The University of the State of New York

The State Education Department
State Review Officer
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No. 22-050

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, Ltd., attorneys for petitioners, by Sarah Khan, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the International Institute for the Brain (iBrain) for the 2020-21 and 2021-22 school years. Respondent (the district) cross-appeals from the IHO's determinations related to the 2020-21 school year. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student has been the subject of prior State-level administrative reviews involving the student's 2019-20 and 2020-21 school years (see Application of a Student with a Disability, Appeal No. 21-117; Application of a Student with a Disability, Appeal No. 21-099). Accordingly, the parties' familiarity with the facts and procedural history preceding this matter—as well as the student's educational history—is presumed and they will not be repeated herein unless relevant to the disposition of the issues presented in this appeal.

The student is non-verbal and non-ambulatory and presents with significant delays in his gross and fine motor skills, activities of daily living (ADL) and self-help skills; however, he "seem[ed] to be functioning at or near grade level," was approaching age-appropriate standards, and was very conversational using an assistive technology device (Parent Exs. Q at p. 1; HH ¶ 10; II at pp. 2-9). He has received several diagnoses including but not limited to cerebral palsy, spastic quadriplegia, and hypoxic ischemic encephalopathy (Parent Ex. II at pp. 1, 8). The student has attended iBrain at district expense since the 2018-19 school year (see Parent Ex. GG ¶ 5).[1]

Leading into the 2020-21 school year, a CSE had developed an IEP, dated May 26, 2020, which the parents had disagreed with and which was the subject of a prior impartial hearing and appeal that culminated in a State-level administrative review decision that found the district responsible for the costs of the student's unilateral placement at iBrain for the 2020-21 school year at a reduced amount (Parent Ex. G; Dist. Ex. 6; see Application of a Student with a Disability, Appeal No. 21-117).

A CSE convened on February 8, 2021 to conduct the student's annual review and developed an IEP with an anticipated implementation date of March 1, 2021 (Parent Ex. II). Upon finding that the student remained eligible for special education as a student with a traumatic brain injury, the February 2021 CSE recommended that he receive 12-month services in an 8:1+1 special class in a district specialized school, attend adapted physical education, receive support from a group health paraprofessional, and receive related services including five 60-minute sessions of individual occupational therapy (OT), five 60-minute sessions of individual physical therapy (PT), four 60-minute sessions of individual speech-language therapy, one 60-minute session of speech-language therapy in a small group, one 60-minute session of individual counseling, and one 60-minute session of counseling in a small group (id. at pp. 1, 17-19, 23).[2] The CSE also recommended an assistive technology device (dynamic speech generating device and applications), supports for school personnel, one 60-minute session of group parent counseling and training per month, and special transportation consisting of pick-up from the closest safe curb location (id. at pp. 18-19, 22-23). In a prior written notice and a school location letter, both dated February 24, 2021, the district summarized the February 2021 CSE's recommendations and identified the particular public school site to which the district assigned the student to attend (Parent Ex. R).

A. April 2021 Due Process Complaint Notice

In a due process complaint notice dated April 23, 2021, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) because the district failed to offer a program and placement tailored to meet the student's unique needs for the "current" (2020-

[1] iBrain has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] The student's eligibility for special education as a student with a traumatic brain injury is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

21) school year (Parent Ex. A at pp. 1, 3).[3] Specifically, the parents claimed that the February 2021 IEP recommended a placement consisting of an 8:1+1 special class in a district specialized school, which did "not have an environment properly matched to [the student]'s academic, behavioral/social, physical, and management needs" (id. at p. 3). The parents also argued that "based on their prior knowledge and experience with that type of program and placement," they did not believe that the recommended placement would meet the student's intensive management needs and that the student would not receive educational benefits in an environment with peers having dissimilar needs (id.). The parents also stated that they had attempted to schedule a tour of the assigned public school site but had been unsuccessful (id.). The parents further asserted that the assigned public school site was not wheelchair accessible and that the district's own website confirmed this information (id.). The parents also found information in the district's February 2021 IEP which inaccurately reflected that the student did not have mobility needs and did not require an accessible school "troubling" (id.).

The parents next alleged that the district's February 2021 CSE utilized the iBrain school report to develop the student's IEP but "modified the language" by eliminating critical supports, services, management needs, and goals, and changing the location for services to all pull-out sessions from a combination of push-in and pull-out services (Parent Ex. A at pp. 3-4, 5). The parents asserted that the district's IEP failed to address all of the student's needs and would expose the student to regression (id. at p. 4). The parents further contended that the district failed to recommend assistive technology services and appropriate devices (id.). The parents alleged that the failure to recommend assistive technology programming services denied the student a FAPE (id.). The parents asserted that the district's proposed IEP included contradictory information regarding the student's need for assistive technology devices (id. at p. 5). The parents claimed that the district's IEP inaccurately stated that the student did not require a particular device to address his communication needs or any assistive technology devices or services (id.).

The parents further asserted that the district's CSE failed to recommend sufficient special transportation accommodations such as a 1:1 travel paraprofessional, air conditioning, a bus lift, a wheelchair ramp, and a 60-minute limited travel time provision (Parent Ex. A at p. 5). The parents also alleged that the district failed to conduct any evaluations of the student and failed to properly consider the evaluative information provided by iBrain to the district's CSE (id. at p. 6).

The parents argued that iBrain was an appropriate unilateral placement for the student and that equitable considerations favored full reimbursement and requested direct payment to iBrain of the cost of the student's attendance including 12-month services, related services, a 1:1 paraprofessional, and special transportation with appropriate accommodations (Parent Ex. A at p.

[3] The hearing record filed by the district with the Office of State Review includes a due process complaint notice, dated June 7, 2021, identified as a "corrected" version of the complaint in this matter (June 2021 Corrected Due Process Compl. Not.). The corrected version includes more specific references identifying the 2020-21 as the challenged school year and adjusted some phrasing in the complaint; however, the substance of the allegations remained consistent (compare Parent Ex. A, with June 2021 Corrected Due Process Compl. Not.). The hearing record does not clearly show that a "corrected" version of the complaint was permitted by the IHO or agreed upon by the district as an amendment (see 20 U.S.C. § 1415[c][2][E][i][II]; [f][3][B]; 34 CFR 300.508[d][3], 300.511[d]; 8 NYCRR 200.5[j][1]). To the contrary, the IHO appears to rely on Parent Exhibit A as the operative due process complaint notice setting forth allegations relevant to the 2020-21 school year (see IHO Decision at p. 3), and that is the complaint that will be cited for purposes of this decision.

6). The parents also requested a new CSE meeting and the provision of assistive technology services and devices as well as augmentative and alternative communication (AAC) to assist the student with communication (id.).

B. Events Post-Dating the April 2021 Due Process Complaint Notice

Subsequent to the parents' April 2021 due process complaint notice, the district sent the parents another prior written notice and school location letter, both dated June 1, 2021, which again summarized the recommendations of the February 2021 IEP and identified the same assigned school location as set forth in the February 2021 school location letter (Parent Ex. S; compare Parent Ex. S at p. 5, with Parent Ex. R at p. 5).

The parents sent the district a ten-day notice letter, dated June 23, 2021, notifying the district of their intent to continue the student's unilateral placement of the student at iBrain for the 2021-22 school year and seek district funding of the costs of the student's attendance (Parent Ex. T).

On June 30, 2021, the parents executed an enrollment contract with iBrain for the student's attendance during the 2021-22 school year (Parent Ex. V).

C. July 2021 Due Process Complaint Notice

In another due process complaint notice dated July 7, 2021, the parents alleged that the district failed to offer the student a FAPE for the 2021-22 school year (Parent Ex. B at p. 1). The parents alleged that the February 2021 CSE failed to develop measurable and appropriate annual goals, failed to identify all of the student's intensive management needs, failed to mandate sufficient related services including music therapy and assistive technology services with accompanying goals, failed to recommend 1:1 paraprofessional services, inappropriately denied access to assistive technology devices, failed to provide direct and individual parent counseling and training, and failed to mandate appropriate special transportation accommodations (id. at pp. 3-5). In addition, the parents asserted that the district failed to recommend a school placement that could offer appropriate peer grouping or provide extended school day services which the student would require in order to receive all of his related services (id. at pp. 5-6).

The parents sought findings that the district denied the student a FAPE for the 2021-22 school year and that iBrain was an appropriate unilateral placement for the student and, as relief, requested direct funding of the cost of the student's attendance at iBrain for the 2021-22 school year including 12-month services, related services, and a 1:1 paraprofessional and/or nurse (Parent Ex. B at p. 7). In addition, the parents requested reimbursement or prospective funding of the student's special transportation costs with limited travel time, a transportation paraprofessional, nurse or porter; provision of assistive technology devices, services and AAC; and reimbursement of the parents' costs associated with the student's assistive technology device including required service hours and accessories (id.).

D. Impartial Hearing Proceedings and Events Post-Dating the July 2021 Due Process Complaint Notice

The IHO conducted a prehearing conference on July 23, 2021 (Tr. pp. 1-8). By order dated July 23, 2021, the IHO consolidated the two impartial hearings related to the parents' April 23, 2021 and July 7, 2021 due process complaint notices (Consol. Order at pp. 3-4). A hearing date on July 30, 2021 was devoted to identifying the student's stay-put placement during the pendency of the proceedings (Tr. pp. 9-26).[4] In an interim decision on pendency dated August 15, 2021, the IHO directed the district to fund 83 percent of the student's tuition and transportation costs as pendency (Aug. 15, 2021 Interim IHO Decision at p. 7).[5] In a "modified" interim decision regarding pendency dated August 17, 2021, the IHO directed the district to fund 100 percent of the cost of the student's attendance at iBrain as pendency (Aug. 17, 2021 Interim IHO Decision at p. 2).

While the impartial hearing was pending, the CSE reconvened on August 26, 2021, to consider an assistive technology evaluation of the student and amended the student's IEP to reflect that the student would trial a new assistive technology device and to add a new annual goal related to increasing his vocabulary and comprehension using his device (see Dist. Ex. 13 at pp. 2-3, 10, 15, 28-29).[6] An additional difference between the February 2021 IEP and the amended August 2021 IEP include changes to the "accessibility" section on the student information summary form

[4] The parties and the IHO convened for a status conference on August 20, 2021 (Tr. pp. 27-37).

[5] During the July 30, 2021 pendency hearing, five documents were admitted into evidence as parent exhibits A-E (Tr. p. 10). During the substantive portion of the impartial hearing, the parents offered into evidence new exhibits, re-using the letters A through E, notwithstanding that at least parent exhibits C through E were not identical to the exhibits entered into evidence during the pendency portion of the hearing (Tr. p. 59). The pendency exhibits were not included with the certified hearing record submitted to the Office of State Review. By letter dated May 12, 2022, the undersigned directed the district to provide the parents' missing pendency exhibits, as well as the parties' briefs, other submissions related to pendency, and an amended and corrected certification of the hearing record. On May 19, 2022, the Office of State Review received the missing briefs and the parents' request for reconsideration of the IHO's first interim decision on pendency; however, the district again failed to file the parents' pendency exhibits A through E. Therefore, the hearing record remains incomplete. As the student's pendency placement is not at issue on appeal and, by the description of the exhibits, it seems that the pendency exhibits were subsequently entered into evidence during the substantive portion of the hearing (compare Aug. 15, 2021 Interim IHO Decision at p. 9, with Parent Exs. A-D; U), the district's failure in this instance does not prejudice the parents. However, the district is reminded that its failure to file the completed and certified record with the Office of State Review could result in an SRO, "at his or her discretion," striking the board of education's answer or other responsive paper, dismissing a cross-appeal, "making a finding that the board of education has violated the parent's right to due process," or referring the "board of education to the office of the State Education Department responsible for enforcing compliance with Article 89 of the Education Law" and its implementing regulations (8 NYCRR 279.9[b][1]-[4]).

[6] The IEP generated as a result of the August 26, 2021 reconvene meeting continued to bear the date February 8, 2021 (see Dist. Exs. 13 at pp. 33, 36; 14); however, within the IEP, text added to the document includes the following with reference to the date: "8/26/21: [the student] will trial his new AT device from 9/13/21-12/23/21. Team asked if there were any issues with this start date, psych said likely no and gave them name and email of contact person" (Dist. Ex. 13 at p. 10). The assistive technology evaluation purportedly relied upon by the August 2021 CSE was not included in the hearing record.

to reflect that the student needed an accessible school building, had limited mobility, and used a wheelchair and walking aids (compare Dist. Ex. 14 at p. 35, with Parent Ex. II at p. 24).

E. Impartial Hearing Officer Decision

The impartial hearing continued on February 11, 2022, on which date the parties addressed the merits of the parents' claims (Tr. pp. 38-156). The district offered documentary evidence (see Dist. Exs. 1-16) but the school psychologist who the district intended to call was not available for examination and the IHO denied the district's requests to substitute an alternative witness or to adjourn the matter (see Tr. pp. 80-83, 94, 96-98). The school psychologist who was disclosed as a potential witness was listed as the district representative at the May 2020 CSE meeting, and the proposed alternative witness, a district representative, attended the February 2021 meeting (compare Tr. pp. 80-81, with Parent Ex. II at p. 25, and Dist. Ex. 7); it is not clear why the district would not disclose all of the members of the CSE(s) in question as potential witnesses.

By final decision dated March 19, 2022, the IHO found that the district offered the student a FAPE for the 2020-21 and 2021-22 school years, found the parents' unilateral placement at iBrain for the 2020-21 and 2021-22 school years was appropriate, and identified equitable considerations that, if she had found a denial of a FAPE, would have weighed against an award of tuition reimbursement (IHO Decision at pp. 7-11). With respect to the district's offer of a FAPE, the IHO found the district's documentary evidence "comprehensive and compelling" and, further, that the parents "failed to provide factual support for their complaints about [the district's] IEP and proposed school placement" (id. at p. 9). The IHO noted that the district's IEP "substantially mirrored" the IEPs created by iBrain except for the absence of music therapy and the school location (id.). As for the former, the IHO found that the parents "did not assert or prove that the lack of Music Therapy was catastrophic" (id.). As for the latter, the IHO found that the parents' claims regarding a district public school's ability to implement the student's IEP were "vague and speculative" (id.). The IHO indicated that the parents never raised their concern about the school's accessibility or its ability to deliver the recommended related services within the school day at a CSE meeting or in their 10-day notice to the district (id. at pp. 9-10). The IHO further indicated that the parents' claims about assistive technology and transportation lacked specificity (id. at p. 10).

As for the unilateral placement, the IHO found that iBrain addressed the student's educational, management, and social needs (IHO Decision at p. 10). The IHO went on to weigh equitable considerations and indicated that, given the "high bar the Parent[s] placed on what constituted an appropriate placement and their categorical rejection of all [district specialized schools]," their actions were not reasonable (id.). The IHO denied the parents' request for district funding of the costs of the student's attendance at iBrain for the 2020-21 and 2021-22 school years (id. at p. 11).

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO erred by finding that the district offered the student a FAPE for the 2020-21 and 2021-22 school years and that equitable considerations did not warrant full reimbursement. The parents assert that the IHO misrepresented material facts in her decision by stating that the February 2021 district IEP "mirrored" the iBrain IEP, when the

iBrain IEP included a more extensive description of the student's needs, recommended all related services on a push-in/pull-out basis, and recommended music therapy, a 1:1 paraprofessional, assistive technology services, specific devices, equipment, and software, individual and group parent counseling and training, access to a school nurse, and transportation accommodations including a 1:1 travel paraprofessional. The parents allege that the IHO erred by finding that the district's documentary evidence was comprehensive and compelling when the district did not call any witnesses to authenticate its evidence. The parents argue that the IHO shifted the burden of proof to the parents and erroneously found that the parents failed to present factual support for their claims. The parents contend that they presented documentary and testimonial evidence that was unrebutted by the district. The parents further allege that the IHO erroneously failed to find that the district's failure to recommend music therapy or a 1:1 paraprofessional, along with all of its other failures, resulted in a denial of a FAPE to the student. The parents assert that the omission of the 1:1 paraprofessional cannot be characterized as a clerical error because the CSE reconvened in August 2021 and continued to fail to recommend a 1:1 paraprofessional. In addition, the parents argue that the district cannot use retrospective testimony to rehabilitate a facially deficient IEP after the fact.

Next the parents allege that the IHO erroneously disregarded the CSE's failure to recommend a travel paraprofessional or other transportation accommodations and indicated that the parents' assertions did not lack specificity. The parents argue that they provided medical forms demonstrating the student's need for special transportation accommodations including an accessible lift bus, air conditioning, limited travel time, and a 1:1 travel paraprofessional. The parents further allege that the IHO erroneously disregarded the CSE's failure to recommend both push-in and pull-out related services and disregarded the district's failure to correct the omission when the CSE reconvened. The parents argue that the IHO erred by finding that the parents' assistive technology claims lacked specificity and assert that the student required assistive technology services and devices to receive a FAPE. The parents contend that the district's August 2021 CSE reconvened to add updates to the February 2021 IEP from an assistive technology evaluation that recommended new devices and trialing of new devices but failed to recommend assistive technology as a related service on the IEP.

The parents further claim that the IHO mischaracterized the hearing record by finding that the parents' reasons for rejecting the assigned school site were speculative. The parents argue that they learned through their own research that the assigned school site was not accessible to wheelchairs and the IHO declined to take notice of the district's publicly available website. The parents also assert that the coordinator at the assigned school site told the student's mother that related services were 30 minutes long and the school was inaccessible and did not offer extended school day services. The parents further argue that the IHO erroneously discounted the mother's testimony given that the district did not cross-examine the mother or rebut her testimony about the assigned school site. The parents also allege that the assigned school could not implement 60-minute sessions of related services when the assigned school site did not offer extended school day services and the district's IEP recommended only pull-out sessions of related services. The parents contend that their claims about grouping were not speculative and that the recommended assigned school site would have grouped the student with peers with behavioral challenges.

Next, the parents argue that the IHO erred by finding that equitable considerations did not favor the parents' request for relief. Specifically, the parents allege that the IHO erred by

determining that the parents were never willing to consider a district specialized school and that the parents never raised their concerns about the inaccessibility of the assigned school site with the district. The parents further contend that the IHO erred by finding that the parents did not raise concerns about 60-minute sessions, extended school day, and push-in/pull-out services at the CSE meetings and in their ten-day notice letter. Lastly the parents allege that the IHO abused her discretion by making unsound and unsupported objections to evidence and testimony that was part of the record and unrebutted by the district and held the parents to a different standard.

The parents request reversal of the IHO's determinations that the district offered the student a FAPE for the 2020-21 and 2021-22 school years, and that equitable considerations did not weigh in favor of the parents' requested relief. The parents further request that the IHO's determination that iBrain was an appropriate unilateral placement be affirmed. With their request for review, the parents offer a proposed exhibit for consideration as additional evidence in their appeal.

In an answer and cross-appeal the district argues that the IHO correctly determined that the district offered the student a FAPE for the 2021-22 school year and that the IHO did not shift the burden of proof to the parents. The district further asserts that it properly relied on documentary evidence and was not required to call a witness to authenticate the February 2021 IEP because the parent testified about the meeting. The district contends that the parents were permitted to submit documentary and testimonial evidence consistent with due process and that their additional evidence should be disregarded.

The district next asserts that the February 2021 IEP offered the student a FAPE as written and that the recommendation for a group paraprofessional was a clerical error on the IEP. The district asserts that the CSE meeting minutes—offered as additional evidence with their cross-appeal—demonstrate the recommendation of a 1:1 paraprofessional. The district also argues that the inclusion of two goals on the IEP for the paraprofessional further demonstrates that the recommendation for a group paraprofessional was a clerical error that does not rise to the level of a denial of a FAPE. The district contends that the parents' claims related to assistive technology are without merit because the parents rejected the February 2021 IEP and unilaterally enrolled the student in iBrain. As such, the district alleges it was under no obligation to implement any aspect of the IEP and not required to provide the student with an assistive technology device.

With regard to the parents' assigned school site claims, the district alleges the claims are speculative and that the parents' claim that the school site was wheelchair inaccessible was not raised in the due process complaint notice and was raised by the parent on direct examination and in the parents' closing brief. The district next alleges that the parents did not submit the required medical forms to support a recommendation for special transportation services. The district also argues that it recommended appropriate parent counseling and training sessions.

The district cross-appeals the IHO's determinations related to the 2020-21 school year and argues that they must be annulled in accordance with the doctrine of res judicata.[7]

[7] Neither party appeals the IHO's determination that iBrain was an appropriate unilateral placement. As such, this finding has become final and binding on the parties and will not be further 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,

In a reply and answer to the district's cross-appeal, the parents reiterate their claims from the request for review, argue that the district's proposed additional evidence should not be considered, and assert that the district's cross-appeal should be denied.[8]

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.

*10 [S.D.N.Y. Mar. 21, 2013]).

[8] In their reply, the parents appear to believe that the proposed additional evidence annexed to their request for review related to the district's website and assigned school site. As discussed below, the parents' proposed additional evidence consisted of emails related to the number of pages in the parties' post-hearing briefs. The parents did not describe the content of the proposed exhibit in their request for review.

§ 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]).[9]

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-

[9] 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).

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. Burden of Proof

The parents allege that the IHO improperly shifted the burden of proof to the parents and abused her discretion by casting doubt on the testimony of the student's mother. The parents further assert that the IHO's actions prejudiced the parents and that the IHO failed in her role. The parents also contend that the IHO held the parents to a specific page limit in their post-hearing brief and permitted the district to deviate from it.[10] The parents argue that they provided factual support for the claims they made in their due process complaint notices and that the IHO disregarded their evidence.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

In her decision, the IHO correctly stated more than once that the district bore the burden of proof to show that it offered a FAPE (IHO Decision at pp. 8, 9). In her analysis of whether or not the district offered the student a FAPE, the IHO found that the parents "failed to provide factual support for their complaints" and that "the [p]arents did not keep and produce evidence

[10] State regulation provides that an IHO may receive memoranda of law from the parties not to exceed 30 pages in length (8 NYCRR 200.5[j][3][xii][g]). During the impartial hearing, the IHO limited the page-length for the post-hearing briefs further to no more than 20 pages (Tr. p. 154). The district submitted a post-hearing brief to the IHO that totaled 28 pages (Dist. Post-Hr'g Brief). The parents cite the discrepancy, not as a basis for reversal of the IHO's decision on its own, but to argue that the IHO's receipt of the noncompliant post-hearing brief demonstrated that the IHO treated the parties differently. However, at this juncture, the IHO's receipt of the district's brief in excess of the page limitations is insufficiently prejudicial, insofar that I have considered the entirety of the hearing record, along with the parties' respective positions and come to an independent judgment based on the evidence itself.

documenting their efforts" to raise their concerns with appropriate school officials or the CSE (id.). The IHO also found that the documentary evidence produced by both parties was "comprehensive and compelling" (id.). Beyond the statement crediting both parties' documentary evidence, the IHO concluded that the district's and iBrain's IEPs were similar with the exception of music therapy, after which the IHO detailed why she found the parents' evidence unpersuasive in her discussion of the district's offer of a FAPE. The IHO then determined that "[b]ased on the evidence outlined above"—which was primarily a discussion of the parents' evidence—"the [s]chool [d]istrict established that it provided FAPE" (id.).

While the IHO's discussion of the parents' evidence may have appeared at times to shift the burden to the parents when making findings of fact, the decision when read in its entirety reveals that the IHO made her decision based on an assessment of the relative strengths and weaknesses in evidence presented by both the district and the parents rather than by solely allocating the burden of persuasion to one party or the other (see generally IHO Decision). Thus, even assuming the IHO misallocated the burden of proof to the parents, the error would not require reversal in this case insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H., 685 F.3d at 225 n.3). I am likewise unpersuaded that the IHO abused her discretion in casting doubt on the testimony of the student's mother; rather, the IHO did not make specific credibility findings.

Notwithstanding the above, the parents' concerns are understandable given the IHO's word choice and focus on what the parents' evidence proved or did not prove within a discussion of the district's offer of a FAPE, where it is indisputable that the district bore the burden of proof. Rather than engaging in an analysis of the district's evidence and then indicating whether or not the parents had come forward with persuasive evidence to refute the district's case, the IHO instead began each sentence of her analysis with "the parents." This word choice and sentence structure should be avoided when discussing whether or not the district has met its burden, particularly in a case where the district has opted not to present any witnesses in support of its documentary evidence.

Upon review, I have conducted an impartial and independent review of the entire hearing record and applied the correct burden of proof, which is on the district to establish that it offered the student a FAPE (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]; see Educ. Law § 4404[1][c]). As discussed below, I do not agree with the IHO that the district established that it offered the student a FAPE.

2. Scope of the Impartial Hearing

Next it is necessary to consider the district's cross-appeal of the IHO's decision to the extent it addressed the merits of the parents' claims relating to the 2020-21 school year. In its answer and cross-appeal, the district argues that the IHO's findings related to the 2020-21 school year must be annulled on the ground of res judicata.

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills

Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6). Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]).

In a decision dated August 13, 2021, another SRO determined that the district failed to offer the student a FAPE for the 2020-21 school year, found that iBrain was an appropriate unilateral placement for the student for the entire 2020-21 school year, and that equitable considerations warranted a 50 percent reduction in tuition reimbursement (Application of a Student with a Disability, Appeal No. 21-117). When the parties reconvened for a status conference on August 20, 2021, the parents' attorney advised the IHO that a decision had been rendered in that matter and had "concern[ed] the student's [2020-21] school year" (Tr. p. 29). When the parties convened on February 11, 2022 for the first day of the substantive portion of the impartial hearing, the parents' attorney noted in her opening statement that the "case [wa]s about how the [district] ha[d] failed this [student] a free and appropriate public education [sic] for the [2020-21] and [2021-22] extended school years" (Tr. p. 46; see Tr. pp. 50, 51, 53, 54, 116). At this point in the proceedings, the district's attorney was not yet present, having joined the impartial hearing after it had already started (Tr. p. 68). Nevertheless, after joining the impartial hearing, the district's attorney did not object to the parents' inclusion of the 2020-21 school year or seek to exclude it based on the August 13, 2021 decision of the SRO. In her final decision, the IHO determined that the district offered the student a FAPE for both the 2020-21 and 2021-22 school years (IHO Decision at pp. 9, 10, 11).

The district's reliance on the doctrine of res judicata herein is misplaced. The claims in the April 23, 2021 due process complaint notice do not emerge from the same nucleus of operative fact as any claim actually asserted in the prior administrative proceeding. The April 23, 2021 due process complaint notice challenged the appropriateness of the February 8, 2021 IEP (see Parent Ex. A) and the July 6, 2020 due process complaint notice in the prior proceeding challenged the appropriateness of a May 26, 2020 IEP (see Application of a Student with a Disability, Appeal No. 21-117).

While the district has misapplied the res judicata argument in this case, it does not alter the fact that, after this proceeding was commenced, the parents subsequently obtained all of the requested relief they sought for the 2020-21 school year via the prior State-level review proceeding. In instances such as this one, where a CSE develops an IEP for a student in the middle of a school year, resulting in recommendations that bridge two school years, the more relevant focus in terms of the analysis of the district's offer of a FAPE is the challenged IEP. On the other hand, when looking at relief, parents who have elected a self-help remedy by unilaterally placing their students are often required to execute tuition contracts for attendance at private schools that focus on a single, specific school year. In such instances, the parents may be awarded tuition

funding for an entire school year notwithstanding that the challenged IEP was intended to be in place for only a portion of that year, a remedy that falls within the broad discretion to grant equitable relief that is afforded to administrative hearing officers under IDEA.[11] In the case at bar, notwithstanding the IHO's reference to the district's offer of a FAPE for the 2020-21 school year, ultimately the IHO confined her determinations to examining the February 2021 IEP and the assigned public school site for the 2021-22 school year. Although the IHO went on to consider the appropriateness of the unilateral placement, she did not specify if her analysis was applicable to either one or both of the 2020-21 and the 2021-22 school years and, as she found the district offered the student a FAPE, she did not award relief for either school year. Accordingly, there is insufficient basis to disturb the IHO's decision.

3. Additional Evidence

Both parties have submitted additional documentary evidence with their pleadings for consideration on appeal. As noted above, the parents attached one proposed exhibit with their request for review (Req. for Rev. Ex. A). The district also submitted five proposed exhibits with its answer and cross-appeal (Answer & Cr.-Appeal Exs. 1-5).

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

Initially, the parents' proposed exhibit consists of an email correspondence between the parties and the IHO which included argument related to the IHO's instructions on post-hearing brief page limits. It is arguable that this sort of documentation should have been included as part of the hearing record and, therefore, does not represent additional evidence presented for the first time on appeal (see 8 NYCRR 200.5[j][5][vi][a], [b], [c], [e]-[f] [stating the requirement that, in addition to exhibits and the transcript of the proceedings, "any response to the [due process] complaint," "all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record). In any event, the documentation is not necessary in order to render a determination.

Turning to the district's proposed additional evidence, the February 8, 2021 CSE minutes, the parents' July 6, 2020 due process complaint notice, the April 14, 2021 IHO decision, the August 13, 2021 SRO decision, and the parents' December 13, 2021 complaint in filed in the district court

[11] Similarly, an administrative hearing officer's broad discretion to formulate equitable relief may result in reimbursement for less than the contractual period if the circumstances warrant. Parties who wish to challenge IHO decisions in such matters should be prepared to make specific arguments that are rooted in in the evidentiary record developed during the impartial hearing.

are either documents already available for consideration as publicly available (i.e, the SRO decision) or could have easily been disclosed and offered at the time of the impartial hearing on February 11, 2022 and are not necessary to render a decision in this matter. As such, none of the district's proposed exhibits will be accepted as additional evidence in this proceeding.

B. FAPE - February 2021 IEP

Initially, I note that the February 2021 IEP was in place when the parents made their decision to unilaterally place the student and filed two due process complaint notices in April 2021 and July 2021; the August 2021 IEP was later developed almost two months into the 12-month school year and after proceedings in this matter had already commenced (see Dist. Ex. 13; Parent Exs. A-B; II; see also Tr. pp. 1-37). There is some authority that indicates that a later-developed IEP is operative; however, those cases tend to arise when a school district attempts to defend a later-developed IEP that includes additional recommendations in line with a course of action discussed with the parents at an earlier date (see McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP" where it "incorporate[d] recommended classes, accommodations, and goals that were presented to Parent prior to her unilateral decision to enroll" the student in a private school]; see also M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *25 n.3 [S.D.N.Y. Sept. 28, 2018] [finding the later developed IEP to be operative even though it was developed during the first weeks of school]). Moreover, the Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unliterally] place" their child before the beginning of a school year (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]). Here, with the exception of the recommended assistive technology and building accessibility notations, the February 2021 and August 2021 IEPs set forth identical recommendations, and the substantive deficiencies identified below are present in both documents. Therefore, even if the August 2021 IEP was considered operative, the outcome of the present matter would not change. As the February 2021 IEP was in place when the parents made their decision to unilaterally place the student, that is the IEP that shall be examined herein unless otherwise noted.

1. The Student's Needs

Although not in dispute, a review of the student's needs as reflected in the February 2021 IEP provides useful context with respect to determining whether the student required 1:1 paraprofessional and assistive technology services and if so, whether the omission of those services in the IEP resulted in a denial of a FAPE. The February 2021 IEP present levels of performance were generally adopted from portions of the February 2021 iBrain 2021-22 IEP (compare Parent Ex. Q with Parent Ex. II at pp. 1-11).

The February 2021 district IEP described the student as pleasant and enthusiastic, and noted that he enjoyed going to school, exemplified by his consistent attendance (Parent Ex. II at p. 2). The IEP indicated that the student used assistive technology to communicate and that he could comprehend and follow instructions independently when taught new concepts or in problem solving activities (id.). The IEP noted that the student was more focused in an isolated environment with less visual or auditory distraction and indicated that he could remain on task when told the goals, expectations, and rewards prior to beginning the activity (id.). Additionally, the February

2021 IEP reported that the student was approaching age-appropriate standards, was very conversational, and provided well thought out responses to questions as well as ask questions (id.). Additionally, the IEP described that the student needed individualized, direct instruction across all areas, he benefitted from having academic areas addressed across therapeutic and academic contexts in push-in and pull-out sessions and noted that he was "very enthusiastic and participate[d] in classroom conversation and show[ed] a great amount of empathy towards his peers and adults" (id.).

With regard to communication, the February 2021 IEP reported that the student utilized his assistive technology, facial expressions, and vocalizations to communicate (Parent Ex. II at p. 3). Specifically, the IEP described that the student was able to "spontaneously formulate[] grammatically structured sentences 5-7 words in length in order to express his wants and needs, respond to questions, advocate for himself by expressing his thoughts, and engage in conversational exchange with peers and adults" (id.). The IEP further indicated that the student had been producing utterances of increased length with less prompting about topics of interest, and that a familiar carrier phrase was used to help him produce longer and more complex utterances, and verbal and written prompts were utilized to produce varied syntax and content (id. at pp. 3-4).

The February 2021 IEP reported that the student's receptive language skills showed that he understood communication and directions "the same as same-age peers" and noted that he had made "great progress" in reading comprehension, understanding figurative language and increasing vocabulary; however, he continued to require moderate to maximum cues and support to recall information, interpret figurative language, identify key details in a text and make inferences (Parent Ex. II at p. 4). The IEP indicated that the student required less prompting and assistance to formulate cohesive and syntactically correct sentences, and minimal to moderate prompting from the clinician to compose and complete sentences during conversation (id.). Additionally, the February 2021 IEP indicated that the student may have some deficits within his working memory because he frequently forgot information soon after it was presented, which impacted his ability to carry out more complex directions; however, the IEP also noted that this may at times be due to the student's inattentiveness or lack of interest in the structured activity (id.). Finally, the IEP indicated that the student demonstrated understanding of novel terms and concepts but continued to require multiple repetitions "in order to truly retain the information presented" (id.).

With regard to expressive language, the February 2021 IEP stated that the student was "able to combine single words, spelling and phrases together to communicate about a variety of subjects as same age peers" and to expand on a thought in conversation (Parent Ex. II at p. 5). The IEP described that the student was "an effective but slower-paced communicator with familiar and unfamiliar partners," evidenced by his "ability to formulate well thought out phrases and sentences in response to questions, conversational exchange, or when expressing thoughts, wants and needs" (id.). However, the student was dependent on using eye-gaze to communicate, and benefitted from extended wait time to formulate messages via his Tobii I-12 device and from verbal cues to engage in conversation with longer utterances when conversing with an unfamiliar communication partner (id.). Furthermore, the student "use[d] gestures and two words together with meaning, along with 4-5 word sentences" and required verbal and visual assistance in connecting two or more thoughts to tell a simple story, and demonstrated the ability to seek information by asking questions, talk about his own feelings or thoughts and describe objects or actions (id.). According to the February

2021 IEP, the student had increased his sentence length to an average of 7 to 10 words for a variety of communicative purposes and it was noted that he was able to identify when he made grammatical errors with minimal to moderate verbal and/or visual prompts and was beginning to do so independently (id.). Additionally, the student continued to benefit from moderate to maximal verbal and visual cues to explain figurative language and to express thoughts using more complex vocabulary (id.).

With regard to assistive technology, the February 2021 IEP indicated that the student was "highly proficient" utilizing a Tobii Dynavox I-12 device with eye gaze and noted that he easily navigated its interface in conjunction with his needs (Parent Ex. II at p. 7). The IEP noted that the student demonstrated strength in communicating his wants and needs as well as topics of interest; however, he needed assistance continuing a conversation with more than one-to-two-word utterances when discussing topics of lower interest or that were unfamiliar (id.). Additionally, the student was knowledgeable of the set up and use of the AAC device; however, he required assistance as times to recalibrate his device if the communication system stopped working (id.). According to the IEP, the student's needs had changed over the past few years, that the then-current device was no longer able to meet his needs and had become laborious for the student (id.). The IEP noted that the parent would submit a formal request for assistive technology (id.). Further, the February 2021 IEP reported that speech-language therapy session time was also used to make environmental modifications in order to increase the student's participation and AAC device and program set up (id. at pp. 3, 4). The student was very successful navigating and activating his device using eye-gaze application; however, he required additional time to access and calibrate his device and to make appropriate selections to formulate utterances and communicate wants and needs (id. at p. 4).

The February 2021 IEP indicated that speech-language therapy sessions also included oral motor exercises and feeding trials, during which he received four to five spoonfuls of puree from the nurse to receive medication, which allowed for evaluation of his tolerance of puree consistency, his mandibular control, and to monitor for signs of aspiration or penetration (Parent Ex. II at p. 4). The IEP described that the student primarily consumed a puree consistency diet, with thin liquids via a straw; however, he did not have the motor control to independently suck liquids from a straw therefore, he required assistance from a "familiar feeder" who could squeeze his bottle to bring the liquids up through the straw for him (id. at p. 5).[12] The clinician reported that due to the student's tone and overall motor coordination, he often presented with mild anterior spillage of foods and liquid during meals, and he required redirections to attend when consuming foods as he had been noted to show overt signs and symptoms of aspiration or penetration when he became more distracted (id.).

Socially, the February 2021 IEP indicated that the student was "very sociable and charismatic" and he engaged with peers and adults and had a great relationship with his sister (Parent Ex. II at p. 8). Additionally, the IEP reflected parent report that the student was a "sensitive, funny and silly boy" who enjoyed using his gait trainer and going outside for walks and

[12] According to the IEP, a gastrostomy tube (g-tube) was placed in March 2020 "to address [the student's] needs related to nutrition and healthy weight gain" although the student "continue[d] to consume some nutrition and hydration via oral eating both at home and at school" (Parent Ex. II at p. 5).

that he was becoming more social with others (id.). Finally, the IEP reported that the student was able to engage in two-to-three conversational turns and noted that his goal was five turns (id.).

The February 2021 IEP present level of physical performance indicated that the student's neonatal hypoxic ischemic encephalopathy resulted in a brain injury and neonatal seizures, and as a result the student received the diagnoses of cerebral palsy, spastic quadriplegia and hypoxic ischemic encephalopathy (Parent Ex. II at p. 8). The IEP further explained that the student's brain injury impacted his motor and sensory functioning, information processing, language, and speech, and described him as non-ambulatory and nonverbal; however, he was able to communicate via assistive technology (id.). Additionally, the IEP indicated that the student was fully dependent in all ADL skills (id.).

With regard to gross motor development, the February 2021 IEP indicated that the student's control over his body had greatly improved and noted that he made the most progress towards using his Quikie powered wheelchair which he accessed with a 3-point head array (Parent Ex. II at pp. 8, 9). The student was able to maneuver small spaces (e.g. elevator and narrow doorways) and could drive in familiar places with close supervision, with no intervention needed; however, the IEP indicated that the student continued to have challenges when needing to stop abruptly (id. at p. 9).

Within the management needs section, the February 2021 IEP indicated that the student required: a 1:1 paraprofessional in order to benefit from participation in an educational setting; aided language stimulation (model what is being demanded with repetition); repetitive additional processing time; repetition of "verbal clues with physical clues" to increase comprehension;[13] provide additional processing time; overall support of verbal, visual and tactile cues; person transfers for all mobility; appropriate positioning in his wheelchair and all adaptive equipment to keep his head, trunk and pelvis in alignment to prevent contractures and regression of ROM; one-on-one instruction using direct instructional model; highly structured classroom or corner room with less stimuli from visual and auditory distractions; direct instruction; multisensory supports; sensory breaks during instruction; repeated directions; a quiet non-distracting environment; access to communication device; and set-up and programming of communication device (Parent Ex. II at p. 10).

2. Supplementary School Personnel: Group Paraprofessional

Turning first to the parties dispute about the recommendation for a group paraprofessional instead of a 1:1 paraprofessional in the February 2021 IEP, while not set forth among the special factors in the IDEA or federal regulation, State regulation includes as a special factor a CSE's consideration of "supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability" (8 NYCRR 200.4[d][3][vii]; see 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]). A CSE must consider a number of factors before recommending a 1:1 aide on a student's IEP, including: the student's management needs, goals for reducing the need for 1:1 support, the specific support the 1:1 aide would provide, other supports or accommodations that could meet the student's needs, the extent (e.g., portion of the day) or circumstances (e.g.,

[13] While it is unclear from the record, it is believed that this management need was intended to read: repetition of verbal cues with physical cues (Parent Ex. II at p. 10).

transitions between classes) the student needs the 1:1 aide, staffing ratios, how the support of a 1:1 may enable the student to be educated with nondisabled peers, any potential harmful effect of having a 1:1 aide, and training and support that will be provided to the aide to help the aide understand and address the student's needs (8 NYCRR 200.4[d][3][vii]). Further, a State guidance document, dated January 2012 contemplates that a "goal for all students with disabilities is to promote and maximize independence," and provides examples of student needs that may require a CSE to consider a recommendation for the services of a one-to-one aide, including: the student "presents with serious behavior problems with ongoing (daily) incidents of injurious behaviors to self and/or others or student runs away and student has a functional behavioral assessment and a behavioral intervention plan that is implemented with fidelity"; the student "cannot participate in a group without constant verbal and/or physical prompting to stay on task and follow directions"; the student "needs an adult in constant close proximity for direct instruction," "requires individualized assistance to transition to and from class more than 80 percent of the time," and "needs an adult in close proximity to supervise social interactions with peers at all times" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," Office of Special Educ. Field Advisory [Jan. 2012], at p. 1 & Attachment 2, available at http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf).

According to the director of special education at iBrain (director) who attended the February 2021 CSE meeting, the student was nonverbal and non-ambulatory and had intensive management needs which required a "significant degree of individualized attention and intervention," and she specifically noted that he required adult support for all activities of daily living due to his brain injury (Tr. pp. 102-03; Parent Exs. HH ¶ 10; II at p. 25). The director indicated in her written testimony that, during the 2020-21 school year, in addition to the 8:1+1 classroom and related services, the student also received the services of a 1:1 paraprofessional all day and access to a school nurse (Parent Ex. HH ¶ 14). The director testified that the student required a 1:1 paraprofessional during the school day because he was unable to independently navigate his environment and interact with materials, and so he could communicate independently (Tr. p. 103). She further noted that the student needed someone to set up his device and to provide support if the device needed to be reset (id.). Additionally, the director testified that the student required support for all ADL skills, to participate in academic activities and lessons, to transition in and out of his wheelchair, for repositioning, and for feeding (id.). She opined that the student required a 1:1 paraprofessional in order to participate meaningfully for the entire school day and for his continued safety (Tr. pp. 103-04).

The February 2021 IEP referenced a March 24, 2020 social history update, which reflected that at the time of the social history update, the student attended iBrain and received the services of "a fulltime 1:1 health paraprofessional" (Parent Ex. II at p. 1). The student's management needs indicated that the student needed a "one-to-one paraprofessional in order to benefit from participation in an educational setting" (id. at p. 10). According to the section on the "Effect of Student Needs on Involvement and Progress in the General Education Curriculum," the CSE recommended an 8:1+1 special class in a specialized school with related services of speech-language therapy, PT, counseling, OT, assistive technology, adaptive physical education "and a Para" (id.). The February 2021 district IEP included two annual goals for the student related to

the paraprofessional support, with accompanying short-term objectives (id. at pp. 16-17).[14] However, in the recommendations section, the IEP reflects that the recommendations for the student included a "Paraprofessional, Health, Ambulation, Feeding; Self-Care; Safety," with an applicable service delivery recommendation of "Group service," at a frequency of "Daily," at a duration of "Full time," without a location indicated and with an initiation date of March 3, 2021 (Parent Ex. II at p. 25; see "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at pp. 38, 40-41, 43-45, Office of Special Educ. Mem. [Dec. 2010], available at https://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). In addition, the district sent the parents two prior written notes dated February 24, 2021 and June 1, 2021, respectively, which again referred to the recommendation of a group health paraprofessional (Parent Exs. R at p 1; S at p. 1).

The district does not meaningfully contest that the student required a 1:1 paraprofessional but instead contends that this was the CSE's recommendation notwithstanding the reference in the IEP to a group paraprofessional. Indeed, during the impartial hearing, the district attempted to show, through cross-examination of the iBrain director, that there was an understanding that the CSE recommended a 1:1 paraprofessional for the student rather than the group paraprofessional listed in the IEP (see Tr. pp. 125-27). On cross-examination, the iBrain director testified that according to her recollection of the February 2021 CSE meeting, there was agreement with the student's need for a 1:1 paraprofessional and she expected that the recommendation would be continued (Tr. pp. 125-26). Similarly, in its post-hearing brief, the district asserted that the parents' claim that the district failed to recommend a 1:1 paraprofessional was without merit (Post-Hr'g Bf. at p. 14). The district argued that the parents did not include this claim in their ten-day notice letter, the student's mother did not include it in her testimony, and that iBrain's director testified that the February 2021 CSE was in agreement with the recommendation for a 1:1 paraprofessional (id.). In conclusion, the district argued that "[i]n spite of the recommendation reading "Group Service" for Student's paraprofessional, testimony from the parent, [iBrain director], and the IEP itself all seem[ed] to suggest that everyone's understanding of the Student's paraprofessional was that it would be an individual paraprofessional" (id. at p. 15). In its answer and cross-appeal, the district continues to assert that the recommendation for a group paraprofessional was a clerical error on the IEP.

Despite the district's position that the members of the February 2021 CSE understood the recommendation was for a 1:1 paraprofessional, the evidence does not bear that out. The district did not call a witness who attended the CSE meeting or offer the CSE meeting minutes into evidence during the impartial hearing to corroborate this position.[15] The student's mother did not testify that it was her understanding that the CSE recommended a 1:1 paraprofessional, and the

[14] While the district argues that the annual goals demonstrate the CSE's intention to recommend a 1:1 paraprofessional, there is no indication in the goals that a paraprofessional serving a group of students could not work on the particular goals with the student (see Parent Ex. II at pp. 16-17).

[15] As noted above, the district belatedly attempts to offer CSE meeting minutes as additional evidence on appeal; however, the district offers no explanation as to why the minutes were not previously offered for the IHO's consideration during the impartial hearing. During any impartial hearing in which the terms of an IEP are being challenged, it should be obvious that the minutes outlining the discussions at the CSE meeting(s) relevant to the challenged IEP should be offered as evidence by the school district.

testimony of the iBrain director does not, on its own, support the district's position in light of the plain language of the IEP, which was thereafter repeated twice in the prior written notices. Taking apparently contradictory positions on appeal, the district argues that it did not need to call a witness to defend the February 2021 IEP because the document "speaks for itself" yet also argues that the explicit recommendations in the document should be disregarded (Answer & Cr.-Appeal ¶¶ 9, 12). While there may be instance where it would exalt form over substance to invalidate an IEP based on a clerical error, for example if the service was listed in a different section than expected and/or if the conduct of the parties demonstrated an understanding of the substance of the recommendations (see S.B. v. New York City Dep't of Educ., 2017 WL 4326502, at *14 n.13 [E.D.N.Y. Sept. 28, 2017] [declining to invalidate IEP where supports for management needs were described throughout the IEP but not in the management needs section]; M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding an IEP appropriate, notwithstanding that a recommendation was omitted from the IEP because of a clerical error, where the recommendation appeared in the CSE meeting minutes and was reflected in the conduct of the parties]), here the IEP is internally inconsistent and the district failed to present sufficient evidence to support its position that the CSE members, including the parents, understood the recommendation to be for a 1:1 paraprofessional.

Despite the district's protestations to the contrary, whatever the CSE members may have discussed or believed at the conclusion of the February 8, 2021 CSE meeting was belied by the inconsistent programming recommendations written into the February 2021 IEP and the February and June 2021 prior written notices. The parents are not required to accept a written IEP with conflicting terms and incorrect prior written notices on the basis of a discussion had at a CSE meeting of which there was no evidence at the impartial hearing. The district has effectively conceded that the student's needs cannot be met by a group paraprofessional and, therefore, the inappropriate recommendation/conflicting terms contribute to a finding that the district failed to offer the student a FAPE.

3. Assistive Technology Services and Devices

The parents allege that the IHO erred in finding that their assistive technology claims lacked specificity and that the district's failure to recommend assistive technology services including customizing or adapting the student's AAC device, training the student, coordinating other therapies around the device, and training professionals who work with the student in using the device denied the student a FAPE. The parents also allege that when the CSE reconvened in August 2021 to consider the results of an assistive technology evaluation, the district failed to recommend assistive technology as a related service.

Federal and State regulations describe an assistive technology device as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability" and assistive technology service as "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device" (34 CFR 300.5, 300.6; 8 NYCRR 200.1[e]; [f]). Furthermore, State regulations consider assistive technology

services to be a related service defined as a "developmental, corrective, and other supportive services as are required to assist a student with a disability" (8 NYCRR 200.1[qq]).[16]

With respect to assistive technology services, the February 2, 2021 proposed iBrain IEP indicated that, at that time, the student received one 60-minute session per week of assistive technology services (Parent Ex. Q at p. 12). The February 2021 proposed iBrain IEP recommended that the student continue to receive assistive technology services on an as needed basis, with monthly collaboration with other disciplines, and that his need for direct services be reevaluated regularly (id. at p. 13). The February 2021 proposed iBrain IEP included a program recommendation of assistive technology services, "Individual, Consultation[,] 1 time per week [for] 60 minutes across all environments [with an implementation date of] 2/21/21" (id. at p. 46). The proposed iBrain IEP also separately recommended assistive technology devices, "Individual[,] Daily[,] Throughout the day[,] Across all environments [with an implementation date of] 2/21/21," as well as training of school personnel on the use of assistive technology (id. at pp. 46-47).

The district's February 2021 IEP contained contradictory information related to assistive technology. Although the student's use of an AAC was well documented in the student's present levels of educational performance and the CSE's recommendation included the use of a "[d]ynamic display speech generating device" with specific applications, the "Student Needs Relating to Special Factors" section of the IEP indicated that the student did not need a particular device or service to address his communication needs, did not need an assistive technology device or service, and did not require the device to be used in the student's home (compare Parent Ex. II at pp. 1, 2, 3, 4, 5, 7, 8, 10, 12, 13, 15, 18, 20, with Parent Ex. II at p. 11). The February 2021 IEP also indicated that the parents and staff of iBrain believed that the student's devices and software were outdated, laborious for the student, and took a long time to generate information (Parent Ex. II at p. 7).

[16] Examples of the term assistive technology service include:

> (1) the evaluation of the needs of a student with a disability, including a functional evaluation of the student in the student's customary environment;
>
> (2) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by students with disabilities;
>
> (3) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
>
> (4) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
>
> (5) training or technical assistance for a student with a disability or, if appropriate, that student's family; and
>
> (6) training or other technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that student

(8 NYCRR 200.1[f]).

The February 2021 district IEP incorporated the present levels of performance from the proposed iBrain IEP; however, the assisted technology services recommendations detailed above were not included (compare Parent Ex. II at p. 7, with Parent Ex. Q at pp. 12-13). The February 2021 district IEP listed "Assistive Technology Devices and/or Services" as a single recommendation (Parent Ex. II at p. 18). The student's device, software and applications were recommended as an "Individual service" to be provided daily, throughout the school day, within the school building, with an implementation date of March 1, 2021 (id.). In the section entitled "Supports for School Personnel on Behalf of the Student," the district IEP recommended "Training for assistive technology use," to be delivered as a "Group/Individual" service, on an "Annual" basis, for a "Class Period," within the "School building" (id. at pp. 18-19). The district IEP did not include a separate recommendation for assistive technology services (see id. at pp. 17-19).

The February 2021 IEP also indicated that "Parent/Advocate w[ould] submit formal request for [assistive technology] AT" (Parent Ex. II at p. 7). The CSE reconvened on August 26, 2021, to consider the results of a district assistive technology evaluation (Dist. Ex. 13 at pp. 2-3).

To the extent the August 2021 CSE reconvened consistent with a course of action agreed upon during the operative February 2021 CSE meeting (see McCallion, 2013 WL 237846, at *8), the results of the August 2021 CSE meeting will be discussed briefly below.[17] However, the notation in the February 2021 IEP putting the onus on the parents, rather than the district, to make a "formal" request for an assistive technology evaluation is problematic since the district may not delegate its responsibilities to the student under the IDEA to the parents. If the CSE agrees that the student needs to be assessed in a particular area, the district must seek parental consent and conduct that evaluation (see 8 NYCRR 200.4[b][3]). Moreover, while the August 2021 IEP modified the assistive technology device recommendations for the student, the IEP still lacked provision for assistive technology services, or an explanation regarding to why they were not necessary even though the parents had filed a due process complaint notice against the district approximately one month before, listing the lack of assistive technology services in the student's IEP among their claims (see Parent Ex. B at p. 4).

The August 2021 IEP reflected that the student's mother initiated the AAC and assistive technology evaluation in collaboration with his iBrain school team "due to concerns regarding increasing difficulties and fatigue when accessing his communication system" (Dist. Ex. 13 at p. 3).[18] According to the IEP, the "team" was looking for alternative access to eye gaze and a quicker means for the student to get his thoughts out (id.). Additionally, the CSE was looking for a means for the student to simultaneously access communication and his academic needs (id.). The evaluators recommended that the student "trial a dynamic display speech-generating device" such

[17] Ordinarily, in the absence of a resolution mutually reached in a manner consistent with Board of Educ. of Yorktown Cent. Sch. Dist. v C.S. (990 F.3d 152, 169 [2d Cir. 2021], I would not allow facts and revised IEPs that post-date the claims in the due process complaint to further muddy the waters regarding previous IEPs, but the district itself has opened the door by raising and arguing facts related to assistive technology and the August 2021 IEP in a bid to defend itself from claims that were raised by the parents (see, e.g., Dist. Post-H'rg Brief at p. 10; Answer and Cross-Appeal ¶ 13). The strategy did not help the district's case.

[18] The assistive technology evaluation which the August 2021 CSE convened to consider was not included in the hearing record.

as an "iPad Pro 12.9in with TouchChat with WordPower 140 SS vocabulary and head emulation access, and custom mounting solution" (id.). In addition, a second device, a Surface Pro with eye gaze/head emulation with word prediction, PDF annotator, and e-reader software was suggested to help the student meet his academic needs (id.). The evaluators stated that the two separate devices would "help alleviate the struggle that [the student] face[d] when needing to navigate between his communication software and his academic software" (id.). The evaluators further recommended that the student's present academic team implement the custom assistive technology and AAC systems throughout the academic day across all settings (e.g., classroom, related services, remote learning) (id.). The IEP further noted that the AAC device represented the student's voice and should be used as a means for him to access his curriculum, IEP goals, and trial plan goals during the trial period (id.). The evaluators also stated that the assistive technology devices should be considered as a required support for the student to access his academic curriculum and should be implemented accordingly during the trial period (id.). In addition, it was noted that all supporting staff should be involved with the implementation and use of the devices (id.). The IEP also recommended that the student's vocabulary should be customized to his needs and academic goals (id.). Lastly, the IEP indicated that school staff would provide continuous support to the student as needed in his environment when utilizing the devices and monitor his progress using assistive technology (id.). The academic, developmental and functional needs of the student included an entry that stated, "8/26/21: [the student] will trial his new AT device from 9/13/21-12/23/21. Team asked if there were any issues with this start date, psych said likely no and gave them name and email of contact person" (id. at p. 10). The "Student Needs Relating to Special Factors" section of the August 2021 IEP again incorrectly indicated that the student did not need a particular device or service to address his communication needs, did not need an assistive technology device or service, and did not require the device to be used in the student's home (id. at p. 14). However, the August 2021 IEP recommended assistive technology devices and software consistent with the recommendations provided by the assistive technology evaluators during the meeting (compare Dist. Ex. 13 at p. 3, with Dist. Ex. 13 at pp. 28-29).

Despite its additions to the student's IEP related to assistive technology devices, the August 2021 CSE did not add a recommendation for assistive technology services (see Dist. Ex. 13).

The iBrain director testified that the student required assistive technology services to "bridge . . . the academic content" and the skills he was acquiring (Tr. p. 104). She indicated that, because the student was "very bright" and learning "new things all the time," the assistive technology services ensured that his device would be programmed and organized to have "all of the right vocabulary words and all of the right software [and] programs" at pace with the content and skills he was working on (Tr. pp. 104-05). For example, the director noted that, as part of the assistive technology services, applications could be identified to help the student access "more complicated mathematical content and writing content" and to facilitate the student's "ability to take notes and summary" on his device (Tr. pp. 105-06).

Notwithstanding the parents' allegations challenging the CSEs' failure to recommend assistive technology services in the IEP for the student, the district presented no evidence at the impartial hearing to explain why, for a student who relied to a high degree on assistive technology devices for communication and to participate in academic instruction, assistive technology services were not recommended. Further, the district did not present evidence to explain how the student's device would be maintained had the student attended a district placement, and how the

student would benefit from using his device absent such services being listed in the proposed IEP.[19] As such, the hearing record lacks evidence demonstrating that the February 2021 and August 2021 CSEs' decisions to exclude assistive technology services was based on the specific needs of the student. Given the student's assistive technology needs identified during the February 2021 and August 2021 CSE meetings, the record is insufficiently developed to support a finding that the lack of assistive technology services in the student's proposed IEP was appropriate, which contributes to a finding that the district denied the student a FAPE for the 2021-22 school year.[20]

4. Transportation

On appeal, the parents also allege that the IHO erred by disregarding their allegation that the February 2021 IEP failed to include appropriate transportation accommodations.

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Specialized forms of transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891, 894 [1984]; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The requested transportation

[19] The district's argument in the answer with cross-appeal that it was not required to actually provide an assistive technology "device" by implementing the student's proposed public school IEP (see 8 NYCRR 200.1[e]), because the IEP was rejected by the parents may be true, but it is also beside the point when the claim was not about implementation but whether the proposed IEP was inadequate due to a lack of assistive technology "services" (see 8 NYCRR 200.1[f]). As described above, the device is defined differently from the service.

[20] The district argued in its post-hearing brief that the proposed iBrain IEP failed to explain the purpose of the assistive technology services (Post-Hr'g Bf. at p. 11). While it would have been relevant and potentially probative for the district to question the parents or the iBrain personnel about their viewpoints on that subject during the impartial hearing, it chose not to, and it is the district's burden to establish why the provision of assistive technology services was not necessary for the February 2021 and August 2021 district IEPs to offer the student a FAPE. In its answer and cross-appeal, the district does not address whether or not assistive technology services were required to offer the student a FAPE (Answer and Cross-Appeal ¶¶ 10, 13). Additionally, the district asserts that it was not required to implement the recommendation for assistive technology devices and services because the parents rejected the February 2021 and August 2021 IEPs (Answer and Cross-Appeal ¶ 13).

must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

The student's IEP that preceded the one at issue in this matter—the May 2020 IEP—included special transportation recommendations for the student including transportation to the closest safe curb location, a 1:1 transportation paraprofessional, a lift bus, air conditioning, wheelchair accessibility, and limited travel time (Dist. Ex. 6 at p. 32). With respect to the student's transportation at the unilateral placement during the 2020-21 school year, the iBrain director indicated in her written testimony that the student received special transportation accommodations of a 1:1 paraprofessional, limited travel time, air conditioning, a lift bus, and wheelchair accessibility (Parent Ex. HH ¶ 15). The director explained that the student had a tendency to become hot, therefore air conditioning was necessary and that, because there was no safe way to mount his communication device, a transportation paraprofessional was necessary in order for him to be able to communicate, as well as to monitor his health (Tr. p. 112).

The February 2021 IEP indicated that the student needed special transportation accommodations consisting of "[t]ransportation from the closest safe curb location to school" (Parent Ex. II at p. 22). However, the IEP did not specify other special transportation accommodations for the student such as the 1:1 transportation paraprofessional, limited travel time, air conditioning, a lift bus, or wheelchair accessibility (id.). The district argues that the omission of further accommodations on the student's IEP is related to the parents' failure to submit medical forms to the CSE prior to the meeting; however, the parents' evidence includes medical forms that appear to have been filled out by the parents and student's physician in January 2021 (see generally Parent Ex. P), including a request for medical transportation accommodations form that reflected the student's need for "special transportation including a lift bus/wheelchair ramp, air conditioning, wheelchair accessibility, and flexible pick-up/drop-off times/locations and a 1:1 transportation paraprofessional due to being fully dependent for adult support for all daily activities," as well as his need for limited travel time (id. at p. 21). The district does not grapple with this evidence by, for example, alleging that it did not receive it prior to the February 2021 CSE meeting or offering evidence of forms or communications that the parents disregarded; instead, the district cites the testimony of the student's mother seemingly to indicate that the parent did not testify about the medical forms (see Answer ¶ 15, citing Tr. pp. 63-79; Parent Ex. GG). In any event, the district's policies, which according to the district's argument apparently includes removing transportation accommodations from a student's IEP unless a parent meets the requirement of submitting specific medical documentation prior to arranging for services, cannot be used as an excuse for the district not meeting its obligations under the IDEA (see J.L. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 465 [S.D.N.Y. 2018]). While a school district can and should solicit medical information from parents that would be useful in ascertaining the student's individualized needs, the obligation to assess the student ultimately falls on the district.

Although the February 2021 IEP reflected that the student needed special transportation and minimally recommended curb-to-curb transportation, merely checking a catch-all box to indicate that a student is eligible for some kind of special transportation is inadequate to show that the CSE engaged in the requisite planning to address a student's individual needs. Accordingly, given the evidence in the hearing record regarding the student's transportation needs, the February 2021 CSE's failure to include adequate transportation accommodations for the student contributes to a finding that the district denied the student a FAPE.

5. Building Accessibility

Throughout this matter, the parents have alleged that the assigned public school site was not appropriate because it was not wheelchair accessible. However, upon reviewing the IEP, it appears that the student's need for building accessibility was variably addressed, making the claims really a "substantive attack[] on [the] IEP . . . couched as [a] challenge[] to the adequacy" of the assigned public school site's capacity to implement the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 245 [2d Cir 2015]). That is, although the February 2021 IEP in several places acknowledges that the student was wheelchair bound (see Parent Ex. II at pp. 1, 6, 8-10), on the summary pages of the document, under the heading "Accessibility," the document includes the answers "No" next to the questions "Does the student need an accessible school building?" and "Does the student have limited mobility?" (Parent Ex. II at p. 24). According to the parents, after receiving the school location letter in February 2021, they researched the school, learned it was not wheelchair accessible, and reached out to the district but received no response (Tr. pp. 72-74; Parent Ex. GG ¶¶ 7, 9; see Parent Ex. R at p. 5). In the June 2021 school location letter, the district assigned the student to attend the same school (compare Parent Ex. R at p. 5, with Parent Ex. S at p. 5).

The "Accessibility" section on the student's IEP represents a section that is an addition compared to the State's model student information summary and IEP forms (see "Model Forms: Student Information Summary and Individualized Education Program [IEP]," Office of Special Educ. Mem. [Jan. 2010], available at https://www.p12.nysed.gov/specialed/formsnotices/IEP/memo-Jan10.htm). More specifically, the summary pages appended to the end of the IEP form used by the district follow the format of the optional "student information summary form" (see id.). State guidance regarding the optional summary form indicates that it is "not a required component of a student's IEP," may be used in a district's discretion "to supplement the information included in a student's IEP," and may include information that districts and parents feel is important but which is not required by law or regulation to be included in a student's IEP ("Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents," pp. 1-2, Office of Special Educ. [Oct. 2010], available at https://www.p12.nysed.gov/specialed/formsnotices/IEP/training/QA-411.pdf).

While, consistent with State guidance, the district was free to add to the optional student information summary form and include information about building accessibility, under the present circumstances, it was not permissible for the district to set forth information on the summary form that conflicted with the rest of the IEP. Ultimately, the August 2021 CSE modified the references to the student's accessibility needs in the IEP, but not until after the beginning of the school year and after the parents made their decision to unilaterally place the student starting July 7, 2021 (see Dist. Ex. 13 at p. 35; Parent Ex. V at p. 1). Given the above determinations that the deficiencies in the student's IEP related to the paraprofessional support, assistive technology services, and transportation, together, denied the student a FAPE, it is unnecessary to opine on the degree to which the inaccurate references to the student's accessibility needs further contributes to this overall finding that the district failed to offer the student a FAPE. It is sufficient to warn the district to take better care when adding summary sections to the model form to then set forth accurate student information therein.

Having found that the student was denied a FAPE for the 2021-22 school year based on the district's failure to recommend a 1:1 paraprofessional and failure to recommend assistive technology services or appropriate transportation accommodations in the February 2021, it is not necessary to address the additional grounds alleged by the parents on appeal in support of their claim that the district denied the student a FAPE for the 2021-22 school year, including their claims that IEP did not include related services on both a push-in and pull-out basis, did not include music therapy, and did not include individual parent counseling and training. As neither party has appealed the IHO's determination that iBrain was an appropriate unilateral placement, I turn next to the IHO's findings concerning equitable considerations.

C. Equitable Considerations

The parents assert that the IHO erred by finding that equitable considerations did not weigh in favor of an award of full tuition reimbursement. The parents further argue that the IHO erred by determining that the parents were never willing to consider a district specialized school and that the parents never raised their specific concerns in their ten-day notice letter.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st

Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68).

Here, the IHO found that the parents' willingness to consider a public school option for the student was pretextual (see IHO Decision at p. 9). However, even if the evidence in the hearing record supported a finding that the parents had no intention of placing the student in any program the district may have recommended, it is well-settled that it would not be a basis to deny their request for tuition reimbursement (see E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]).

Further, the parents provided notice to the district of their intent to unilaterally place the student at iBrain for the 2021-22 school year (Parent Ex. T). The ten-day notice letter stated the parents' view that the district's "recommended program and placement w[ould] not appropriately address [the student's] educational needs for the 2021-2022 extended school year" (Parent Ex. T at pp. 1-2). The parents further shared their concerns about the assigned public school site's capacity to implement the IEPs during the regular school day, as well as their concerns about " the appropriateness of the recommended school, related services, and class grouping, as well as transportation" (id.). Finally, the parents indicated their disagreement with the district's failure to provide an assistive technology device to the student or to recommend "appropriate assistive technology services" (id. at p. 2). Thus, the parents adequately raised specific concerns to which the district could have responded. In addition, the district has not alleged that the parents were not cooperative in this matter or set forth an argument in its answer relating to equitable considerations. Accordingly, the evidence in the hearing record supports a full award of that costs of the student's attendance at iBrain during the 2021-22 school year, including transportation.

Finally, although the parents requested direct payment to iBrain, the parents have not demonstrated an inability to pay the cost of the student's attendance at iBrain and direct payment is an appropriate remedy only where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011]). As the parents have demonstrated an obligation to pay, but has not demonstrated a lack of financial resources, tuition reimbursement upon proof of payment for services delivered is the appropriate remedy.

VII. Conclusion

In summary, the hearing record supports the conclusions that the February 2021 CSE's failure to recommend a 1:1 paraprofessional, assistive technology services, and appropriate special transportation accommodations was not appropriate and failed to address the student's needs as presented to the CSEs. As a result, the student was denied a FAPE for the 2021-22 school year. Neither party has appealed the IHO's determination that iBrain was an appropriate unilateral

placement. Further, equitable considerations support the parents' request for tuition and transportation costs for the student's attendance at iBrain for the 2021-22 school year.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated March 19, 2022, is modified by reversing those portions which found that the district offered the student a FAPE for the 2020-21 school year and 2021-22 school years and which found that equitable considerations did not weigh in favor of an award of tuition reimbursement; and,

IT IS FURTHER ORDERED that the district shall reimburse the parents for the cost of the student's tuition at iBrain, as well as related services and transportation, for the 2021-22 school year, upon presentation of proof of payment.

Dated: **Albany, New York**
June 20, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER