The University of the State of New York

The State Education Department
State Review Officer
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No. 22-020

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

Appearances:
Brain Injury Rights Group, attorneys for petitioners, by Sarah Khan, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the International Institute for the Brain (iBrain). Respondent (the district) cross-appeals from the IHO's determinations that equitable considerations favored the parents and that the district must fund an assistive technology device. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student in this matter has been the subject of prior impartial hearings, as well as appeals to the Office of State Review (Application of a Student with a Disability, Appeal No. 18-133; Application of a Student with a Disability, Appeal No. 20-070; Application of a Student with a Disability, Appeal No. 20-067; Application of the Dep't of Educ., Appeal No. 20-090; see

generally Parent Ex. B).[1] The student has been attending iBrain since summer 2018 (Tr. pp. 288, 290). Many of the above-referenced appeals for State-level review focused upon the parties' long-running disagreement over the student's stay-put placement; however, in Application of a Student with a Disability, Appeal No. 20-070 the undersigned issued a determination on the merits in a tuition reimbursement dispute that was related to the student's placement at iBrain during the 2018-19 school year.

The student is nonverbal and non-ambulatory and presents with delays in his cognition; speech and oral motor skills; receptive, expressive, and pragmatic language skills; social/emotional development; ability to attend; and fine and gross motor skills (Parent Ex. D at pp. 1-28; E at pp. 1-19).[2] He has received diagnoses including but not limited to, cerebral palsy, quadriplegia with dystonia and epilepsy resulting from a traumatic brain injury which occurred in infancy (Tr. pp. 287-88; Parent Exs. D at p. 1; E at p. 15; Dist. Ex. 1 at p. 3). The student communicated by way of using visual eye gaze, touching, smiling, laughing, crying, using facial expressions, and vocalizing (Parent Ex. D at pp. 1-5). He currently uses a PRC eye gaze device to assist with communication, as well as high and low-tech augmentative and alternative communication (AAC) devices (see generally Parent Exs. D; E at pp. 8-9, 14; see Dist. Ex. 3 at pp. 1-2).

By letter dated February 22, 2021, the district notified the parents of a CSE meeting scheduled for March 9, 2021 (Dist. Ex. 9 at pp. 1-4).

On March 6, 2021, iBrain completed a private school IEP for the student for the 2021-22 school year that was similar to an IEP that a public school would create under the IDEA (Parent Ex. D at p. 1). The private IEP included recommendations that the student receive a 12-month program in a nonpublic school and instruction in a 6:1+1 classroom with a full time 1:1 paraprofessional (id. at pp. 48-49). iBrain indicated that due to the student's physical and cognitive needs, he required a quiet environment, limited distractions, and highly individualized attention and support (id. at pp. 2-3). It was also recommended that the student be provided with assistive technology including among other things, a speech generating eye gaze device (id. at pp. 49-50). With regard to related services, iBrain recommended five 60-minute sessions per week of individual occupational therapy (OT), five 60-minute sessions per week of individual physical therapy (PT), five 60-minute sessions per week of individual speech-language therapy, three 60-minute sessions of individual music therapy per week, one 60-minute group music therapy session

[1] Numerous actions were commenced by the parents seeking judicial review to seek public funding of iBrain on a pendency theory as well (see N. v. New York City Dep't of Educ., 2021 WL 5712075, at *1 [E.D.N.Y. Dec. 2, 2021]; N. v. New York City Dep't of Educ., 2021 WL 797653, at *1 [S.D.N.Y. Feb. 25, 2021]; N. v. New York City Dep't of Educ., 2019 WL 5865245, at *1 [S.D.N.Y. Nov. 7, 2019], aff'd, 824 F. App'x 81 [2d Cir. 2020]; N. v. New York City Dep't of Educ., 2019 WL 3531959, at *1 [S.D.N.Y. Aug. 2, 2019]).

[2] There are duplicate exhibits in the hearing record (Tr. pp. 66-70; compare Parent Ex. E, with Dist. Ex. 10; compare Parent Ex. D, with Dist. Ex. 4; compare Parent Ex. M with Dist. Ex. 16). The parties are encouraged to confer beforehand and submit joint exhibits to the extent practicable (8 NYCRR 200.5[j][3][xii][b]). Although the IHO did discuss these exhibits with the parties to determine the differences between them, she is reminded of her obligation to exclude from the hearing record any evidence she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (Tr. pp. 66-70; 8 NYCRR 200.5[j][3][xii][c]). It is noted that Parent Ex. D was initially withdrawn to prevent duplication, but was later admitted (Tr. pp. 68, 220). Where exhibits are duplicated, the corresponding parent exhibits will be cited.

per week, one 60-minute session per month of individual parent counseling and training, and two 60-minute individual assistive technology service sessions per week (id. at pp. 36, 38, 40-41, 43, 48-50).

On March 9, 2021, a CSE convened for the student's annual review and developed an IEP for the student with an implementation date of March 23, 2021 (Tr. p. 106; Parent Ex. E at pp. 1, 45). The March 2021 CSE found the student eligible for special education and related services as a student with a traumatic brain injury and recommended a 12-month program in a 6:1+1 special class in a specialized school (Tr. pp. 106-107; Parent Ex. E at pp. 1, 36, 38, 43). The CSE also recommended that the student be provided with an assistive technology speech generating eye gaze device, two 60-minute sessions of individual assistive technology services per week, five 60-minute sessions per week of OT, school nurse services as needed, five 60-minute sessions per week of PT, one 60-minute session per month of parent counseling and training, five 60-minute sessions per week of speech-language therapy, a full time 1:1 health paraprofessional, and supports for school personnel on behalf of the student (Parent Ex. E at pp. 36-37, 43).[3] The CSE also found that the student needed specialized transportation which included a 1:1 paraprofessional, lift bus, air conditioning, and limited time traveling (id. at pp. 41, 44).

In a prior written notice and school location letter, both dated March 31, 2021, the district described the proposed actions of the CSE and informed the parent of the public school site the student had been assigned to attend (Parent Ex. F at pp. 1-6). In a prior written notice and school location letter, both dated June 14, 2021, the district again provided the parents with notice of the student's continued eligibility for special education services and the CSE's recommended 12-month program and the same assigned school site (Parent Ex. F at pp. 1-4; Dist. Ex. 13 at pp. 1-4).[4]

On June 23, 2021, the parents provided the district with notice of their rejection of the public programming and intent to unilaterally place the student at iBrain for the 2021-22 "extended school year" and seek public funding for that placement (Parent Ex. G at pp. 1-2).[5] The letter indicated in part that the parents "remain[ed] willing and ready to entertain an appropriate [district]

[3] The district's IEP provides for all related services to be delivered to the student in English: however, with regard to OT the IEP stated that it was to be provided to the student in Spanish (Parent Ex. E at pp. 36-37). Limited explanation is provided for why the IEP recommends that such services be provided in Spanish, although the assistant principal of the recommended specialized school indicated that it may have been a clerical error in the IEP (Tr. pp. 211-12).

[4] Both the district and the parents submitted prior written notices and school location letters with regard to the CSE meeting that occurred on March 9, 2021. The documents appear similar; however, it is unclear from the record why the district's documents are dated June 14, 2021, and the parents' documents are dated March 31, 2021 (compare Parent Ex. F with Dist. Exs. 13, 14).

[5] Although the parents reference an "extended school year," they are disputing the March 2021 IEP which has an implementation date of March 23, 2021, and a projected annual review date of March 9, 2022 (Parent Ex. E at pp. 1, 36-37). Therefore, claims that reference the 2021-22 "extended school year" will be considered claims related to the March 2021 IEP and are deemed only applicable to the twelve-month period in which the IEP at issue was in effect.

program and an appropriate public or approved non-public school placement that can provide the required intensive academic and related services program [the student] require[d]" (id. at p. 2).

On July 2, 2021, the parents signed an enrollment contract providing for the student to enroll at iBrain for the period from July 7, 2021 to June 24, 2022 (Parent Ex. I at pp. 1, 7). Additionally, on July 20, 2021, the parents executed a special transportation service agreement which was to be effective from July, 1, 2021 to June 30, 2022 (Parent Ex. K at pp. 1, 5).

A. Due Process Complaint Notice

In a due process complaint notice dated July 7, 2021, the parents alleged that the district procedurally and substantively denied the student a FAPE based upon the March 2021 IEP (Parent Ex. A at pp. 1, 3). Initially, the parents requested that for pendency the student be allowed to remain at iBrain at public expense and accordingly the parents requested direct payment for the costs of school tuition, related services, and for special transportation services and support to and from iBrain (id. at pp. 1-2).

The parents alleged that at the time of the March 2021 CSE meeting the district failed to provide a program and placement that was uniquely tailored to meet the student's needs (Parent Ex. A at p. 3). Specifically, the parents asserted that the district failed to provide music therapy despite being aware that it was beneficial to the student (id.). The parents stated that the March 2021 IEP acknowledged that music made the student more happy, expressive, regulated, engaged, responsive, and able to communicate (id.). According to the parents, the student's social interactions and cognitive abilities also improved with music (id.). In addition, the parents asserted that music helped the student's sensory motor skills as it improved movement in his upper extremities (id.).

The parents asserted that due to the student's impairments, assistive technology devices and services were necessary for the student during the school day to both engage with the community and his educational program (Parent Ex. A at p. 3). The parents argued that assistive technology programming sessions would provide a meaningful educational benefit to the student by augmenting his ability to utilize assistive technology and assist in making progress in his academic curriculum (id. at p. 4). However, the parents alleged that the March 2021 CSE inappropriately denied the student access to assistive technology devices, AAC, and programming services (id. at pp. 3-4). The parents asserted that the district refused to provide the recommended devices and services despite the student's short-term and long-term goals having included integrating an assistive technology device into his educational curriculum and daily activities, and would continue to refuse even if new assistive technology evaluations were completed (id.).

The parents also argued that the district failed to recommend sufficient parent counseling and training, as it was to occur by way of group sessions (Parent Ex. A at p. 4). Although the March 2021 IEP recommended one monthly 60-minute parent group, the parents asserted that individual counseling and training was required to assist them in acquiring the skills necessary to support implementation of the student's IEP (id.).

The parents argued that the district's recommended school location was not appropriate because a 6:1+1 classroom in a specialized school was not a suitable environment for the student's

academic, behavioral, and social needs (Parent Ex. A at p. 4). The parents made a general assertion that such schools are primarily for students on the autism spectrum, which was inappropriate for the student based upon his extensive medical and personal needs (id. at pp. 4-5). Additionally, the parents argued that the student would not have access to appropriate peer models (id. at p. 5). The parents' position was that the recommended specialized school would be a health hazard to the student because he would be placed with ambulatory students who have intensive behavioral and communication needs, which was problematic based upon the student's visual impairment and inability to sense danger (id.).

The parents asserted that the recommended specialized public school site could not implement the March 2021 IEP because an extended school day had not been recommended (Parent Ex. A at p. 5). Specifically, as the student was mandated to receive 17 hours of related services on a push-in and pull-out basis in addition to 35 instructional periods weekly, there were not enough hours in a regular school day (id.). The parents argued that an extended school day was necessary because providing all of the student's services on a push-in basis would deprive the student of the opportunity to learn and practice new skills in an environment free from distractions (id.).

The parents argued that the student's placement at iBrain in an 8:1+1 classroom with a 1:1 paraprofessional was appropriate to address the student's academic, physical, social and emotional needs, because the student's intensive management needs were appropriately identified, and the school acknowledged that the student required a significant degree of individualized attention and intervention (Parent Ex. A at pp. 3, 5). The parents further asserted that iBrain was appropriate because the student received 30 minutes of individual academics five times per week, small group instruction throughout the day, and related services of OT, PT, speech-language therapy, and vision education services provided in 60-minute sessions on a push-in and pull-out basis, which allowed for appropriate transitioning, repetition, and rest between activities, while addressing the student's needs and IEP goals (id. at pp. 2-3). The parents further argued that iBrain was appropriate because the student received music therapy, individual parent counseling and training once per month, and special transportation accommodations in the form of a 1:1 travel paraprofessional, air conditioning, lift bus, and travel time not exceeding 90 minutes (id. at p. 3).

The parents asserted that there were no equitable considerations that would bar reimbursement because at all relevant times they attempted to cooperate with the CSE review and placement process (Parent Ex. A at p. 5). Additionally, the parents alleged that despite being familiar with the recommended specialized school from in-person visits in prior years, they made multiple calls to the proposed placement to investigate changes that may have been made, in an effort to explore the recommendation set forth in the March 2021 IEP (id.).

As relief, the parents sought an order finding that the district and its March 2021 IEP denied the student a FAPE and a finding that iBrain was an appropriate unilateral placement for the student (Parent Ex. A at p. 6). The parents also sought an directive requiring the district to fund the full cost of the student's tuition and related services at iBrain as well as a 1:1 paraprofessional, nurse, and special education transportation consisting of limited time travel and a paraprofessional, nurse or porter services (id.). Additionally, the parents requested a new CSE meeting to address potential changes, for the district to provide assistive technology services and devices and ACC to assist the student with communication, and reimbursement for all costs associated with the student's assistive

technology device including as required service hours and accessories such as a mount (id.). Lastly, the parents desired attorneys' fees and recovery of all related disbursements as permitted by statute (id.).

B. Impartial Hearing Officer Decision

A pre-hearing conference was conducted by the IHO on August 12, 2021, and the parties and IHO reconvened to determine the student's pendency placement on August 18, 2021 (Tr. pp. 1-24). Immediately following the August 18, 2021 appearance, the IHO issued an interim decision on pendency, which determined that another IHO's final decision dated April 19, 2021 governed the student's pendency placement in this proceeding (Interim IHO Decision at p. 3; see Parent Ex. B at p. 4).[6] The IHO directed the district to fund the student's attendance, related services, and special transportation at iBrain from the date the due process complaint notice was filed, until a final resolution of the matter was reached (Interim IHO Decision at p. 3). On September 17, 2021, an appearance commenced to address issues pertaining to a subpoena seeking documentary evidence (Tr. pp. 25-56). An impartial hearing on the merits commenced on October 19, 2021, and concluded on December 6, 2021, after three days of proceedings (Tr. pp. 57-330).

In a final decision dated January 23, 2022, the IHO found that the district's March 2021 IEP considered the student's strengths, weaknesses, management needs, and developed appropriate goals (IHO Decision at p. 9). The IHO acknowledged that the district recommended a 12-month program, but found it unnecessary to address the parents' claims regarding the need for an extended school day because the district indicated that it could provide the student with the services set forth in the March 2021 IEP during the regular school day (id. at pp. 8-9). The IHO ultimately found that the CSE's recommendation of a 6:1+1 classroom was the least restrictive environment in which the student could be successful and be able meet his goals (id.).

With regard to the district's refusal to provide music therapy on the student's IEP, the IHO determined that the district was not obligated to provide the same services as the program offered at iBrain and noted that the district incorporated many of the goals and aspects of music therapy in its recommended programming (IHO Decision at p. 9). The IHO also found that the recommendation made for group parent training and counseling was appropriate (id. at p. 8). Finally, the IHO decided that the district's failure to provide an assistive technology device did not deprive the student of educational benefits, as a device had been provided by the family (id.).

The IHO determined that based upon the testimony presented, the district could have implemented the program recommended by the March 2021 CSE (IHO Decision at p. 11). Although the IHO acknowledged that all students enrolled in the assigned public school had IEPs, the questions presented by the parents with regard to the student's class were speculative due to the student having never attended the assigned public school site (id. at p. 10). Accordingly, the IHO found that the March 2021 IEP was both procedurally and substantively appropriate for the

[6] The April 19, 2021 IHO decision that established the basis for the student's pendency placement in this case determined that the district did not present witnesses or arguments that it offered a FAPE, that iBrain was an appropriate unilateral placement for the student for the 2020-21 school year, and that the district was financially responsible for the costs of the tuition, related services, and special transportation associated with the student's enrollment at the unilateral placement (Parent Ex. B at p. 8).

student and that the parents' concerns did not rise to the level of the district having denied the student a FAPE (id. at pp. 10-11).

The IHO determined iBrain to be an appropriate placement because it provided the student with various related services, including PT, OT, speech-language therapy, music therapy, assistive technology, parent counseling and training, special transportation services, and the individualized supports and services necessary for the student to make progress (IHO Decision at pp. 13, 15-16). The IHO also found that iBrain provided direct one-to-one instruction that was "fine tuned for the individual" (id. at p. 13). While enrolled at iBrain during the 2021-22 school year, the student had been initially placed in a 6:1+1 classroom for students with highly intensive needs, but was moved to an 8:1:1 setting as he was later deemed to have significant management needs but did not require a "super high level" of support for communication (id. at pp. 13, 15).

Finally, regarding equitable considerations, the IHO found that there were no equitable considerations that would bar the parents from obtaining relief (IHO Decision at p. 15). The parents' request for tuition and transportation for the student's attendance at iBrain was denied based upon the determination that the district offered the student a FAPE (id. at p. 17). The March 2021 IEP was deemed valid until March 2022, so there was no reason to make changes or reconvene prior to that due date (id. at p. 16). However, the IHO found that because the student made progress with the assistive technology device, that was purchased by friends and family despite it not being their responsibility, the district was to provide reimbursement for the cost of such device (id. at p. 17).

IV. Appeal for State-Level Review

The parents appeal from the IHO's determination that the district offered the student a FAPE during the relevant period, as the recommended program and school had been previously deemed inappropriate and the district failed to establish that it was capable of implementing the program set forth in the March 2021 IEP.

The parents assert that the IHO should have found implementation impossible because without an extended school day the district would be mathematically unable to provide 17 hours of related services in 60-minute increments in a limited school day consisting of 45-minute periods in addition to the 35 instructional periods weekly. The parents also argue that the district did not establish that the assigned public school offered an extended school year as required, as testimony indicated that the school year began in September and the student's IEP mandated a start date of July 2021.[7]

The parents assert that the inappropriateness of the placement was not speculative, but rather that it is a publicly available fact that the recommended specialized school places students with autism and behavioral issues in 6:1+1 classrooms. The parents argue that such classrooms are primarily for students classified with autism, making it an inappropriate class grouping for the

[7] Despite the parents' assertion that the March 2021 IEP mandates a start date in July 2021, the IEP has an implementation date of March 23, 2021 (Parent Ex. E at pp. 1, 36-37). Accordingly, as noted above, such IEP would only be in effect until March 2022, as indicated by the projected date of annual review being March 9, 2022 (id.).

student who is non-ambulatory, nonverbal and has a traumatic brain injury. They argue that the IHO disregarded testimony as to how such grouping would adversely affect the student, place him in danger, and be an obstacle to his learning. Further, the parents contend that the district did not meet its burden with respect to whether the student would be placed in a class at the recommended specialized school with students who had needs similar to their sons.

The parents allege that they did their "due diligence" by visiting the assigned public school in past years and then calling the school to determine what had changed; however, they were advised that the school only had 6:1+1 classrooms available in the building. The parents assert that their ability to assess whether the school and its facilities changed from past visits was impeded because they were unable to visit the physical location due to the COVID-19 pandemic. Regardless, it was the parents' position that the student did not need to attend the school before challenging the appropriateness of the placement.

The parents claim that the IHO erred in finding that the district's refusal to supply an assistive technology device, as referenced in the March 2021 IEP, did not rise to a denial of FAPE. The parents argue that because assistive technology had been an issue in the past, the district was on notice of its responsibility but ignored its obligation to provide the same. The parents maintain that their unilateral placement of the student at iBrain and purchase of an assistive technology device for him did not absolve the district of its obligation. Further, the parents argue that the IHO's order for reimbursement of the device did not cure the district's failure to implement the student's IEP.

The parents allege that the district's refusal to provide music therapy also constituted a denial of FAPE. The parents state that the IHO improperly disregarded the benefits and progress that the student received from music therapy and relied upon an unsupported argument that the goals targeted by music therapy could be addressed through other services. The parents allege that music therapy at iBrain is individualized to the student, and the assigned public school would not provide the same type of service.

As relief, the parents seek an order reversing the IHO's finding that the district provided the student a FAPE, while affirming the findings related to the appropriateness of iBrain, the equitable considerations favoring the parent, and the reimbursement of the cost of the student's assistive technology device. The parents continue to seek funding for all of the relief requested for tuition, related services, and transportation.

In its answer and cross appeal, the district responds with a denial of all of the material allegations in the parents' request for review and requests that the appeal be dismissed. First, the district argues that it offered a FAPE to the student during the relevant period. Specifically, with regard to the parents allegedly being denied an opportunity to visit the assigned public school and the school's inability to offer an extended school year, the district asserts that such claims were not contained in the parents' due process complaint notice and cannot now be raised for the first time on appeal. The district alleges that on appeal the parents did not contest that group parent training was appropriate, that the IEP contained appropriate management needs and goals, and that the related services were in the least restrictive environment for the student. The district argues that the IHO was correct in determining that the parents' extended school day claims were meritless, that the March 2021 IEP could be implemented in the assigned public school, and that the district

is not obligated to duplicate the program that iBrain provided to the student. The district argues that the parents' claims regarding the functional grouping of the recommended class were speculative and without merit, as the student did not attend the school. The district also contends that no testimony reflected that the assigned public school was unable to provide an appropriate grouping for the student. Additionally, the district argues that the IHO erred by finding that equitable considerations favored the parents, as the ten-day notice was untimely, insufficient, and vague. Lastly, the district asserts that the IHO erred in ordering reimbursement for the assistive technology device that had been obtained by the parents while the student was enrolled at iBrain, requiring that portion of the IHO decision to be reversed.

The parents submit a reply and answer to the district's cross-appeal, in which they deny the district's allegations and reaffirm all of the arguments they made in their request for review. Specifically, the parents repeat their arguments associated with the March 2021 IEP and the district denying the student a FAPE, that the equities favor the parents, that the IHO's finding regarding the appropriateness of iBrain should be upheld, and that the IHO's reimbursement of the assistive technology device should be sustained.

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]).[8]

[8] 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).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. Scope of Impartial Hearing

Before turning to the merits of the parents' appeal, it is necessary to examine which claims are before me for review. The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

With regard to the parents' arguments relating to the school's inability to offer an extended school year, the district argues that such claims are raised for the first time in the request for review (see Answer and Cross Appeal ¶¶ 7, 9).[9] The district asserts that the parents' due process complaint notice "cannot be reasonably read" to contain these allegations, making them beyond the scope of the impartial hearing and this appeal (id.). Here, the parents' due process complaint notice made references to an extended school year, the March 2021 IEP clearly recommended a twelve-month academic school year, and the student's parent acknowledged on the record that the

[9] In the alternative, the district argues that such an allegation appears to be based upon a statement made by the district's assistant principal during the hearing, in which he stated that the 2021-22 school year began on September 13, 2021 and ended on June 27, 2022, causing the parents to assert that an extended school year would not be provided (Tr. pp. 198-199; Answer and Cross Appeal ¶ 9). The district argues that such testimony was an inadvertent mistake, that should be disregarded as the assistant principal also indicated that the school was able to implement the student's IEP (Answer and Cross Appeal ¶ 9). Even further, it was argued that the assistant principal's testimony could not be used to challenge the March 2021 IEP as it occurred after the parents rejected the same and made the decision to place the student at iBrain for the 2021-22 school year (id.).

district recommended the same (Tr. p. 316; see Parent Exs. A; E at pp. 38, 45). However, now on appeal the parents argue that the district did not establish that the assigned public school offered an extended school year (Req. for Rev ¶ 21). Review of the evidence in the hearing record shows that the parents did not seek the district's agreement to expand the scope of the impartial hearing to include issues relating to an alleged failure to provide an extended school year. Further, the parents did not file an amended due process complaint notice to add this claim, nor can it be said that the district "opened the door" to this claim by raising evidence as a defense to claims that were not identified in the due process complaint notice (M.H., 685 F.3d at 250-51). Therefore, I will not review this issue.

For the same reason, the parents' alleged inability to visit the assigned public school will not be addressed herein, as it is also being raised for the first time on appeal.[10] The parents' due process complaint notice states as follows, "[p]arents were familiar with the recommended school placement [district 75] program from in-person visits in prior school years, but also made multiple calls to the proposed placement to investigate what, if any, changes had been made as part of their effort to explore the [district's] recommendation for this school year, but ultimately determined it was not safe or appropriate for [the student]" (Parent Ex. A at p. 5). The due process complaint notice made no allegation that the parents were prohibited from visiting the assigned public school (see Parent Ex. A). However, the parents' request for review states that the COVID-19 pandemic prevented a physical visit to the school location (Req. for Rev. ¶ 20). The district argues that although the parents allege that the school was denying visitors, the parents did not indicate that they ever requested such appointment or were denied an opportunity to have one (Answer and Cross Appeal ¶ 8). In their reply, the parents state that the due process complaint notice alleged that they tried to contact the school location multiple times to investigate whether it was appropriate, therefore it does not matter that they did not explicitly indicate in their due process complaint notice that they were denied an opportunity to visit the assigned public school during the 2021-22 school year (Reply and Answer to Cross Appeal ¶¶ 10-11).

The parents appear to admit that such issue was not initially raised by arguing, that "[i]t does not matter that [p]arents did not explicitly plead in the [due process complaint] that they were denied an opportunity to visit the school location this year; they alleged that the school location was inappropriate, gave numerous and detailed examples for why they believed so, and that [sic] stated they are familiar with the school" (id. ¶ 10). There is no evidence in the record to establish that the parents sought the district's agreement to expand the scope of the impartial hearing to include such issue and there was no amended due process complaint notice filed to address such claim. In fact, it appears that the parents' statements in their due process complaint notice regarding previous school visits appear to be offered to support a finding that equitable considerations would weigh in their favor in terms of their cooperation with the CSE process. Based upon this, and the fact that the district does not appear to have "opened the door" to this claim, it will not be reviewed on appeal.

[10] Even before the public health crisis brought on the COVID-19 pandemic, SROs and courts have long held that "inability [of a parent] to visit the classroom to form an opinion as to its appropriateness is not itself a procedural defect" (S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *13 [S.D.N.Y. Nov. 9, 2011]) and the same may be said of a consultant hired by a parent to conduct a similar site visit (see C.M. v. Mount Vernon City Sch. Dist, 2020 WL 3833426 [S.D.N.Y. July 8, 2020]).

2. Scope of Review

State regulation governing practice before the Office of State Review requires that the 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]; see 8 NYCRR 279.4[a]). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

In the parents' due process complaint notice it was alleged that individual parent counseling and training was necessary, but the IHO rejected such argument on the grounds that group parent counseling and training was appropriate (Parent Ex. A at p. 4; IHO Decision at p. 8). On appeal, the parents did not re-assert such arguments relating to individual parent counseling and training. As such, those findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013])

Similarly, the parents asserted in the due process complaint notice that assistive technology services were not recommended for the student by the district (Parent Ex. A at pp. 3-4). However, the March 2021 IEP provided two 60-minute sessions per week of individual assistive technology services (Tr. pp. 127-128, 166; Parent Ex. E at p. 37). The school psychologist also testified that the student needed assistive technology services to communicate (Tr. p. 167). Accordingly, on appeal there does not appear to be a dispute remaining with regard to assistive technology services, but rather one remains with respect to which party should bear fiscal responsibility for provision of the student's assistive technology device (see Req. for Review).

Although the district asserts in its closing brief that the parents failed to show that iBrain was an appropriate placement for the student, such argument was abandoned by the district on appeal (see Dist. Ex. 18 at pp. 16-18; see Answer and Cross Appeal). In fact, neither party challenged any portion of the IHO's finding that iBrain was an appropriate unilateral placement for the student making the same final and binding on the parties. Therefore, the IHO's finding that iBrain was an appropriate unilateral placement for the student need not be addressed herein.

Accordingly, the threshold issue remaining to be addressed on appeal is whether the IHO was correct in determining that the district offered the student a FAPE. If not, a review of whether equitable considerations favored the parents is warranted. Lastly, it must be decided whether the relief granted by the IHO, namely reimbursement by the district for a parentally purchased assistive technology device, was appropriate given her determination that the district offered the student a FAPE.

B. March 2021 IEP

1. Music Therapy as a Related Service

The parents appeal the IHO's finding that the district offered the student a FAPE despite not including music therapy as a related service in the student's March 2021 IEP and assert that the student greatly benefitted from the music therapy provided at iBrain (Req. for Rev. ¶¶ 6, 39-42; Reply and Answer ¶ 15). The district asserts that the IHO's determination regarding music therapy should be sustained because the student's needs that were addressed by music therapy at iBrain were targeted by appropriate goals, services and supports included in the district's March 2021 IEP (Answer and Cross Appeal ¶¶ 11-12).

As discussed above, the student is nonverbal and non-ambulatory, and has received diagnoses of a traumatic brain injury, bilateral periventricular leukomalacia, cerebral palsy, quadriplegia with dystonia, gastroesophageal reflux disease, infantile spasms, and a seizure disorder (Tr. p. 288, Parent Ex. D at pp. 1-28; E at pp. 1-19; Dist. Ex. 1 at pp. 1-2; 4 at p. 1; 6 at pp. 1-2). Due to the student's limitations, he has a short attention span, has difficulty concentrating on on-task behaviors and memorizing steps and directions, has limited motor movements, fatigues easily, and has experienced challenges with learning new skills (Tr. pp. 109, 121; Parent Ex. D at p. 1; Dist. Ex. 6 at pp. 1-2). According to the March 2021 iBrain IEP, the student's physical health was deemed to impact both his intellectual and cognitive potential, with his progress being dictated by his physical health and well-being (Parent Ex. D at p. 1). The student's most common mode of communication was through visual eye gaze, but he also communicated by way of touch, looking, smiling, laughing, crying, using facial expressions, and vocalizing (id. at pp. 1-5). The student uses a PRC eye gaze device to assist with communication, as well as high and low-tech AAC devices (see Dist. Ex. 3 at pp. 1-2; see generally Parent Exs. D; E at pp. 8-9, 14).

According to the district's March 2021 IEP, the student was recommended to receive three 60-minute sessions per week of individual music therapy and one 60-minute session per week of music therapy in a group at iBrain (Parent Ex. E at p. 11).[11, 12] The March 2021 IEP indicated that the student's music therapy focused on improving his sensory processes, motor functioning skills, self-expression and communication (id.). The IEP reflected that the student became "extremely happy and excited in the presence of live music" and explained that "[d]ue to [the student's] high levels of responsiveness to the therapeutic aspects of music, working toward skills he ha[d] demonstrated difficulty within other contexts within a music therapy setting c[ould] be beneficial" (id.). Additionally, the March 2021 IEP indicated that the student could become easily distracted by surroundings and required maximum verbal and live musical support to redirect attention and

[11] When drafting the student's 2021-22 IEP, the March 2021 CSE relied heavily on the present levels of performance contained in the March 2021 iBrain IEP (compare Parent Ex. E at pp. 1-19 with Parent Ex. D at pp. 1-25).

[12] The evidence in the hearing record indicated that the student had not previously received music therapy services, rather, the recommendation for music therapy in the March 2021 iBrain IEP was in response to the student's "high level of responsiveness and motivation to music therapy services as demonstrated in assessment" (Parent Exs. B at p. 4; D at p. 43).

noted that on some days his energy level was low, and he needed extra live musical support to complete musical tasks (id. at pp. 11-12).

Furthermore, information presented during the March 2021 CSE meeting indicated that the student's music therapy goals targeted: sensory motor - to improve the movement in his upper extremities; cognitive - to improve turn taking and create music with peers and familiar adults; speech and language - to increase communication to interact more with peers and adults; and noted that the student had improved his finger isolation via strumming his guitar (id. at p. 13). Specifically, according to the March 2021 iBrain IEP, the annual goals developed for music therapy included: to improve movement of upper extremities to actively participate within the context of music therapy with the short term objectives of keeping his head in a lifted position and increasing mobility in both arms to play musical instruments; to increase active participation in interpersonal interactions with corresponding short term objectives to improve turn-taking, and to create music with peers and familiar adults; and to increase expressive communication skills with corresponding short term objectives of responding to prompts using a device, body language or facial expression and to comment within the session (Parent Ex. D at p. 42).

Despite the parents' assertion that the student required music therapy in order to receive a FAPE, review of the district's March 2021 IEP showed that the areas and skills targeted during music therapy were addressed by related services, annual goals and management needs (see Parent Ex. E). Specifically, the March 2021 CSE recommended the student attend a 12-month program in a 6:1+1 special class in a specialized school along with the related services of two 60-minute sessions of individual assistive technology services per week, five 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, one 60-minute session per month of group parent counseling/training, five 60-minute sessions per week of individual speech-language therapy, school nurse services as needed, a full time, individual health paraprofessional, and supports for school personnel on behalf of the student (Tr. pp. 106-107, Parent Ex. E at pp. 36-37). The district's March 2021 IEP contained annual goals designed to improve the student's: ability to bear weight in his upper extremities; functional grasp and reach; attention; functional endurance and active reaching; participation in family, school and community events; communication skills; functional communication with peers and adults; and his social/pragmatic communication skills (Parent Ex. E at pp. 21-35). Additionally, the district's March 2021 IEP identified the following human, environmental, and material management needs of the student including but not limited to: a 1:1 paraprofessional; aided language stimulation; model what is being demanded with repetition; repetitive additional processing time; repetition of verbal cues with physical cues to increase comprehension; increased wait time to process information; modeling, verbal, visual and gestural cues; repetition; verbal cues, praise and sufficient motivation to remain engaged and interested in activity; skilled manual prompting for the facilitation of appropriate movement patterns; one-on-one instruction using direct instructional model; highly structured small classroom with less stimulus from visual and auditory distractions; direct instruction; multisensory supports; sensory breaks during instruction; repeated instruction; brief rest breaks every 15-20 minutes to avoid fatigue; a quiet non-distracting environment to minimize distraction; access to a communication device and assistive technology devices to participate and interact in school activities; have his interests (i.e., music; socializing; sports; stories/books; slapstick comedy) incorporated into his school day in order to maximize his interest and make skills relevant to his future; access to an instructional laptop with software to support literacy and

math skills; sit to stand or prone for standing program; activity chair, gait trainer, and adaptive tricycle (id. at pp. 18-19).

An IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" and includes psychological services as well as "recreation, including therapeutic recreation" (20 U.S.C. § 1401[26][A] [emphasis added]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]).

Although it is undisputed that iBrain recommended that the student receive music therapy during the 2021-22 school year (Parent Ex. D at pp. 1, 43, 49), comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE; rather, it must be determined whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint notice, and whether the IEP developed by its CSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (Rowley, 458 U.S. at 189, 206-07; R.E, 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "'the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent'"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at *8 [S.D. Cal. Feb. 14, 2013] [noting that "'[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits'"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at *5 [S.D. Cal. Mar. 14, 2011]).

The district's school psychologist testified that although music therapy is more individualized than music offered to students as part of their curriculum, the CSE did not recommend it for the student because he would receive music as part of the curriculum (Tr. pp. 96-97, 124, 156-157). The school psychologist stated that the student's interest in music was incorporated into his management needs and aspects of music therapy were included in the student's present levels of performance (Tr. pp. 124-125, 153, 158). She further explained that the goals of music therapy as a related service were to help strengthen the student's upper extremities, to improve his expressive language, and to help him with interpersonal interactions, which the CSE incorporated into the March 2021 IEP through annual goals and recommendations for services such as OT and assistive technology (Tr. pp. 124-25, 150, 158; 160-66; see Parent Ex. E at pp. 22-25, 27, 30-34). As such, the school psychologist opined that because those goals were

addressed in other areas, it was not necessary to include music therapy as a related service (Tr. pp. 124-25, 150, 158; 160-66).

As such, review of the district's March 2021 IEP reveals that it provided related services—albeit in a different way than those the parent preferred—and supports to address the student's needs that iBrain addressed through music therapy (see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 592-93 [S.D.N.Y. 2013][finding that, although the evidence may have supported that music therapy was beneficial for the student, it did not support the conclusion that the student could not receive a FAPE without it]). There was no denial of a FAPE to the student in this case merely because the district did not opt to use music therapy as a related service in the same manner as iBrain.

2. Extended School Day

The parents appeal the IHO's finding that an extended school day was not necessary to implement the student's March 2021 IEP, contending that the school district did not establish it was capable of complying with the related services mandated by the IEP (Req. for Rev. ¶ 16; Reply and Answer to Cross Appeal ¶ 7). The parents argue that the district denied the student a FAPE because it was mathematically impossible to provide the student with all required academic instruction and related services in a regular school day (Parent Ex. O at pp. 10-11; Req. for Rev ¶ 17; Reply and Answer ¶ 7). Specifically, the parents allege that it is impossible for the recommended 17 hours of related services that are provided in 60-minute increments to fit in a limited school day consisting of 45-minute periods, in addition to the school's legally required 35 instructional periods provided in the 6:1+1 special class (Parent Ex. O at pp. 10-1; Req. for Rev. ¶ 18).

The March 2021 CSE recommended the student receive the related services of two 60-minute sessions of individual assistive technology services per week, five 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, and five 60-minute sessions per week of individual speech-language therapy (Parent Ex. E at pp. 36-37). According to the assistant principal of the assigned public school, a school day is approximately six hours and 50 minutes broken into eight 45-minute periods (including lunch) (Tr. pp. 194, 209). In order to accommodate the IEP mandates for instructional periods and related services, the assistant principal explained that related services could be provided pushed into the classroom or students pulled out depending on the IEP, and that the related services providers meet with the classroom teacher and create a schedule that met the IEP mandates (Tr. pp. 210-11).

The district's school psychologist testified that although the district could recommend an extended school day, the student's March 2021 IEP was created to be delivered within a regular school day (Tr. pp. 145-148). The school psychologist testified that the March 2021 CSE recommended the related services be provided either within the student's 6:1+1 special class or at the service provider's separate office; however, the majority of the related services sessions should be conducted on a push-in basis so that the student could work towards his academic goals (Tr. pp. 168-169, 175). Furthermore, she explained that sessions should be conducted on a pull-out basis if a session mandated a separate location or the student was learning a new skill (Tr. pp. 168-169). The school psychologist testified that although it would be preferrable to have a majority of the related services provided on a push-in basis, the March 2021 CSE gave the providers flexibility to deliver services on a pull-out basis as needed (Tr. pp. 176-176). She further explained that because

the student could fatigue and could sometimes be inattentive, the CSE did not want to "lock" the provider into a set push-in, pull-out schedule (Tr. p. 176). The evidence supports the IHO's conclusion that the district was capable of implementing the student's IEP.

Additionally, the parents argue that the recommended placement was unable to implement the recommendations contained in the March 2021 IEP during the regular school day as one their reasons for rejecting the assigned public school site (Parent Ex. G at p. 1). Their view was not borne out by the evidence, as the student never attended the assigned public school site pursuant to the March 2021 IEP. Any conclusion that the district would not have implemented the student's IEP or that the assigned public school site could not meet the student's needs would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's programming under the IEP or to refute the parents' claims (R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]; F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187 & n.3]). In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the March 2021 IEP.

C. Assigned Public School Site and Grouping

Turning to the parents appeal from the IHO's finding that their arguments pertaining to the assigned public school and the grouping of students therein were speculative, the parents contend that the assigned school would not have provided appropriate grouping for the student because the proposed class primarily included students classified under the disability category of autism (Req. for Rev. ¶ 26). According to the parents the proposed class was a "wholly inappropriate class grouping" and that "such a setting and grouping would adversely affect [the student], place him in danger, and present an obstacle to learning" (id. ¶¶ 26-27).

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B., 589 Fed. App'x at 576). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49

[2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Turning first to the parents' claims related to the functional grouping of the proposed class at the assigned public school, neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).[13] State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

It is undisputed that the March 2021 CSE recommended that the student receive instruction in a 6:1+1 special class in a specialized school (Parent Ex. E at pp. 1, 36, 42-43). However, the

[13] To be clear, there is no requirement in the IDEA or State regulation requiring that grouping be conducted in accordance with a student's chronological grade.

student never actually attended the recommended 6:1+1 special class, as he was unilaterally placed at iBrain (Parent Exs. G at pp. 1-2; I at pp. 1-7). Furthermore, as noted by the IHO, the testimonial evidence provided did not clearly establish the demographics of the particular class the student would have been assigned to had he attended the public school, as the student never attended such recommended placement (IHO Decision at p. 10). Therefore, the IHO found that all questions presented by the parents which related to other students in the class were speculative (id.).

According to the assistant principal there were various special class ratios in the assigned public school including 6:1+1, 8:1+1, 12:1+1, and 12:1+4 (Tr. pp. 197, 200). He stated that the disability classification of the students in a 6:1+1 special class depended on the students and their IEPs (Tr. pp. 200-01, 204). The assistant principal testified that although the majority of students in the 6:1+1 special classes were classified with autism, there were also "a few different classifications" in the 6:1+1 special classes (Tr. pp. 201-02).[14] Additionally, while the assistant principal could not specifically testify as to how many students were deemed to be non-ambulatory, nonverbal, or required an assistive technology device to communicate during the 2021-22 school year, he stated that the school building was wheelchair accessible, there were 6:1+1 special classes available, a tech team to provide assistive technology, and that the school had the ability to implement the program that had been recommended for the student (Tr. pp. 196-99, 206-07, 209). Further, the assistant principal testified that to the best of his knowledge the student's parents did not visit the recommended school (Tr. p. 199).

The student's mother testified that she did not visit the assigned public school as "[t]hey weren't accepting [] visits this past summer because of COVID," although she spoke to someone at the assigned school (Tr. p. 299). The parent testified that after discussing the services mandated in the student's IEP, the person at the assigned school informed her that "the IEP is a legal document, and so public schools are legally mandated to provide what's in the IEP" and confirmed that a 6:1+1 classroom was provided in the school (Tr. pp. 299-300, 321-22). She stated that, having visited the assigned school in the past, she felt that the public school was not appropriate for the student because students with all types of disabilities are accepted and placed within the same classroom (Tr. pp. 300-01). Specifically, the student's mother stated "[y]ou can have a child with emotional disturbance, and a child with autism, and a child in a wheelchair all attending the same class, which my husband and I considered a safety issue for our son" (id.). She further stated that her concerns were based upon the school being made up of children of various ages and mixed abilities and she emphasized that it was important for the student "to see children who are either just like him or slightly above so that he can emulate what they're doing, and therefore, learn and grow and stretch himself" (Tr. pp. 300, 308). Further, she opined that socialization was extremely important for the student's learning and education (Tr. p. 308).

The director of special education at iBrain (director) testified that the student population at iBrain focused on students who are nonverbal, non-ambulatory and have brain injuries or brain-based disorders, asserting that it would be "highly inappropriate" for the student to be placed in a class with students with autism (Tr. pp. 228, 230, 248, 253, 255). The director testified that students on the autism spectrum, "especially those in more restrictive settings" like the

[14] The assistant principal testified that at the assigned public school in addition to autism, some students had disability category classifications of emotional disturbance and multiple disabilities (Tr. pp. 197-98).

recommended specialized public school, "are severely restricted in [] their language and social use and development," and "typically don't have a strong interest in peers and peer interactions" (Tr. p. 248). The director stated that the student needed peer models that would encourage him and push him to advance with regard to language, as the student thrived on peer interactions (id.). The director further testified that the student being exposed to echolalic speech was the opposite of what the student required, because they wanted him to learn "normal conversational turn taking" (Tr. p. 249). Additionally, she opined that a classroom with students with autism would be an inappropriate environment for the student because students with autism can have "meltdowns" and can "throw things or hit people" (id.). She indicated that the student would not be able to protect himself because he "lacks the safety awareness and would lack the physical ability to do anything about it even if he saw it coming, so it would present a physical danger to him" (id.). Lastly, the director opined that the classroom environment would not be conducive to the student learning as there would be extraneous sounds, noise, and individuals talking in repetition (id.). She explained that the student would become very overwhelmed in such a classroom environment, and it would be difficult for him to process information (Tr. pp. 249-50).

While the parents are free to choose private schooling like iBrain in which they feel all of the children in the classroom fit their preferred characteristics and disability categories, overall, this is not a case in which the evidence shows that the public school site is "factually incapable" of implementing the IEP. The information discussed in detail above does not support disturbing the IHO's finding that the district presented sufficient evidence to show that it would have been able to implement the March 2021 IEP or that the IEP was procedurally and substantively appropriate. The parents' objections to the classification of students with autism or the fact that the other students are ambulatory at the assigned school do not amount to an inability to implement the student's IEP, and therefore fall too closely to an impermissible parental veto over the district's assignment of the student to a public school site. Additionally, as noted by the IHO, arguments relating to the grouping of the student were entirely speculative as no specific information was presented regarding the particular class to which the student would have been assigned had he attended the specialized public school, rather it was merely known that all students in the school have IEPs (IHO Decision at p. 10). Accordingly, based on the above, I decline to find that the district would have been incapable of implementing the March 2021 IEP.

VII. Relief- Assistive Technology

On appeal, the parents argue that the IHO improperly found that the district's refusal to supply the student with an assistive technology device did not constitute a denial of FAPE for the period at issue (Req. for Rev. ¶¶ 28, 37).[15] To the contrary, the district appeals the IHO's order for

[15] Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. One of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

reimbursement of the parentally obtained assistive technology eye gaze device, that had been purchased prior to the March 2021 IEP while the student was in attendance at iBrain, on the grounds that it was not required to provide assistive technology devices to students who have been unilaterally placed (Tr. pp. 167-168, 289; Answer and Cross Appeal ¶¶ 15-16). [16]

According to a document that described the information received from iBrain in 2020 regarding the student's assistive technology use, the student had been using a Tobii I-12 eye gaze system, which was considered to be "outdated and not working well" (Dist. Ex. 3 at p. 1). The information iBrain provided reflected a recommendation that the student upgrade to a PRC Accent 1400 with LOOK eye tracking software (id.). iBrain recommended the PRC Accent 1400 with LOOK eye tracking, in order to provide access to communication and allow him to participate in activities more independently (id.). In September 2020, the student's family and friends purchased a PRC eye-gaze device with LAMP communication software for the student (Tr. pp. 289, 296, 315; Parent Exs. D at pp. 4, 14; E at pp. 7-8). During March 2021, the student continued to utilize this PRC eye gaze device with LAMP software to communicate with others (see Tr. pp. 314-15; Parent Ex. D at p. 4).

The district disputes the IHO's order for reimbursement for the parentally purchased assistive technology device (Answer and Cross Appeal ¶ 15). Notably, t the IHO granted such relief while simultaneously finding that the district's "failure to provide an assistive technology device did not deprive [the s]tudent of educational benefits" and otherwise determined that the district had offered the student a FAPE (IHO Decision at pp. 8, 16, 17). The IHO did not reconcile these seemingly contradictory findings within her decision; rather, she merely cited to a prior impartial hearing decision dated January 2, 2021 and acknowledged that a "claim for a device was litigated last year" (id. at pp. 8, 16). The IHO stated that the "[e]vidence establishes that [the s]tudent has a device and has made progress using the device. Evidence establishes that the device was purchased by friends and family. I find that this was not their responsibility" (id. at p. 16). The IHO did not conduct any analysis regarding whether the district remained responsible for providing an assistive technology device to the student where, as here, it provided the student with a FAPE, and otherwise owed no reimbursement to the parents who had unilaterally placed the student at iBrain at their own financial risk (see generally id.).

The parents contend that because the March 2021 CSE recommended an assistive technology device, the district was to ensure the student had access to all IEP mandated services and equipment. The parents' argument misses the mark. Contrary to the parents' contention, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]; Letter to Hobson, 33 IDELR 64 [OSERS 2000]; Memorandum to Chief State Sch. Officers, 34 IDELR 263 [OSEP 2000]). The school psychologist provided testimony regarding such holding, by stating that the

[16] The district in its cross appeal also disputes the IHO ordering reimbursement for the assistive technology device purchased by the parents on the grounds that the request was barred by the doctrine of res judicata (Answer and Cross Appeal ¶ 16). The district asserts that because the parents purchased the device during the 2020-21 school year, the relief should have been pursued in the prior proceeding that addressed such school year (id.). The parents oppose the same, arguing that purchasing a device does not establish that issue was resolved for the 2020-21 school year. Because I have reached a determination herein in favor of the district it is not necessary to address the res judicata argument.

district was not required to provide assistive technology to students who are unilaterally placed by a parent (Tr. pp. 167-68)

It is undisputed that the parents rejected the March 2021 IEP which recommended placement in a specialized school, when they decided to continue the student's unilateral enrollment at iBrain, a nonpublic school (see Parent Ex. G). At the time the parents rejected the recommended program and public school placement, they rejected the entire March 2021 IEP. Therefore, it became clear that the student would not be educated pursuant to the March 2021 IEP. Once it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]). Further, when the parents obtained an assistive technology device for use at the student's nonpublic school, they did so at their own financial risk. To the extent the parents were denied reimbursement of any costs or fees related to the student's attendance at iBrain, they have provided no authority to support their contention that reimbursement for an assistive technology device was somehow severable from the rest their Burlington/Carter unilateral placement claims and should therefore be provided piecemeal by the district. The claim is illogical and must be rejected on that basis.

Even further, the district argues that the IHO's award to the parents for reimbursement of the assistive technology device should be properly viewed as compensatory relief being provided "to remedy gaps in the putatively appropriate program" offered by iBrain (Answer and Cross Appeal ¶ 15). The district additionally asserts that because the parents' due process complaint notice did not seek the assistive technology device as a remedy to fill in gaps present in iBrain's program, the parents are now barred from making such claim (id.). This is of importance as, 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 Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456-57 [2d Cir. 2015] [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 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.

Therefore, even though it is uncontested that the student benefits from an assistive technology eye gaze device, in the context of this proceeding it was inappropriate for the IHO to order the district to provide reimbursement for the device where the parents had already engaged in self-help by purchasing the assistive technology device, electing to reject the district's proposed March 2021 IEP, and unilaterally placing the student in a private school, and were otherwise denied reimbursement by the IHO for any aspect of the unilateral placement at iBrain.

The evidence in the hearing record does not support the IHO's order requiring the district to provide reimbursement for the assistive technology device purchased by the student's parents. Although the IHO did not find a denial of FAPE, the IHO directed the district to refund the parents for the device they purchased (IHO Decision at p. 17). However, absent a finding of a substantive denial of FAPE, any procedural noncompliance is insufficient to merit compensatory relief (D.K. v. Abington Sch. Dist., 696 F.3d 233, 251 [3d Cir. 2012]); however, an IHO may order a district to comply with certain procedural requirements (34 CFR 300.513[b][3]; see 34 CFR 300.500-536). Under the circumstances presented, the IHO's order directing the district to reimburse for costs associated with a parentally purchased device was not proper. As such, the IHO's award must be annulled.

VIII. Conclusion

Based on the foregoing, I find that the hearing record supports the IHO's finding that the March 2021 IEP was reasonably calculated to enable the student to receive educational benefit in light of his unique circumstances (Endrew F., 137 S. Ct. at 1001; Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]). Here, the parties do not dispute that iBrain was an appropriate unilateral placement for the student. Regardless, having found that the district offered the student a FAPE, I need not reach the issues of whether the private educational services obtained by the parents were appropriate for the student or whether equitable considerations support the parent's request for relief and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134). Accordingly, there is no reason to reach the issues presented on appeal relating to the sufficiency or timeliness of the parents' ten-day notice.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated January 23, 2022 is modified by reversing that portion which ordered the district to reimburse the parents for the costs associated with the student's assistive technology device.

Dated: **Albany, New York**
April 15, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER