impairment (both eyes); a decreased visual response due to a neurological problem affecting the visual part of the brain, as well as optic nerve atrophy (both eyes); and mild to severe damage to the optic nerve that could adversely affect central vision, peripheral vision and color vision (Parent Ex. J at pp. 1, 5). The evaluation report indicated that according to the physician who conducted the exam, the student presented with an inconsistent response to light (*id.*).

<sup>23</sup> The December 2020 iBrain IEP indicated that according to an auditory brainstem response (ABR) conducted in 2017, the student presented with a mild conductive hearing loss in his left ear (Parent Ex. R at p. 12).

structured, with similar peers, direct instruction time with the teacher, and the support of a 1:1 nurse to meet his medical needs (id.). In addition, the student required a paraprofessional to ensure his access to the educational and therapeutic environment (id.).

The iBrain IEP noted that in addition to a 6:1+1 setting, the student require a modified environment that minimized sound and visual distractions, provided individual and group instruction, and provided a structured setting for him to succeed with proper supports (Parent Ex. R at p. 2). In addition, the iBrain IEP indicated that due to the student's brain-based injury he presented with delays in cognition, language, memory, judgment, visual impairment, process-solving, and speech and therefore required extensive physical, medical, and additional support, including a 1:1 nurse and a 1:1 paraprofessional to ensure his access to the educational environment (id.; see Parent Ex. R at pp. 8-12). The December 2020 iBrain IEP indicated that with regard to literacy, the student was working on responding to five sensory activities through a change in facial expression (id.). When the student was presented with a book that provided auditory output and a tactile touch and feel book, once he heard a sound and felt the book, the student opened up his eyes wide and gazed at the location of the tactile object (id.). According to the iBrain IEP, the student enjoyed music and it increased his engagement during academic sessions (id.). The student also showed a positive response to being spoken to in Spanish by the teacher (id.). In the area of math, the iBrain IEP indicated that the student was working on holding an object for 30 seconds with full physical support (id.). During the math evaluation, the student was given a ring that was put inside of his hand (id.). He held the ring for 15 seconds with full physical support (id.). In the area of communication, the student was working on asking for "more" five times when shown items using a preferred mode of communication (id.). The iBrain IEP noted that the student used a switch during the evaluation to request more of a story, but it was uncertain if his movements were intentional or if they were caused by spasms (id.). Other than this, the evaluator did not observe the student use any other method of requesting more (id.). In the area of socialization, the iBrain IEP indicated that the student was able to interact with an adult socially for 30 seconds and was also able to indicate his preferences (id.).<sup>24</sup> The same iBrain IEP identified the student's strength as "showing focus" when working 1:1 with the evaluator (id.). In addition, his response to sensory activities presented to him was strong and intentional (id.). The iBrain IEP noted that due to his brain-based injury, the student required extra time to process information, take breaks, and have any physical or medical needs addressed throughout the day (id.). The iBrain IEP stated that the student required a direct instruction approach for academics and his materials needed to be adapted to his visual and tactile needs (id.).

The December 2020 iBrain IEP also detailed the student's strengths and needs in the areas of speech-language/communication (e.g., receptive language, expressive language, augmentative and alternative communication, and feeding/oral motor), OT, PT, vision education services, assistive technology, and music therapy (Parent Ex. R at pp. 2-7). With regard to speech-language/communication, the December 2020 iBrain IEP indicated the student's strengths were responding to auditory inputs such as music or verbal speech with pleasure responses such as

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<sup>24</sup> The December 2020 iBrain IEP indicated the student used a microswitch, placed in his left hand and attached to a "bigMACK," to promote active communicative participation throughout therapy sessions and academic routine (Parent Ex. R at p. 3). The student was observed to intermittently activate the switch with his left hand; however, due to increased spasms and tone, activations became inconsistent, and intent was not determinable (id.).

vocalizations and laughing (*id.* at p. 3). He was able to display fleeting attention to activities presented (*id.*). In addition to vocalizations to show preference/pleasure, the student used facial expressions (e.g., smiling) across preferred activities (*id.*). The student was observed to intermittently activate a micro switch across the speech-language therapy session independently (*id.*). The iBrain IEP indicated that with respect to speech-language/communication the student required pull-out and push-in sessions to coordinate allied health disciplines with academics, a "methodology [that would] enable [the student] to consistently and functionally identify and describe his basic wants and needs utilizing an augmentative or alternative communication device" (AAC) (*id.*). The iBrain IEP suggested that the student's oral motor management, through sensory-motor intervention, would reduce his risk of baseline aspiration of oral secretions, however, this was not targeted due to restrictions that arose from a telehealth service delivery model (*id.*). The IEP also noted that the student required maximal multimodal sensory input in order to maintain alertness/arousal across sessions (*id.*). In addition, he required posturing assistance in order to maintain head posture to attend to stimuli (*id.*). The iBrain IEP stated that due to difficulties with activation across the provided switch, the student would greatly benefit from an additional assistive technology evaluation in order to determine a more appropriate access point (*id.* at p. 4).

With regard to the student's strengths and needs specific to motor development (OT), the December 2020 iBrain IEP indicated that on his best day, the student's arousal level allowed him to work for upwards of 60 minutes and he was able to follow a one-step direction to initiate a grip switch in his left hand to communicate (Parent Ex. R at p. 4). However, the IEP explained that the student was more likely to be able to maintain his full participation for about 30 minutes at a time before needing a break and additional supports to participate (*id.*). According to the iBrain IEP, when engaged in a highly motivating activity, such as listening to favorite music or in music therapy, the student would open his eyes wider, smile, laugh, vocalize and/or pick his head up (*id.*). The student would demonstrate a physical reaction to sensory stimuli by contracting muscles in his upper extremities, pulling his arms away, flexing his head down towards his chest, or closing his eyes (*id.*). He demonstrated displeasure by crying, widening his eyes, flexing his head down towards his chest, and resisting the use of hand-over-hand assistance (*id.*). The iBrain IEP indicated that the student typically required consistent maximal verbal and tactile cueing and maximal physical assistance to engage in tasks due to low arousal, decreased attention to tasks, low tone and limitations in active range of motion (AROM) in his extremities, poor trunk and head control, and limitations in motor control, strength, and endurance (*id.*). The iBrain IEP noted that the student was often in a state of low arousal upon arrival and required extensive sensory input to stimulate and improve arousal level (*id.*). Efforts to stimulate him were not always successful and he would possibly remain in state of low arousal the entire OT session (*id.*). The iBrain IEP stated that the student was able to best access his switch in his left hand, as his tone was higher on his left side (*id.*). He demonstrated a physical reaction to water on his hands and feet with crying and pulling away (*id.* at pp. 4-5). The student did not demonstrate a preference in treatment location (bed or chair) and required total support to maintain an upright position in both locations (*id.* at p. 5). The iBrain IEP noted that the student's seizures affected his arousal, endurance, and attention to tasks (*id.*). According to the iBrain IEP, the student benefited from engaging in a multi-sensory environment that included a variety of sensory strategies (*id.*). The student responded well to auditory stimulation, tactile input, and encouragement from familiar people (nurse, therapist) to increase his arousal and participation in functional activities (*id.*). The iBrain IEP indicated that the student was most successful with repetition of familiar actions and routines, such as engaging with the switch in his left hand and sensory stimuli, to assist with his cognitive ability to understand

cause and effect for future generalization of skills (id.). The iBrain IEP stated that the student required 60-minute, 1:1 sessions in order to have enough time for transfers, preparatory activities, setting up equipment, and rest breaks to facilitate carry over of skills (id.). The IEP further stated that by receiving continued OT services, the student would have the ability to improve his motor skills, sensory processing skills, cognitive skills, strength, endurance, and neck/postural control which would increase his participation and independence in self-care, play/leisure, and school-based activities (id.).

In the area of PT, the December 2020 iBrain IEP indicated the student was increasingly motivated by familiar faces and sounds and social interaction; the student responded best to music therapy interventions demonstrating "the most volitional muscle activity in his arms and eyes compared to any other time" (Parent Ex. R at pp. 5-6). He was able to stay alert and responsive for the entire length of a PT telehealth session with his eyes open throughout and intermittently moving towards auditory stimuli; he was smiling, laughing, and/or vocalizing slight sounds of happiness (id. at p. 6). According to the iBrain IEP, the student demonstrated response to his feet touching cold/lukewarm water and he actively attempted to move his legs away from it (id.). He also demonstrated volitional upper extremity movement when being sung to, as he actively lifted his (right/left) arms off his lap in support-sitting and smiled as a sign of happiness and enjoyment (id.). With regard to the student's needs in the area of PT, the December 2020 iBrain IEP indicated the student would "most certainly" benefit from a multisensory environment with the presence of his private-duty nurse as a familiar face (id.). He would benefit from various modalities that provided vestibular and proprioceptive input for regulation of his low arousal level, hypotonia, and impaired muscle activity, body awareness, and coordination (id.). The IEP noted that generally, the student required a maximum number of cues (tactile/verbal/auditory) to engage in activity and most often demonstrated trace levels of arousal and participation (id.). It indicated that the student would benefit from equipment such as swings that provided linear and rotational movement patterns, peanut and physio balls, and vibratory and auditory stimulating toys (id.). In addition, the iBrain IEP indicated that the student would benefit from equipment such as a blue-bench, cube-chair, floor-mats, a new stander, and potentially devices that would assist in gait training and static/dynamic standing, which were necessary to encourage lower extremity weight bearing (id.). The iBrain IEP noted other concerns related to PT, specifically that the student had been having continued difficulties with his GI/abdomen, such as distension, gas, and constipation, and had needed to see his GI specialist on multiple occasions (id.). Along with this, he had a significant weight gain in the few months prior to initiating telehealth, which had subsequently directly affected his joint stability and level of participation in all functional mobility training (id.). The iBrain IEP stated that the student would strongly benefit from a mandate of individual PT services five times a week for 60 minutes to facilitate an improved level of activity throughout his day and combat the above-mentioned concerns and needs (id.).

Turning to vision education services, the December 2020 iBrain IEP indicated the student tolerated handling well (Parent Ex. R at p. 6). He appeared to enjoy music and tactile stimulation (id.). With regard to vision needs, the December 2020 iBrain IEP indicated the student needed to develop greater awareness of his environment (id.). In addition, the student needed to improve his sensory perception abilities, including his tactile and auditory senses, and to use whatever residual vision that he might have (id.). The iBrain IEP stated that the student required multiple opportunities to allow for sensory perception skills to develop and improve (id.).

In the area of assistive technology, the December 2020 iBrain IEP indicated the student was motivated by musical activities (Parent Ex. R at p. 7). He was able to activate a switch through squeezing his fist when engaged in these tasks, provided appropriate support (id.). With regard to the student's assistive technology needs, the December 2020 IEP indicated the student needed to continue to develop cause and effect skills for more effective switch use (id.). The IEP suggested that the student would benefit from trialing a variety of switches to determine his best access modality (id.).

With regard to music therapy, the December 2020 iBrain IEP indicated the student demonstrated interest in music and responded to various instruments and sounds positively when actively awake (Parent Ex. R at p. 7). When awake and engaged, the student kept his eyes open, smiled and even vocalized along with the music therapist (id.). According to the iBrain IEP, the student appeared to respond to medium tempo, dynamic and low and medium pitch range. (id.). With regard to the student's music therapy needs, the December 2020 IEP indicated his arousal was low in the morning and early afternoon, affecting his active participation and engagement in music therapy sessions (id. at p. 8). The student required maximum verbal and tactile support to engage in music experiences (id. at p. 7).

In terms of the effects of the student's needs on his involvement in a general education curriculum, the December 2020 iBrain IEP stated that due to the student's brain-based disorder, he required a highly structured program in a 6:1+1 classroom in a specialized school with a 1:1 paraprofessional and 1:1 nurse (Parent Ex. R at p. 12). The iBrain IEP indicated that the student had highly intensive management needs and outlined the human, environmental, and material resources needed to address the student's academic, social, and physical needs (id. at pp. 12-13). The human resources included a 1:1 paraprofessional, aided language stimulation consisting of modeling and repetition, additional response time, partner assisted scanning, verbal/tactile/visual cues, music, and praise; environmental resources included 1:1 instruction using a direct instructional model, a highly structured classroom, modified materials, multi-sensory supports, breaks, tactile opportunities, quiet and non-distracting environment, and rest breaks every 15-20 minutes; and material resources included an iPad, access to AAC, the student's interests incorporated in the school day in order to maximize interest and relevancy, an instructional laptop with resources and software related to literacy and math skills, instructional materials with tactile and auditory components, a Jellybean switch with hand strap, ankle foot orthotics (AFO) worn during specific times of day, a standing program twice a day for 30 minutes, and a Rifton chair (id. at pp. 12-13).

The December 2020 iBrain IEP included a checklist indicating the student's needs relating to special factors (Parent Ex. R at pp. 17-18). The checklist indicated the student needed strategies, such as positive behavioral supports that might impact his or other students' ability to learn, but that he did not need a BIP (id. at p. 17). With regard to a student with limited English proficiency, the student did not need a special education service to address the student's needs as they related to the IEP (id.).<sup>25</sup> In terms of the student's visual impairment, the iBrain IEP indicated that the student's primary mode of learning was tactile and his secondary mode of learning was auditory (id.). With regard to communication and hearing needs, the IEP noted that the student needed a

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<sup>25</sup> As previously noted, the parent's testimony indicated her primary language was Spanish and she understood minimal English (see Parent Ex. Y at ¶2).



particular device and/or service to address his communication needs (id.). More specifically it stated that the student was in possession of a micro switch connected to a bigMACK for communication; however, due to increased fatigue and difficulties arising with the student's then-current access point, a formal evaluation was required by assistive technology to determine a more functional access point in order to more successfully target language (id.). With regard to the student's assistive technology needs, the iBrain IEP indicated that the student needed assistive technology services to meet and access educational materials and he should be allowed to use the device at home (id. at p 18).

The December 2020 iBrain IEP recommended the student receive instruction in a 6:1+1 special class with three 60-minute sessions of individual OT per week, five 60-minute sessions of individual PT per week, three 60-minute sessions of individual speech-language therapy per week, two 60-minute sessions of individual music therapy per week, and three 60-minute sessions of individual vision education services per week (Parent Ex. R at pp. 35-36). Additionally, the December 2020 iBrain IEP provided for a 12-month program, one individual/indirect 60-minute assistive technology services session per week, one 60-minute session of parent counseling and training per month, a school nurse daily throughout the day, a 1:1 paraprofessional throughout the day, multiple assistive technology devices used individually and directly throughout the day, multiple supports for school personnel on behalf of the student, and transportation with adult supervision provided by a nurse, a vehicle with air conditioning, a lift bus/wheelchair ramp, limited travel time, and a regular size wheelchair (id.).

Consistent with a brochure about iBrain, and in testimony by affidavit from the iBrain director of special education, iBrain was described as a private, not-for-profit, and highly specialized special education program created for children with acquired brain injuries or brain-based disabilities (Parent Exs. O at p. 2; T ¶5). iBrain operated over a 12-month extended school-year calendar and offered all services during an extended school day, which began at 8:30 AM and concluded at 5:00 PM (Parent Exs. O at p. 14; T ¶5). iBrain was described as an interdisciplinary program for students, most of whom are nonverbal and non-ambulatory (Parent Ex. T ¶6). All students at iBrain require a 1:1 paraprofessional to assist with activities of daily living (ADL) and to have access to and benefit from the educational program (id.). Many students also require a 1:1 nurse to attend to the students' medical needs (Parent Ex. T ¶6; see Parent Ex. O at p. 8).

The hearing record indicated that during the 2020-21 school year, iBrain had five 6:1+1 classes and one 8:1+1 class (Parent Ex. T ¶7; see Parent Ex. O at p. 4). iBrain could accommodate students aged five through 21 (Parent Exs O at p. 2. T ¶7). All students at iBrain had management needs that were either intensive or highly intensive and required a significant or high degree of individualized attention and intervention (id.). The director of special education testified that iBrain provided its students with IEPs directed toward improving functioning skills appropriate to their cognitive, physical, and developmental levels, through a collaborative and multi-disciplinary approach which incorporated the best practices from the medical, clinical, and educational fields (T ¶8; see Parent Exs. O at pp. 4-5). The director testified that through this collaboration, students were instructed in the most effective strategies with evidence-based practices (Parent Ex. T ¶8). She added that these practices included "direct instruction, cognitive strategies, and compensatory education (using diagnostic-prescriptive approaches), behavior management, physical rehabilitation, therapeutic intervention, social interaction, and transition services" (Parent Ex. T ¶8; see Parent Ex. O at p. 4). According to the director, academic instruction was incorporated into the program throughout the school day (Parent Ex. T ¶8; see Parent Ex. O at pp. 5-6). iBrain

developed a student's IEP by assessing a student prior to starting their educational program instruction (Parent Exs O at p. 3; T ¶9). Students were assessed in various disciplines to determine which material and/or the equipment would be necessary to assist the student daily and develop appropriate IEPs (Parent Exs O at p. 3; T ¶9).

According to the iBrain brochure and director of special education, iBrain also offered its students a variety of related services, including OT, PT, speech-language therapy, vision education, hearing education, assistive technology services, music therapy, and parent counseling and training (Parent Exs O at pp. 5-13; T ¶10). All therapy services were designed to support the education of the students and were provided to the students as needed, usually in 60-minute sessions (Parent Ex. T ¶10). Related services were provided using a push-in and pull-out model, which ensured that each student's therapeutic goals were addressed in multiple locations and environments (Parent Exs O at p. 5; T ¶10). The director of special education testified that doing so was critical for students with brain injuries because they had a severe deficit in their ability to generalize skills (Parent Exs. O at pp. 5-6; T ¶10). The director also noted that students at iBrain generally required 60-minute sessions because of transferring and re-positioning needs, additional transition time and rest, and repetition needs to foster neuroplasticity (Parent Ex T ¶10). Testimony by the iBrain director of special education indicated that although she had some familiarity with current research for ABA and its effectiveness for students with TBI, ABA was not her area of specialty, she was not credentialed in it, and she was not comfortable discussing whether the student needed ABA (Tr. pp. 60-61). The iBrain special education director and the interim director noted that iBrain did not provide ABA to its students and it did not recommend ABA for the student (Tr. pp. 60, 62, 158).

With respect to the student's tolerance level for the duration of scheduled related services sessions, the iBrain interim director testified it was the related service provider's responsibility to assess the student's level of alertness, and ability to respond to a skilled service in concert with the nurse, and as in the student's case, he had a 1:1 nurse (Tr. pp. 173-74). She testified that level of tolerance essentially referred to the "student's ability to respond to a stimuli and respond in an appropriate manner while maintaining appropriate vital signs and attention to task" (Tr. p. 174). Further, the interim director affirmed it was typical for students such as the student in this case, who had medical conditions and diagnoses, to demonstrate varying levels of tolerance during academic or related services sessions (*id.*). She indicated that students with traumatic brain injuries presented differently from session to session based on the time of day (Tr. p. 175). She noted that the student's level of alertness in the morning after a few sessions might be different towards the end of the day, and that his general level of fatigue and alertness affected his tolerance to therapy sessions and academics (*id.*).

The hearing record included the student's schedule at iBrain (Parent Ex. P). The schedule shows in part that the student was scheduled to receive 60-minute sessions of OT, PT, and speech-language therapy (*id.*). Review of the December 10, 2020 iBrain IEP and the April 19, 2021 "Last Report Revision" of the IEP reflects that the student's then-current iBrain recommendation for speech-language therapy was five times per week for 60 minutes (Parent Exs. R at p. 2; DD at p. 2). Both documents indicated, "[h]owever, due to restrictions resulting from the COVID19 pandemic, [the student] was currently receiving, per request, telehealth services via Zoom five times a week for 30 minutes in person with the assistance of the private nurse. Additional services were being provided via activities for home carryover for the remaining time" (Parent Exs. R at p. 2; DD at p. 2). Further the iBrain IEPs indicated that "in person" sessions for feeding/oral motor

therapy were completed in a 1:1 manner for 30 minutes via telehealth (Parent Exs. R at p. 3; DD at p. 2). The student's physical therapy sessions were also delivered via telehealth for five times per week in 30-minute sessions and training was also provided for additional activities (Parent Exs. R at p. 5; DD at p. 5). The student and his family also received a monthly 60-minute parent counseling and training session (Parent Exs. R at p. 9; DD at p. 9).

With regard to OT, the December 10, 2020 iBrain IEP and the April 19, 2021 "Last Report Revision" of the IEP indicated the student required 60-minute 1:1 skilled OT services to allow adequate time for transfers, preparatory activities, equipment set up, rest breaks, demonstrations, repetition, processing/response time, caregiver education, and switch use (Parent Exs. R at p. 4; DD at p. 4). Approximately 30 minutes of session time was needed to perform transfers and preparatory activities such as passive range of motion (PROM), prolonged stretch, weight bearing, sensory input, and equipment set-up in order to increase the student's arousal and body awareness for participation in functional activity (Parent Exs. R at p. 4; DD at p. 4). The student presented with upper extremity hypotonia bilaterally in his wrists, elbows, and shoulders and therefore required stabilization and PROM stretching prior to engagement in activity to maximize his then-current abilities (Parent Exs. R at p. 4; DD at p. 4). The remaining session time was utilized to participate in functional activity with required rest breaks, complete transfers, and transition back to class (Parent Exs. R at p. 4; DD at p. 4).<sup>26</sup> During the 202-21 school year the student's vision education, assistive technology (60-minute session one time per week), and music services, all occurred via telehealth (Parent Exs. R at pp. 6-7; DD at pp. 6-7).

The iBrain interim program director testified by affidavit and stated that she was responsible for overseeing operations of the iBrain program and related services, including PT, speech-language therapy, OT, vision education therapy, music therapy, hearing education therapy, assistive technology, conductive education, counseling, parent counseling and training, academic, and paraprofessional services (Parent Ex. U ¶¶1, 3). At the time of her affidavit, she oversaw the operation of various instructional programs and sought providers to provide services to iBrain students (*id.* ¶4). She was also the community liaison for iBrain and confirmed that services were adequately provided (*id.*). The interim director reported that she was familiar with the student as she met him during an initial evaluation for speech-language therapy that she conducted in July 2020 (*id.* ¶5). She also provided speech-language therapy in a supervisory role for several weeks when the student started at iBrain, virtually (*id.*). The interim director reported that she no longer provided the student direct services, but she continued to supervise all of his related services and providers (*id.* ¶6). She indicated the student participated in related services that were set forth in his then-current iBrain IEP (*id.* ¶7: *see* Parent Ex. U at pp. 51-52). The interim director further indicated the student required OT and PT to address range of motion, strength, spasticity, sensation, quality of movement and skin integrity (Parent Ex. U ¶8). The student also received speech-language therapy to address pragmatics, oral motor feeding, and receptive language skills (*id.*). The interim director reported that the student benefitted from music therapy and vision education services to address auditory and visual attention to a variety of sensory stimuli (*id.*). In addition, iBrain provided the student's mother with parent counseling and training to increase the student's functioning in the home (*id.*). The interim director indicated that parent counseling and

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<sup>26</sup> As noted in the hearing record, the student never physically attended iBrain (Tr. p. 97). Therefore, it is unclear how much actual time he needed with regard to his "transition back to class" (*see* Parent Exs. R at p. 4; DD at p. 4).

training benefitted the student in terms of generalization and maintenance of his social skills as well as that of his family (*id.*). The interim director's written testimony revealed that the student also benefitted from assistive technology services (*id.* ¶9). He used a switch that was a device to respond to various stimuli (*id.*). According to the interim director, during speech-language therapy, the student communicated with his therapist by turning the switch on and off (*id.*). For example, if the therapist played music and then turned the music off, the student would turn his switch to request to turn the music back on (*id.*). At the time of the interim director's affidavit, the student received virtual therapy and/or educational instruction daily, on a preset schedule, due to his medical complexities and COVID-19 (*id.* ¶10). The interim director supervised the student's related services by observing his Zoom sessions with his related service therapists, and she assisted in the preparation of his quarterly progress reports to assess and gauge the student's progress and to share that information with his mother (*id.* ¶11). The interim director indicated the student's arousal levels during virtual instruction varied, depending on his physical state due to medical conditions (*id.* ¶12). There was no paraprofessional in the home pursuant to the specific request and direction of the parent (*id.*). The interim director indicated that there was a 1:1 nurse in the home who assisted the student daily, making it possible for the student to receive virtual learning and therapy (*id.*).<sup>27</sup> The nurse participated and assisted in ensuring the student was properly aroused and positioned for his virtual therapy sessions such as OT and PT (*id.*). The interim director reported it was typical for the student to present at various performance levels in response to the related service sessions due to his severe brain injuries/disorders (*id.* ¶13). When the student started at iBrain, it was determined that his tolerance for the related services he was being evaluated for, and the appropriateness of the educational program, was appropriate (*id.*). The interim director explained that the student's progress was being monitored and followed for potential modifications (*id.*). During cross examination, the interim program director testified that Zoom was used to engage services with the student in his home with his nurse (Tr. p. 160 *see also* Tr. pp. 107-08).<sup>28</sup> Sessions were always scheduled for 60 minutes according to the student's "mandate," but they were administered based on the student's level of tolerance (Tr. pp. 161-62). The student demonstrated decreased levels of alertness, "On occasion" (Tr. p. 162).

In her testimony by affidavit, the iBrain director of special education indicated she was familiar with the student and she participated in his initial team meeting to develop an IEP for him (Parent Ex. T ¶ 11). She also conducted the student's classroom observation remotely via Zoom on December 15, 2020 (*id.*). The director of special education also noted that the iBrain team felt the student was a good fit for the school; iBrain could provide the services the student required

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<sup>27</sup> The hearing record reflects that iBrain did not employ the 1:1 nurses assigned to its students (Tr. p. 99). Rather, the 1:1 nurses worked with separate agencies (Tr. p. 99).

<sup>28</sup> On multiple occasions, the hearing record referred to live virtual instruction as "telehealth" (Tr. pp. 101, 106, 163). The iBrain special education director testified that live synchronous instruction was provided to the student (usually accompanied by his nurse) with the therapist or teacher "almost always via Zoom" (Tr. p. 124). She characterized the platform as Zoom and telehealth as "sort of a...mobile assistant" (Tr. p. 124). The only time she would call it telehealth was when there was one person on a Zoom call with the student who was one of the student's providers and was doing a session to address the student's academic or therapeutic goals (Tr. p. 125). The iBrain special education director noted that the NPS would characterize instruction as a "home program" if, for example, the therapist provided exercises and activities to be done to address the student's goals asynchronously (Tr. p. 125). This would be provided to the student's mother and nurse at the request of the parent if they were unable for some reason to participate in a particular telehealth session (Tr. p. 125). Make-up of missed sessions occurred depending on the availability of the student and the provider (Tr. pp 125-26).

based on information provided by his family and the results from his initial meeting assessments that included speech-language therapy, vision education, PT, OT, and assistive technology services (*id.* ¶12). After completing intake assessments over the summer, the student began attending iBrain remotely on October 5, 2020, and at the time of the impartial hearing he was still enrolled in the program and attended remotely (*id.* ¶13).<sup>29</sup> During the 2020-21 school year, and consistent with an IEP developed by iBrain staff, the student attended a 6:1+1 special class as part of an extended school day in a 12-month program (*id.* ¶14). The student was in a classroom with other students that have similar needs (*id.* ¶15). The students in his classroom functioned at a pre-kindergarten level in math and English-language arts (ELA), each student was dependent on assistive technology to communicate, had a 1:1 paraprofessional, and received similar frequency and duration of related services, including music therapy (*id.* ¶15). However, during cross-examination the director of special education testified the student never came into a classroom at iBrain for in-person instruction (Tr. p. 97). While she did not know the student's specific remote learning schedule, the director of special education reported that iBrain provided services Monday through Friday, as if the student was at the school in-person (Tr. pp. 107-08), and that Zoom was used to engage services with the student in his home with his nurse (Tr. pp. 107-08, 160). With regard to OT, the iBrain director of special education indicated that usually the occupational therapists ended up using Zoom (Tr. p. 101). In the student's case, the occupational therapists worked along with the student's nurse (*id.*). According to the iBrain director of special education, a lot of work was done on ADLs and self-care skills within the context of the home (*id.*). The occupational therapist directed the student's nurse on what to do, how to position the student, and what to use (*id.*). The director of special education noted that the student had an assistive technology device at home so they were able to work and address "those goals" as well (*id.*). The occupational therapists provided feedback to the student and the nurse about the student's performance, what to do next, how to position things, how to do range of motion exercises "and so on for addressing his OT goals and development" (*id.*). When asked how iBrain staff actually knew the student responded to the Zoom video, the director of special education indicated that they looked for the student's physical reaction, his vocalization, and his smile and facial expression (Tr. pp. 102-03). She noted that during academics, the student would "light up" and show his response to what people were asking him to do (Tr. p. 102). She reported the student tried to activate his switch with some prompting and he had done well learning how to use his switch for communication and learning how to make requests, for example to read e-books (Tr. pp. 102-03).<sup>30</sup>

According to the iBrain director of special education, PT was also delivered remotely with the physical therapist telling the nurse what to do (Tr. p. 104). Review of the iBrain quarterly progress note for the second quarter of the 2020-21 school year showed that the student's goals had been addressed as his performance for corresponding benchmarks were rated with a numerical code in accordance with a rubric as follows: (1) not introduced; (2) inconsistent progress; (3)

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<sup>29</sup> For the 2020-21 school year, iBrain offered the parent the option of a paraprofessional coming to the home, but the parent was not comfortable with that arrangement (Tr. pp. 100-01). Instead, the parent requested the option of telehealth services (Tr. p. 101). During re-direct examination, the director of special education indicated that based on a conversation with the parent, the student attended instruction remotely rather than in-person due to parental concerns about his health during the pandemic (Tr. p. 126). As the student was medically fragile (the parent wanted to limit his exposure to illness (Tr. p. 126).

<sup>30</sup> The December 2020 iBrain IEP indicated that due to increased spasms and tone, activations of the assistive technology switch became inconsistent, and intent was not determinable (Parent Ex. R at p. 2).

emerging; (4) achieved (Parent Ex. S). All goals had one or more benchmarks with a rating of at least "2" (inconsistent progress) or "3" (emerging). Review of a quarterly progress note for the third quarter of the 2020-21 school year reflects the student attained a rating of "4"(achieved) on a benchmark related to pre-literacy skills for the ability to use his smile or AAC device to answer "yes" or "no" with maximum adult support, and for the ability to use picture cues or an AAC device to answer "yes" or " no" with moderate adult support (Parent Ex. EE at p. 1). Other notations with regard to the above noted rubric were included in the progress report for the third quarter of the 2020-21 school year for all instructional and related service areas (Parent Ex. EE).

In summary, the evidence above supports finding that the remote learning program provided to the student during the 2020-21 school year was specially designed to meet his special education needs. Accordingly, based on the totality of the evidence in the hearing record, I find that iBrain was an appropriate unilateral placement for the student for the 2020-21 school year.

## **2. Equitable Considerations**

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).

The district asserts that the cost of the student's attendance at iBrain was unreasonable because the student did not attend a full year of school at iBrain, did not receive a 1:1 paraprofessional, and the cost of base and supplemental tuition included services the student did not receive. The district further asserts that the student has a history of excessive absences and the hearing record did not include proof of attendance. Lastly, the district contends that the parent requested direct payment of tuition to iBrain but failed to demonstrate an inability to pay the cost of the student's attendance.

The IHO found that the parent cooperated with the CSE and provided timely notice to the district of her intent to unilaterally enroll the student at iBrain and on those bases awarded full tuition reimbursement and/or direct payment for the student's attendance at iBrain for the 2020-21 school year (IHO Decision at p. 8).

In an affidavit, the iBrain program director averred that the expected dates of attendance for the student were July 6, 2020 through June 25, 2021 (Parent Ex. Q ¶2). The student was expected to attend five days per week for a total of 221 school days, which was equivalent to 44.2 school weeks (id.). iBrain's base tuition and supplemental tuition amounts were based on the expected dates of attendance (id. ¶¶8-9). The terms of the iBrain enrollment contract indicate that a student is enrolled ten days after the parent's attorney sends a ten-day notice to the district (Parent Ex. N at p. 1). In this matter, the parent's attorney sent a ten-day notice to the district on September 15, 2020 (Parent Ex. H at p. 1). The iBrain director of special education testified that the student began attending iBrain remotely on October 5, 2020 (Parent Ex. T ¶13). The hearing record reflects that the student has a history of being absent from related services sessions and further that the parent declined a 1:1 paraprofessional while the student attended iBrain for the 2020-21 school year (Tr. pp. 100-01; see Parent Ex. BB). The cost of the 1:1 paraprofessional is not delineated in the chart listing the costs of each related service provider in the affidavit of the iBrain program director and there is no evidence of the student's attendance record while enrolled at iBrain (Parent Ex. Q ¶8). Based on the testimony of the iBrain director of special education, the student attended iBrain for 37 school weeks from October 5, 2020 through June 25, 2021 (see Parent Ex. T ¶13).

Based on the above, the IHO should have reduced the student's award of tuition based on the student's period of enrollment. The student is entitled to direct payment of the cost of the student's attendance for 37 weeks (base tuition is reduced to \$132,262.44).

In addition, the supplemental tuition, as identified in the iBrain contract, "includes the cost of related services, as well as the cost of a transportation paraprofessional and/or individual nursing services" (Parent Ex. N at p. 2). The contract also provides that the supplemental services "will be billed on the first business day of the month for the previous month's services" (id.). While the parent provided an affidavit showing the projected cost of the full provision of recommended related services to the student, the hearing record does not include bills or invoices showing the delivery of related services to the student. Accordingly, rather than direct the district to pay for services that may not have been delivered in full, the supplemental tuition identified in the iBrain contract, including the cost of related services, shall be paid for by the district upon presentation to the district of proof of delivery of services to the student during the 2020-21 school year.

**VII. Conclusion**

Based on the foregoing, the IHO erred in his award of compensatory educational services to the student. For the 2019-20 school year, the IHO miscalculated the number of missed related services to which the student was entitled to receive as compensatory education. The IHO further erred in awarding 920 hours of compensatory ABA services and 184 hours of compensatory parent counseling and training for both the 2019-20 and 2020-21 school years without considering whether the requested compensatory education fit within the period set for a denial of FAPE. The IHO also erred in awarding compensatory education and direct payment of tuition for the same portion of the 2020-21 school year. Finally, the IHO correctly found that iBrain was an appropriate unilateral placement for the student for the 2020-21 school year but failed to reduce the amount of the tuition award to reflect the time period the student attended iBrain.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision, dated August 27, 2021, is modified by reversing those portions which awarded compensatory education for the 2019-20 and 2020-21 school years; and,

**IT IS ORDERED** that the district is directed to fund the cost of 160 hours of 1:1 instruction by a certified special education teacher or a BCBA and 32 hours of parent counseling and training, both to be provided by a provider of the parent's choosing; and,

**IT IS FURTHER ORDERED** that the district is directed to fund six 30-minute sessions of PT; five 30-minute sessions of OT; nine 45-minute sessions of speech-language therapy; and nine 30-minutes sessions of vision education services for the student; and,

**IT IS FURTHER ORDERED** that the IHO's decision, dated August 27, 2021, is further modified to reflect that the district is directed to fund the cost of the student's attendance at iBrain from October 5, 2020 through June 25, 2021 in an amount not to exceed \$132,262.44 for base tuition and that the district is directed to pay for supplemental tuition upon presentation to the district of proof of delivery of services to the student during the 2020-21 school year.

**Dated:** Albany, New York  
November 26, 2021

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**