The University of the State of New York

The State Education Department
State Review Officer
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No. 22-150

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by John Henry Olthoff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Anthony M. Ameche, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request to be reimbursed for his daughter's tuition costs at the International Institute for the Brain (iBrain) for the 2021-22 and 2022-23 school years. Respondent (the district) cross-appeals from the IHO's award of transportation funding. The appeal must be sustained in part. 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 received diagnoses of cerebral palsy, spastic diplegia, bilateral blindness, bilateral retinal detachment, static encephalopathy, global developmental delays, periventricular leukomalacia, failure to thrive, and sleep disturbance (Parent Ex. C at pp. 1, 4). The student is nonverbal but "is able express herself through limited American Sign Language [ASL] signs, vocalizations, and occasional use of an [augmentative and alternative communication] AAC device" (Parent Exs. E at pp. 12, 18-19, 30; F at p. 35). The student is "legally blind," she requires

assistance for ambulation including bilateral ankle foot orthosis (AFOs), and "otherwise relies upon an adapted stroller" for mobility (Parent Exs. C at pp. 4, 16; E at pp. 10-11).[1]

After arriving from outside the United States, the parent testified that the student was referred to the CSE in April 2019 and placed in a 12:1+4 special class in a district school for a brief period (Tr. pp. 42-45). The parent unilaterally placed the student at the International Academy of Hope (iHope) in remainder of spring 2019 (Parent Ex. B at pp. 1, 4). On July 8, 2020, the parent filed a due process complaint notice seeking tuition reimbursement and alleging that the district had failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (id. at p. 3).

For the 2020-21 school year the student continued to attend iHope in a 12-month 6:1+1 special class together with a 1:1 paraprofessional and related services of five 60-minute sessions per week of individual speech-language therapy; five 60-minute sessions per week of individual occupational therapy (OT); four 60-minute sessions per week of individual physical therapy (PT); four 60-minute sessions per week of individual vision education; two 60-minute sessions per week of hearing education services; and one 60-minute session per month of individual/group parent counseling and training (Parent Exs. B at pp. 6, 9, 14-16; C at pp. 1, 4). On July 7, 2021, the parent filed another due process complaint notice with the district seeking tuition reimbursement and alleging that the student was denied a FAPE for the 2021-22 school year and subsequently an IHO consolidated the two matters (Parent Ex. B at p. 3).

During the initial part of the 12-month 2021-22 school year the student attended iHope in a 6:1+1 special class as it was determined that the student "require[d] an intensive educational environment" with a "high degree of individualized attention to meet daily care needs" (Parent Ex. C at pp. 30, 31). Additionally, iHope recommended a 1:1 paraprofessional together with related services of five 60-minute sessions per week of individual speech-language therapy; five 60-minute sessions per week of individual OT; four 60-minute sessions per week of individual PT; three 60-minute sessions per week of individual vision education; two 60-minute sessions per week of hearing education services; and one 60-minute session per month of individual/group parent counseling and training (id. at pp. 20, 22-25, 27-28, 30). Further, iHope recommended three 60-minute sessions per week of orientation and mobility services to help the student understand "body concepts, spatial directions, movement in familiar areas, the impact of visual impairment, use of travel tools, level of communication, non-visual additional needs, level of supervision needed for safe travel, spatial/environmental conceptual understanding, and compliance with instruction" (id. at p. 29). The student was also recommended to have a speech generating device (id. at p. 4). Additionally, iHope recommended special transportation consisting of air conditioning, lift bus, wheelchair, and travel time of no more than 60-minutes (id. at p. 31). In an October 19, 2021 decision, an IHO determined that the district had denied the student a FAPE during the 2020-21 and 2021-22 school years and ordered the district to reimburse and/or directly fund the student's unilateral placement at iHope and provide special transportation (Parent Ex. B at pp. 15-16).

On April 5, 2022, while the student was attending iHope, the parent notified the district of his intent to place the student at iBrain for the remainder of the 2021-22 school year and seek

[1] The May 31, 2022 IEP also noted that the student used a wheelchair in school (Parent Ex. F at pp. 36, 65, 67).

funding by the district for the same (Parent Ex. D at pp. 1-2).[2] The parent stated that pursuant to the October 19, 2021 IHO decision the district had already been found to have denied the student a FAPE for the 2021-22 school year (id. at p. 1). Further, the parent stated that although the October 19, 2021 IHO decision found that the student was entitled to funding at iHope for the 2021-22 school year, due to the student's "multifaceted and complex" then-current needs he "had no choice" but to enroll the student at iBrain (id. at p. 2).

On April 25, 2022, the student began attending iBrain for the remainder of the 2021-22 school year (see Parent Exs. D at p. 1; E at p. 31). At iBrain, the student was enrolled in an 8:1+1 special class with a 1:1 paraprofessional (Parent Ex. E at pp. 1, 3, 59). Additionally, the student received five 60-minute sessions per week of individual speech-language therapy; five 60-minute sessions per week of individual OT; five 60-minute sessions per week of individual PT; three 60-minute sessions per week of individual vision education services; two 60-minute sessions per week of individual assistive technology services; four 60-minute sessions per week of individual hearing education services; two 60-minute sessions per week of individual music therapy; one 60-minute session per week of group music therapy; and one 60-minute session per month of individual parent counseling and training (id. at pp. 19, 21, 26, 28-30, 43, 46-47, 50, 52, 54, 56, 58).

On May 30, 2022, iBrain held a meeting to develop an education plan for the 2022-23 school year (see Parent Ex. E). The staff at iBrain recommended the following 12-month program and related services: 8:1+1 special class; 1:1 direct instruction for 30 minutes daily; five 60-minute sessions per week of individual OT; five 60-minute sessions per week of individual PT; three 60-minute sessions per week of vision therapy; two 60-minute sessions per week of individual music therapy; one 60-minute session per week of group music therapy; four 60-minute sessions per week of individual hearing education services; five 60-minute sessions per week of individual speech-language therapy; and one 60-minute session per month of individual/group parent counseling and training (Parent Ex. E at pp. 33, 61-63). Additionally, iBrain recommended 1:1 paraprofessional services, two 60-minute sessions per week of individual assistive technology services, an AAC device, and adaptive seating (id. at pp. 62-63).

On May 31, 2022, a CSE convened for an annual review (see Parent Ex. F). The May 2022 CSE continued to determine that the student was eligible for special education services as a student with a traumatic brain injury (TBI) (Parent Ex. F at p. 1).[3] Due to the severity of the student's "physical and cognitive impairments," the May 2022 CSE recommended a 12-month program consisting of an 8:1+1 special class in a specialized district school; five 60-minute sessions per week of individual OT; one 60-minute session per month of group parent counseling and training; five 60-minute sessions per week of individual PT; five 60-minute sessions per week of individual speech-language therapy; and three 60-minute sessions per week of vision therapy (id. at pp. 36, 59-61). The May 2022 CSE also recommended 1:1 paraprofessional services for health, safety, ambulation, and feeding (id. at p. 60). Additionally, the May 2022 CSE recommended a Braille embosser to be used throughout the school day and two 60-minute sessions per week of individual

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

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

assistive technology services (id.). Lastly, the May 2022 CSE determined that the student required special transportation from the "closest safe curb location to school," 1:1 paraprofessional services, lift bus, and walking aids (id. at pp. 64-65, 67).

On June 11, 2022, the parent entered into an enrollment contract for the student's attendance at iBrain for the 2022-23 school year (see Parent Ex. I). Further, on June 16, 2022, the parent entered into a transportation service agreement with Sisters Travel and Transportation Services, LLC for the transportation of the student to and from iBrain for the 2022-23 12-month school year (see Parent Ex. J).

In a letter dated June 17, 2022, the parent notified the district of his disagreement with the May 2022 CSE's recommended program for the 2022-23 school year, and intent to unilaterally place the student at iBrain for the 2022-23 school year (see Parent Ex. G). The letter indicated the parent was rejecting the district's proposed program and placement per the May 31, 2022 IEP because he had not received a prior written notice or a school location letter and that, accordingly, he had been unable to obtain information sufficient to evaluate the district's proposed placement (id. at p. 1). The letter further noted that the student suffered from a brain-based injury, that her educational needs were multifaceted and complex, and that the district had never recommended a program and placement that had been determined to meet her needs (id.). The letter indicated that "[n]one of the proposed [IEPs] to be implemented during the 2022-2023 extended school year [we]re designed to enable [the student] to receive educational benefits or receive appropriate related services" (id. at p. 2).[4] The parent expressed concern about the appropriateness of the recommended placement for reasons including, but not limited to, class size ratio, class functional and academic grouping, staffing, accessibility, availability of adequate resources, and the lack of individualized attention and support as the recommended placement was not the least restrictive setting (id.). Finally, the letter indicated that the parent remained willing and ready to entertain an appropriate district program and an appropriate public or approved non-public school placement that could provide the required intensive academic and related services program the student required (id.). However, at that time, the parent indicated he "ha[d] no choice other than to enroll" the student at iBrain, which according to the letter, was an appropriate placement for her (id.).

Upon receipt of the parent's 10-day notice, the district responded, in writing, stating that it determined that the parent's claim was "not appropriate for settlement" and the parent must file a due process complaint notice if he wanted to pursue a unilateral placement at public expense (Parent Ex. H).

A. Due Process Complaint Notice

In a due process complaint notice dated July 6, 2022, the parent alleged that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years (see Parent Ex. A).

The parent requested pendency based upon the "last agreed-upon placement," which the parent asserted was the October 19, 2021 IHO decision which found iHope appropriate for both the 2020-21 and 2021-22 school years (Parent Ex. A at p. 2). However, the parent requested

[4] While the ten-day notice letter referred to IEPs, the only district IEP for the 2022-23 school year in evidence in this matter is the May 31, 2022 IEP (Parent Ex. F).

pendency at iBrain and not iHope (id.). The parent contended that, because the district failed to make an offer of pendency and failed to demonstrate that iHope was available for the student, iBrain was the "operative placement" for the student for the 2022-23 school year (id.).

With respect to the 2021-22 school year, the parent disagreed with the unilateral placement of the student at iHope as the student "did not receive appropriate academic instruction" and iHope inappropriately used applied behavior analysis (ABA) instruction (Parent Ex. A at p. 3).

Next, the parent alleged that the May 2022 IEP failed to recommend hearing education services and music therapy (Parent Ex. A at p. 4). The parent disagreed with the district's recommendation for placement in a specialized district school (id.). Additionally, the parent argued that the district failed to provide a prior written notice and school location letter for the 2022-23 school year (id.). The parent also contended that because the student was blind the May 2022 CSE should have considered "deferral to the Central Based Support Team for a nonpublic school placement" (id. at p. 5). The parent alleged that the May 2022 CSE failed to adopt iBrain's recommendations for music therapy and hearing education services and failed to conduct its own evaluations to support a denial of these services (id.). Finally, the parent argued that the May 2022 CSE engaged in predetermination when it recommended a district specialized school (id.).

The parent then argued that the student was receiving an appropriate education at iBrain with "appropriate related services, that me[t] her complex and unique needs" (Parent Ex. A at p. 5). The parent additionally argued that equitable considerations weighed in favor of an award of tuition funding as he made the student available for evaluations, cooperated with the CSE, and provided timely notice of his intent to unilaterally place the student at iBrain (id. at p. 6).

As relief, the parent requested a declaratory finding that the district denied the student a FAPE for the 2021-22 and 2022-23 school years and a determination that iBrain was an appropriate placement for the 2022-23 school year (Parent Ex. A at p. 6). The parent sought an order requiring the district to directly fund the costs of the student's tuition at iBrain for the 2021-22 and 2022-23 school years including the costs for related services and 1:1 paraprofessional services (id.). The parent also requested direct "funding of special education transportation with limited time travel, paraprofessional, air conditioning, a lift bus, and a regular-sized wheelchair" (id.). The parent requested that the CSE reconvene to develop a new IEP with any changes ordered by the IHO (id.). Lastly, the parent requested an order for the district to fund an independent neuropsychological evaluation (id.).

B. Impartial Hearing Officer Decisions

A hearing on the issue of pendency was held on August 12, 2022 at which the parent and district submitted written briefs and exhibits in support of their positions (Tr. pp. 10-19; IHO Ex. III at pp. 2-3; see IHO Exs. IX-XI). Both parties agreed that the last agreed upon placement was set forth in the unappealed October 19, 2021 IHO decision that found that the parent's unilateral placement of the student at iHope was appropriate (see IHO Ex. III). However, the parent disagreed with the placement at iHope and instead requested pendency at iBrain (id. at p. 3). More specifically, the parent argued "that the exception mentioned in footnote 65 in Ventura de Paulino v. New York City Department of Education, 959 F.3d 519, 531 [2d Cir. 2020]" was applicable to this case and the IHO "ha[d] co-junctive authority with the District court to award equitable relief"

(id.).[5] On the other hand, the district argued that the parent could not "alter the last established pendency in this case," which was at iHope (id. at p. 3). The district argued that the parent unilaterally enrolled the student at iBrain "at their own financial risk" and pendency did not lay at iBrain (id. at p. 4).

In an interim decision, dated August 17, 2022, the IHO found that the October 19, 2021 IHO decision from the prior matter "was on the merits, including a determination of the appropriateness of the unilateral placement at [iHope]" (IHO Ex. III at p. 6). The IHO further held that the district had not agreed to fund the student's pendency placement at iBrain (id. at p. 7). Next, the IHO confirmed and agreed with the district's argument that the parent was not allowed to "unilaterally alter" the student's placement and argue that the new placement was pendency (id.). Accordingly, the IHO found that the "then current educational placement" was based upon the unappealed October 19, 2021 decision which was at iHope (id. at p. 8). The IHO explained that, when the district did not appeal the October 19, 2021 decision, the district "consented, by operation of law," to the student's placement at iHope and "assumed the legal responsibility to pay" for iHope during pendency (id. at p. 9). The IHO found that the parent continued to have the option to seek funding of iBrain tuition and expenses in the underlying case under a Burlington-Carter analysis (id.). Lastly, the IHO determined that the parent should have sought injunctive relief in district court to alter the student's pendency as the IHO herself did "not have authority to issue a traditional injunction like a district court to order a change in a student's stay-put placement" (id. at pp. 9-10). Based on the foregoing, the IHO denied the parent's request for pendency at iBrain (id. at p. 10).

On August 2, 2022, the parent and IHO participated in a prehearing conference, after which a substantive hearing on the merits was held on August 31, 2022 (see Tr. pp. 1-136).[6] In a decision dated October 5, 2022, the IHO determined that the district offered the student a FAPE for the 2022-23 school year and denied the parent's requests for reimbursement of tuition at iBrain for the remainder of the 2021-22 school year, tuition reimbursement at iBrain for the 2022-23 school year, and an independent neuropsychological evaluation (IHO Decision at p. 28).[7]

As for the 2021-22 school year, the IHO found that when the student was unilaterally placed at iBrain on April 25, 2022 there was "no issue on the appropriateness of the program and placement offered to the [s]tudent by the [d]istrict for the 2021-[]22 school year" as the student was attending iHope pursuant to a decision on the merits of the appropriateness of iHope (IHO Decision at pp. 18-19). In connection with the parent's determination that iHope was no longer desirable, the IHO held that the reasons proffered by the parent "would be best tested before a court against the requirement of legal standards for seeking the relief of change in placement" (id. at p. 20). The IHO further found that to alter the student's placement from April 25, 2022 through

[5] By "co-junctive" it appears that the IHO meant that her authority is "coextensive" with the district court's authority to award injunctive relief in accordance with IDEA's stay-put rule (see IHO Ex. IX at p. 8).

[6] The district failed to appear at the prehearing conference (see Tr. pp. 1-7).

[7] The IHO decision is not paginated; for the purposes of this decision, the pages will be cited consecutively with the cover sheet as page one (see IHO Decision at pp. 1-35).

June 27, 2022 would require either an agreement between the parent and district or for the parent to seek an injunction from district court (id.).

Next, the IHO discussed that, when a parent no longer believes a placement is appropriate, he may refer the student to the CSE for review (IHO Decision at p. 21). But the IHO found that the parent did not seek a CSE review in his April 2022 10-day notice but stated that he "identified" iBrain as an appropriate placement (id.).

The IHO discussed the testimony of the iBrain director of special education (iBrain director) who testified about the similarities of the May 2022 IEP with the iBrain education plan for the 2022-23 school year (IHO Decision at pp. 6-7). Based upon her testimony, the IHO found that the iBrain director admitted that the May 2022 IEP was appropriate (id. at p. 7). The IHO further referenced that the iBrain director testified that she recommended an 8:1+1 class and 60-minute related service sessions, all of which were found in the May 2022 IEP (id.). The IHO also relied on the fact that the May 2022 IEP described the student's present levels of performance and assessments and specifically the student's "needs with respect to vision, cognition, academics, language, social skills, and sensory regulation," all of which were also contained in the May 30, 2022 iBrain education plan (id. at pp. 7-8). The IHO also found that the May 2022 annual goals "ha[d] an informed, reasonable and viable basis upon which [the s]tudent could derive an educational benefit for the school year" (id. at p. 9). The IHO found that the disagreement with the recommendation for a public school setting articulated by the iBrain director was "too speculative and vague" (id.). The IHO found that the May 2022 CSE considered the parent's concerns and documented those concerns in the IEP (id. at p. 10).

The IHO found that the May 2022 CSE was "duly constituted" and the parent "meaningfully participated" in the meeting (IHO Decision at p. 22). The IHO found that the testimony of the iBrain director and parent "that no public or non-public school in [the district] c[ould] provide a FAPE to the [s]tudent unconvincing" (id.). The IHO found that the May 2022 IEP "had clear measurable goals, recommended sufficient support services and each of the requirements for developing an IEP were followed which ma[d]e[] it substantially adequate and reasonably calculated to enable the student to receive educational benefits" (id. at p. 23). As the IHO found that the district offered a FAPE for the 2022-23 school year, the IHO did not to make findings on the appropriateness of the unilateral placement or equitable considerations (id. at p. 24).

Next, the IHO discussed the parent's request for an independent educational evaluation (IEE) (IHO Decision at pp. 24-26). The IHO found that the parent did not seek an IEE prior to the filing of the due process complaint notice (id. at pp. 25-26). Further, the IHO held that the May 2022 CSE "had before it several sources of information provided by Parent, which were sufficient for the CSE to develop a summary of the student's academic achievement and functional performance, including recommendations on how to assist the student in meeting her goals consistent with the IDEA and implementing regulations" (id. at p. 25). The IHO held that, even if the district was required to conduct a triennial of the student, the failure to do so here was a procedural violation that did not rise to the level of a denial of FAPE (id.). The IHO found that the May 2022 IEP was appropriate for the student and there were no allegations that the May 2022 CSE had insufficient evaluative information (id.).

The IHO then addressed the parent's claim that the May 2022 CSE failed to recommend music therapy (IHO Decision at pp. 26-28). The IHO found that, although iBrain recommended music therapy for the 2022-23 school year, "comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE" (id. at p. 27). The IHO further found that no music therapist testified, the parent did not explain the benefit of music therapy, and although the iBrain director testified generally about music therapy she was not a music therapist (id. at pp. 27-28). The IHO held that the May 2022 CSE's failure to recommend music therapy was not a denial of FAPE as the evidence in the hearing record did "not support the conclusion that the student could not receive a FAPE without it" (id. at p. 28).

Lastly, after denying all relief requested by the parent, the IHO found that the student was entitled to special education transportation as per New York State Education Law § 4402(4)(d) (IHO Decision at p. 28).

IV. Appeal for State-Level Review

The parent appeals the IHO's findings that the district offered the student a FAPE for the 2022-23 school year; that the student was not entitled to funding of iBrain from April through June 2022; that the IHO failed to make a finding that iBrain was appropriate for the 2022-23 school year; that the IHO denied an independent neuropsychological evaluation; and that the student's pendency was at iHope and not iBrain.

The parent argues that the IHO erred in finding that the district's failure to issue a prior written notice and school location letter did not deny the student a FAPE for the 2022-23 school year. The parent argues that "[t]here can be no delay in implementing a student's IEP, and a district is required to have an IEP in effect at the beginning of each school year" and the failure to offer a school location prior to the start of the school year constitutes a denial of FAPE. Next, the parent contends that the district's failure to issue a prior written notice "deprived the [parent] of the opportunity to participate in the decision-making process regarding the provision of a FAPE for [the student], impeded [the student's] right to a FAPE, and caused a deprivation of educational benefits." Further, the parent asserts that, if the parent waited until receipt of the prior written notice and school location letter to decide on where to send the student, he would have had no place to send the student for the beginning of the 2022-23 school year.

Next, the parent argues that the IHO erred and "reached incomprehensible and unsupported conclusions" in finding that the May 2022 IEP offered the student a FAPE. The parent asserts that the iBrain director did not admit that the May 2022 IEP was appropriate but "agreed with components" of the May 2022 IEP "that conformed with [iBrain's] recommendations"; however, the parent asserts that the May 2022 IEP was missing supports for school personnel, music therapy, and recommended placement in a district specialized school. The parent argues that the district failed to demonstrate that it "was capable of implementing" the May 2022 IEP. Lastly, the parent contends that, even if he did not intend to enroll the student in a public school, that was not a basis to deny tuition.

The second argument put forth by the parent on appeal is that he is entitled to funding at iBrain from April through June 2022. The parent argues that he "provided extensive testimony" why iHope no longer met the student's needs and he had "no choice but to remove her from [iHope]

and enroll her at [iBrain]." The parent believed that the IHO "incorrectly conflated the rule regarding pendency" in finding that the parent was required to seek injunctive relief for the student's placement at iBrain.

Additionally, the parent alleges that the IHO erred in failing to make a determination about the appropriateness of iBrain or whether equitable considerations weigh in favor of an award of tuition funding. The parent also appeals the IHO's denial of the parent's request for district funding of an independent neuropsychological evaluation, arguing that the district failed to rebut the parent's contention that the district did not appropriately evaluate the student.

Lastly, the parent contends that the IHO erred in failing to find that iBrain was the student's pendency placement because the district did not offer a pendency placement and iHope "had created such a hostile and damaging environment for [the student] that it was unavailable."

In an answer and cross-appeal, the district generally denies the material allegations contained within the parent's request for review. The district argues that the parent is not entitled to funding for the student's tuition at iBrain from April through June 2022 during the 2021-22 school year as the district was only responsible for funding iHope tuition as set forth in the October 19, 2021 IHO decision from the prior matter. Additionally, the district argues that the parent is not permitted to change the student's pendency placement and pendency did not lay at iBrain. In connection with the 2022-23 school year, the district contends that it offered the student a FAPE and any procedural violations did not impact the parent's meaningful participation in the CSE process nor rise to the level of a denial of FAPE. Further, the district asserts that there is no basis for an award of an IEE because the parent did not disagree with any evaluative information or allege that additional information was needed to develop an appropriate IEP.

As for a cross-appeal, the district seeks to vacate the IHO's transportation award. The district contends that, since the IHO found that the district offered a FAPE, it should not be obligated to fund the student's private transportation expenses.

In an answer to the district's cross-appeal, the parent contends that, since the district recommended special transportation, the district was obligated to provide the special transportation. Further, the parent asserts his entitlement to funding of special transportation to and from iBrain is "a component of funding for her educational program during the 2021-2022 and 2022-2023 school years, which also includes tuition and related services."

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the

IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc],

200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[8]

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

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

VI. Discussion

A. Preliminary Matters

1. Scope of the Impartial Hearing

It is first necessary to consider what issues were properly before the IHO for adjudication. In particular, for that portion of time during the 2021-22 school year that predated the projected implementation date of the May 2022 IEP, it is necessary to examine what allegations were raised by the parent.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the

[8] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

In the due process complaint notice, the parent alleged that he became dissatisfied with his unilateral placement of the student at iHope during the 2021-22 school year because the student "did not receive appropriate academic instruction," the curriculum was beyond the student's skill level, the student's behavioral and social/emotional needs were not being met using ABA, and the parent's concerns about methodology were disregarded (Parent Ex. A at p. 3). However, for that portion of the 2021-22 school year before the projected implementation date of the May 2022 IEP, the parent did not allege that the district deprived the student of a FAPE. The district was not responsible for the placement of the student at iHope and, therefore, could not respond to allegations that iHope had become inappropriate at some point during the 2021-22 school year after it had been determined appropriate by another IHO. Further, there is no indication that, upon determining that iHope was not an appropriate placement for the student, that the parent communicated with the district regarding the alleged problems at iHOPE or requested that the CSE reconvene to recommend a new placement for the student. Had the parent done so and the district refused to convene or if the CSE convened and offered a new placement for the student with which the parent disagreed, perhaps then the parent would have a factual basis to allege new claims against the district that had not already been adjudicated in the prior matter that resulted in the order for district funding of iHope for the 2020-21 and 2021-22 school years (see Parent Ex. B). However, having failed to do so, there was no allegation in the parent's July 2022 due process complaint notice that the district engaged in any wrong doing for that portion of the 2021-22 school year. Accordingly, the parent's allegations that predate the projected implementation date of the May 2022 IEP will not be further discussed.

2. Scope of Review

It is also necessary to examine what issues are raised by the parent for review on appeal. State regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4] [emphasis added]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order

to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]).

In this matter, although the due process complaint notice included an allegation that the May 2022 IEP was inadequate based on its failure to include a recommendation for hearing education services (see Parent Ex. A at p. 4), this issue was not addressed by the IHO (see IHO Decision at pp. 21-24). On appeal, the parent does not advance any argument that the IHO failed to make such determination or argue that the district's failure to recommend hearing education services denied the student a FAPE. Within the request for review, the parent sets forth a "Statement of Pertinent Facts," within which he indicates that the May 2022 CSE did not recommend hearing education services for the student (Req. for Rev. ¶ 10); however, under the numbered issues which state the issues presented for review, the parent does not argue that the lack of hearing education services denied the student a FAPE or that the IHO erred in addressing the issue (see Req. for Rev. ¶¶ 17-44). The passing mention of hearing education services in the statement of facts is not sufficient to raise the issue for review. Accordingly, the issue of hearing education services which was raised in the due process complaint notice but not addressed by the IHO and not raised on appeal is deemed abandoned (8 NYCRR 279.8[c][4]).[9]

3. Pendency

The parent contends that the IHO should have determined that, since the district failed to offer a pendency placement and that iHope created a "hostile and damaging environment" for the student, iHope was no longer available to the student and pendency should have been found at iBrain (Req. for Rev. ¶ 43). For the reasons that follow, the arguments advanced by the parent that iBrain should be the student's pendency placement in this proceeding cannot be sustained.

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, the IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino, 959 F.3d at 531; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v.

[9] Both the May 2022 iBrain education plan and May 2022 IEP noted that the student's hearing was within normal limits and the student was able to hear (Parent Exs. E at p. 27; F at p. 15). The May 2022 iBrain education plan indicated that hearing services would be beneficial for the student to help her process information, communicate, follow directions, and learn new concepts and educational skills with the support of tactile sign language (Parent Ex. E at p. 27). The district's May 2022 IEP acknowledged that[iBrain] "us(ed) [hearing education services] as part of a total communication program to teach sign language as a method of communication," but indicated that the district recommended hearing education services "for students with hearing loss who require intervention related to the documented hearing loss" (Parent Ex. F at p. 32). Review of the May 2022 iBrain education plan and the district's May 2022 IEP shows that, to improve the student's attention and communication skills, both documents recommended the use of instructional supports such as verbal, physical, tactile and visual cues, sensory stimulation, redirection to task, a multimodal approach, and sensory breaks (compare Parent Ex. E at pp. 11-12, 23, 39-49, 51-54 with Parent Ex. F at pp. 32-33, 38-55). As such the use of total communication (which incorporates sign language among other modes of communication) was not the only method of addressing those needs. Accordingly, even had the parent alleged on appeal that the lack of hearing education services on the May 2022 IEP denied the student a FAPE, the hearing record would not support such a conclusion.

Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[10] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then-current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). If there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior

[10] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

Here, there is no dispute between the parties that the unappealed October 2021 IHO decision, which found iHope was appropriate and ordered district funding of the student's tuition at there for the 2020-21 and 2021-22 school years, formed the basis of the student's pendency placement (see Parent Ex. B; IHO Ex. III). However, the parent argues that, iHope became so inappropriate for the student, it became "functionally unavailable," and that, as a result, the district was required to identify some other pendency placement for the student. The parent argues that, as the district failed to do so, it should fund the student's placement at iBrain.

Thus the dispute between the parties, as it arises in the pendency aspects of this proceeding is: whether the district was required to locate a school to implement the pendency program after the parents had already unilaterally placed the student at iBrain. The substance of this inquiry was directly addressed by the Second Circuit; the Court found that the district had the authority "to determine how to provide the most-recently-agreed-upon educational program" (Ventura de Paulino, 959 F.3d at 534). More specifically, the Second Circuit held that if a parent disagrees with a district's decision on how to provide a student's educational program, the parent could either argue that the district's decision unilaterally modifies the student's pendency placement and invoke the stay-put provision, seek to persuade the district to agree to pay for the student's program in the parent's chosen school placement, or enroll the student in the new school and seek retroactive reimbursement from the district after the IEP dispute is resolved (id.). According to the Court, "what the parent cannot do is determine that the child's pendency placement would be better provided somewhere else, enroll the child in a new school, and then invoke the stay-put provision to force the school district to pay for the new school's services on a pendency basis" (id.).

Based on the parent's due process complaint notice the parent unilaterally placed the student at iBrain during the 2021-22 school year, then subsequent to placing the student at iBrain, filed for due process on July 6, 2022, and explicitly requested that the district fund the student's placement at iBrain during pendency as iBrain was the student's "operative placement" for the 2022-23 school year (Parent Ex. A at p. 2). Accordingly, the parent appears to have done exactly what the Second Circuit determined was not permissible, i.e., enrolled the student at iBrain and thereafter invoked the stay-put provision to force the district to pay for the student's placement at iBrain on a pendency basis.

The parent's argument on appeal, and during the pendency hearing, focuses on a footnote contained in the Second Circuit's decision in Ventura de Paulino. In that footnote, the Second Circuit noted:

> We do not consider here, much less resolve, any question presented where the school providing the child's pendency services is no longer available and the school district either refuses or fails to provide pendency services to the child. Those circumstances are not

> present here. We note, however, that at least one of our sister Circuits has acknowledged that, under certain extraordinary circumstances not presented here, a parent may seek injunctive relief to modify a student's placement pursuant to the equitable authority provided in 20 U.S.C. § 1415[i][2][B][iii]. See Wagner v. Bd. of Educ. of Montgomery Cty., 335 F.3d 297, 302–03 (4th Cir. 2003) (involving a situation in which the pendency placement was no longer available, and the school district had failed to propose an alternative, equivalent placement)

(Ventura de Paulino, 959 F.3d 519, 534).

This is not the first time that counsel for the parent have raised similar arguments at this level, and counsel for the parents have been advised on previous occasions that "[t]o the extent that the parents cite to footnote 65 in Ventura de Paulino and argue[] that 'a parent may exercise self-help and seek an injunction to modify the student's pendency placement,' the parent should have pursued that argument in District Court because an administrative hearing officer does not have authority to issue a traditional injunction like a District Court to order a change in a student's stay-put placement" (Application of a Student with a Disability, Appeal No. 20-199; Application of a Student with a Disability, Appeal No. 20-198; Application of a Student with a Disability, Appeal No. 21-006; Application of a Student with a Disability, Appeal No. 20-196; Application of a Student with a Disability, Appeal No. 20-194; Application of a Student with a Disability, Appeal No. 20-201; Application of a Student with a Disability, Appeal No. 20-184). Additionally, at this point, the parents have not pointed to any cases in District Court where they have had any success with this argument, in fact, at least one District Court decision has advised counsel for the parents that "[i]f [their clients'] issue is that no timely pendency determination has been made, then they can move to obtain such relief. However, under Ventura, they may not unilaterally alter students' enrollments and then claim pendency funding on that basis" (Araujo v. New York City Dep't of Educ., 2020 WL 5701828, at *4 [Sept. 24, 2020]).

Considering the above, without delving into the parent's arguments as to whether placement at iHope was available to the student to implement pendency, the parent cannot obtain the relief he is seeking—district funding the cost of the student's attendance at iBrain on a pendency basis. Should the parent continue to seek funding for the student's attendance at iBrain for the pendency of this proceeding, the parent may seek a preliminary injunction requesting a change in the student's educational placement, an injunction for which the parent "bears the burden of demonstrating entitlement to such relief under the standards generally governing requests for preliminary injunctive relief" (Wagner, 335 F.3d at 302).[11]

[11] Within the parent's memorandum of law in this matter, the parent argues that his request "satisfies the traditional elements of a preliminary injunction" (Parent Mem. of Law at p. 22), demonstrating an awareness that the student's stay-put placement does not automatically lay at iBrain pursuant to the pendency provisions of the IDEA. Moreover, according to public records, on or about September 2, 2022, the parent requested a preliminary injunction for pendency at iBrain from the United States District Court of the Southern District of New York (see M. v. Banks, 22-cv-07519 (S.D.N.Y. filed Sept. 2, 2022). As of the date of this decision, that matter remains pending. Accordingly, parent's counsel appears aware of the correct forum for this request.

B. FAPE

1. May 31, 2022 IEP - Music Therapy

The parent appeals the IHO's finding that the district offered the student a FAPE despite not including music therapy as a related service in the student's May 2022 IEP.

The May 2022 iBrain education plan indicated that the student was engaged in music therapy sessions and was able to "self-regulate with music, often beginning sessions dysregulated, but [wa]s able to calm down from the music" (Parent Ex. E at p. 32). Specifically, the student had musical preferences such as the "Beatles," Billy Joel, and Motown; she moved her body rhythmically to the music and clapped along with the beat; she also enjoyed strumming the guitar and engaged in musical turn-taking and conversation (id.). Additionally, the student was able to clearly express her preferences when given musical choices, often saying "da," meaning "yes" (id.). The iBrain education plan also indicated that the student responded to redirection from the music therapist and speech therapist to sustain attention to the task (i.e., book) and responded to multisensory toys, the vibrations of the guitar, and sought sensory input (hugs, rubs) (id.). She needed explanations and support for transitions, and step by step explanations to prevent aggression (id.). The student had a low frustration tolerance at times, especially when she was in her stroller for long periods of time (id.). According to the iBrain education plan, iBrain staff would continue to work on the student's frustration tolerance and self-regulation in future music therapy sessions (id.). The iBrain education plan recommended that the student receive two 60-minute sessions of individual/English/direct music therapy and one 60-minute session of music therapy in a group per week, all sessions on a push-in/pull-out basis (id. at pp. 1, 56).

According to testimony by the iBrain director, iBrain employed five to six music therapists and she reported that the music therapy delivered at iBrain had been "helpful" for the student in different ways (Tr. pp. 88, 114, 122). The iBrain director testified that while she was not a music therapist, she had "read a few articles" about music therapy (Tr. pp. 114-15). The iBrain director noted that she had spoken with iBrain's music therapist about "music therapy itself" and that "because music accesses different neural pathways for communication other than . . . typical speech, . . . it doesn't utilize the same pathways in the brain" (Tr. p. 115). She further testified that "the addition of music to activities can help information to be processed and learned differently" (id.). Additionally, the iBrain director testified that iBrain staff had been working on a goal focused on supporting the student's speech sound repetition/imitation within the context of music to help improve her receptive and expressive language skills (id.). iBrain staff had also worked on the student's regulation skills using music as another way to present sensory material and experiences to the student, and for the student to interact and participate (Tr. pp. 115-16). According to the iBrain director, giving the student "those opportunities through music [wa]s another way of presenting material for her to learn to coordinate her movements and her actions," including participating in a song and playing an instrument (Tr. p. 116).

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

services as well as "recreation, including therapeutic recreation" (20 U.S.C. § 1401[26][A] [emphasis added]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]).

Despite the parent's assertion that the student required music therapy in order to receive a FAPE, review of the district's May 2022 IEP shows that the CSE acknowledged the music therapy update from iBrain and recommendation for school-based music therapy to target the goals specified in the iBrain education plan (Parent Ex. F at p. 13). However, the May 2022 IEP indicated that the music therapy present levels and goals in the iBrain education plan were not included in the May 2022 IEP, and that the May 2022 CSE did not recommend music therapy for the 2022-23 school year (id.). Rather, according to the May 2022 IEP, the CSE discussed that "music c[ould] be used as an instructional tool to support with engagement throughout the school day" (id.). The May 2022 IEP included that the parent and iBrain staff "expressed significant concern about the lack of music therapy as a mandated service," noting that musical breaks or music presented recreationally could be provided, but the student would "not appropriately progress towards the identified goals without the service being provided by a certified music therapist" (id. at pp. 13, 68). Additionally, the IEP indicated that the iBrain music therapist expressed that non-board certified music therapists who provided music breaks or music in a recreational way would "not be able to provide the same technique or meet the goals [the iBrain music therapist had] put in place" (id. at p. 68). The IEP also noted that the student "loved music" and used music at home to self-regulate (id.). However, review of the evidence in the hearing record does not demonstrate how the lack of music therapy as a mandated service delivered by a certified music therapist would prevent the student from making adequate progress towards her annual goals. Moreover, review of the May 2022 IEP shows that the student's needs addressed at iBrain in part via music therapy, were addressed by other supports and services that the May 2022 CSE recommended.

Specifically, the May 2022 IEP acknowledged multiple times throughout the document that the student loved music, enjoyed listening to it, and was motivated by it (see Parent Ex. F at pp. 3, 4, 6-10, 12, 25). The student used the sign for music when she wanted to request listening to music, and "more" to continue listening (id. at pp. 7, 9, 32). To address the student's communication, processing, and sensory/regulation needs identified by the iBrain director as areas of need addressed in music therapy (Tr. pp. 115-16), the May 2022 CSE recommended supports for the student's management needs such as incorporation of a total communication approach, use of multisensory materials, and use of pull-out spaces and other environmental adaptations to meet the student's sensory needs (Parent Ex. F at p. 33). Some of the annual goals included multimodal and sensory based approaches that incorporated environmental, verbal, tactile, and gestural cues when completing an activity (see id. at pp. 38-39, 41-57). For example, the May 2022 IEP included an annual speech-language goal with associated short-term objectives or benchmarks to increase the student's comprehension skills for core language as demonstrated by making selections (i.e., greetings, preferred objects/activities) via multimodal means of communication (e.g., high-tech AAC, switch activation, reaching) following maximal verbal, tactile and auditory cues, and prolonged processing time (id. at p. 46). Another speech-language annual goal with associated short-term objectives or benchmarks addressed increasing her expressive language skills using multimodal means of communication (e.g., vocalizations, switch activation, and formal/informal picture symbols, gesture/sign, AAC device) in order to request, comment, answer/ask questions, initiate/terminate conversation across all contexts given the support of aided language stimulation (e.g., modeling) and moderate-maximal verbal, and tactile cues (id. at pp. 47-48). A third speech-

language goal and associated short-term objectives or benchmarks was designed to increase the student's social/pragmatic communication skills through consistent use of AAC, facial expressions/gestures, and vocalizations to participate in social activities (e.g., greet peers/teachers, comment in assessment within push-in class, take turns) across all contexts given minimal-moderate visual, verbal and tactile cues (id. at pp. 48-49). Further, the CSE recommended that the student receive five 60-minute sessions per week of individual speech-language therapy (id. at pp. 59-60).

To address the student's need to improve her participation and frustration tolerance (see Tr. p. 116; Parent Ex. E at p. 32), OT annual goals and associated short-term objectives or benchmarks included in the May 2022 IEP were designed to increase the student's participation in academic, classroom, and self-care activities throughout the school day by meeting three out of three short term objectives that incorporated multi-modal cues (Parent Ex. F at pp. 53, 55). Another OT annual goal and its associated short-term objectives or benchmarks was to increase her participation in play and leisure activities throughout the day as evidenced by meeting the three associated short-term objectives, where two of the short-term objectives incorporated multi-modal cues and the third short-term objective expected the student to demonstrate active arm movement by reaching to complete an action associated with music with minimal verbal and tactile cues in all opportunities (id. at p. 54). Other short-term objectives were designed to improve the student's emotional regulation during times of stress/crying and her use of coping strategies with no more than three signs of aversion, such as hitting, eloping, or throwing materials (id. at pp. 53-54). The Additionally, the May 2022 CSE recommended that the student receive five 60-minute sessions per week of individual OT (id. at p. 59).

Although it is undisputed that iBrain recommended that the student receive music therapy during the 2022-23 school year (Parent Ex. E at pp. 55-56, 62), as the IHO found, comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE; rather it must be determined whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint notice, and whether the IEP developed by its CSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (Rowley, 458 U.S. at 189, 206-07; R.E, 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "'the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent'"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at *8 [S.D. Cal. Feb. 14, 2013] [noting that "'[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as

long as the IEP is reasonably calculated to provide the student with educational benefits'"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at *5 [S.D. Cal. Mar. 14, 2011]).

As such, review of the district's May 2022 IEP reveals that it provided related services—albeit in a different way than those the parent preferred—and supports to address the student's needs that iBrain addressed through music therapy (see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 592-93 [S.D.N.Y. 2013] [finding that, although the evidence may have supported that music therapy was beneficial for the student, it did not support the conclusion that the student could not receive a FAPE without it]). The district was not required to replicate the exact same services that the parent preferred for the student in the private school. There was no denial of a FAPE to the student in this case merely because the district did not opt to use music therapy as a related service in the same manner as iBrain.

2. School Location Letter

The parent asserts that the district's failure to transmit a school location letter prior to the start of the 12-month 2022-23 school year deprived him of a meaningful opportunity to participate in the placement of the student resulting in a denial of FAPE.[12]

In certain factually specific cases, it has been determined that a district's failure to provide a parent with prior written notice of the program recommended and notification identifying the public school building that would implement the program prior to the start of the relevant school year rose to the level of a denial of a FAPE. As discussed below, this is the exact circumstance present in this matter.

In general, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at

[12] The parent also alleges that the district failed to provide prior written notice. Both State and federal regulations require a district to provide prior written notice any time a district proposes or refuses to "initiate or change the identification, evaluation, or educational placement of [a] child or the provision of FAPE to the child" (34 CFR 300.503[a]; 8 NYCRR 200.5[a]). In addition, a district must provide prior written notice of determinations made, the reasons for the determinations, and the parent's right to request additional assessments (8 NYCRR 200.5[a][3]; see 34 CFR 300.305[c], [d]; see also 34 CFR 300.503[b]). Prior written notice must also provide parents with a description of the actions proposed or refused by the district, an explanation of why the district proposed or refused to take the actions, a description of other options that the CSE considered and the reasons why those options were rejected, a description of other factors that were relevant to the CSE's proposal or refusal, a statement that the parent has protection under the procedural safeguards and the means by which the parent can obtain a copy of the procedural safeguards, and sources for the parent to contact to obtain assistance in understanding these safeguards (8 NYCRR 200.5[a][3]; see 34 CFR 300.503[b]; 8 NYCRR 200.1[oo]). A failure to provide a copy of the IEP, the prior written notice, or other educational records is a procedural violation that does not necessarily rise to the level of a denial of a FAPE (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). For example, evidence that the parent attended the CSE and had awareness of the programming recommended by the CSE may defeat a claim that such a procedural violation impeded a student's education (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 754-55 [2d Cir. 2018] [finding no denial of a FAPE where the parents attended every meeting "and did not allege that they were unaware of any programming selected" for the student];]; see also Cerra, 427 F.3d at 193-94; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]). Here, given the finding that the lack of a school location letter resulted in a denial of a FAPE, it is unnecessary to examine whether the same could be said of the lack of a prior written notice.

*6).[13] Although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format describing the "bricks and mortar" location to which a student is assigned and where the student's IEP will be implemented, once an IEP is developed and a parent consents to a district's provision of special education services, the IDEA is clear such services must be provided to the student by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 420; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents, 629 F.2d at 756; Tarlowe, 2008 WL 2736027, at *6). To be clear there is no requirement in the IDEA that a student's IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Moreover, parents generally do not have a procedural right in the specific locational placement of their child (see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x. 1, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191-92 [finding that a district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection], aff'd 553 Fed. App'x 2 [Jan. 8, 2014]).

On the other hand, there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 132 F. Supp. 3d 522, 538-45 [S.D.N.Y 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 23 F. Supp. 3d 210, 227-29 [S.D.N.Y. 2014] [holding that "parents have a procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

Thus, although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016] [noting that "a parent must necessarily receive some form of notice of the school

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

placement by the start of the school year"]; Tarlowe, 2008 WL 2736027, at *6 [finding that a district's delay does not violate the IDEA so long as a public school site is found before the beginning of the school year]). This is particularly so in a district so immense in size as the district in the present case, which has so many public school building locations within its boundaries. While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation—for example, by a school location letter which is the mechanism adopted by the district in this case—it nonetheless follows that it must be shared with the parent before the student's IEP may be implemented.

Here, the district did not offer evidence during the impartial hearing to demonstrate that it provided the parent with notice of the school to which it assigned the student to attend prior to the 2022-23 school year. However, the IHO found that a "school location letter would be futile to achieving a public school placement" for the student because, at the May 2022 CSE meeting, the parent rejected any district public school placement (IHO Decision at pp. 22-23). The evidence in the hearing record does not support the IHO's conclusion in this regard. According to the IEP, during the May 2022 CSE meeting, the parent expressed his understanding that an 8:1+1 special class in a district specialized school "[wa]s for autistic students," whereas the student "needed to be in a classroom with other students with a Traumatic Brain Injury" (Parent Ex. F at p. 67). Notwithstanding his reservations, the parent also expressed that he was "more than happy to view a placement to see if it c[ould] meet [the student's] needs" (id.). In his June 17, 2022 10-day notice letter to the district, the parent indicated he had not yet received a school location letter and, therefore, had been unable to sufficiently evaluated a proposed placement (Parent Ex. G at p. 1). The parent reiterated that he was "willing and ready to entertain an appropriate [district] program and an appropriate public or approved non-public school placement" (id. at p. 2). There is no indication in the hearing record that, even after being so notified, the district provided the parent with school assignment information for the student.

Based on the above, there is insufficient evidence in the hearing record to show that the district met its obligation to notify the parent in some form regarding where or how the student could access his IEP services. This constitutes a procedural error, which under the circumstances presented resulted in the parent being provided with too little information as to how or where the recommended special education program would have been implemented and, therefore, resulted in a denial of FAPE (see F.B., 132 F. Supp. 3d at 538-45; V.S., 25 F. Supp. 3d at 299-301; C.U., 23 F. Supp. 3d at 227-29).[14]

As a result of such finding, I will now turn to whether the parent met his burden to demonstrate the appropriateness of iBrain for the 2022-23 school year.

[14] The district relies on Application of a Student with a Disability, Appeal No. 21-136, for the proposition that a district's failure to provide notice of a school location does not necessarily rise to the level of a denial of a FAPE; however, that decision is factually distinguishable from the present matter (see Answer ¶¶ 18, 20). Specifically, in Application of a Student with a Disability, Appeal No. 21-136, the district delayed in notifying the parents of the assigned school which was the same school assigned to the student in the previous school year. The parents had the opportunity to visit the assigned school but elected not to do so. Therefore, under the circumstances of Application of a Student with a Disability, Appeal No. 21-136, the district's delay in notifying the parents of the assigned school did not result in a denial of FAPE. In this matter, however, the student was not attending a public school and the district failed to offer any notice of the assigned school prior to the 2022-23 school year.

C. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. Student Needs

In this instance, although the student's needs are not directly in dispute, a discussion thereof provides context for the discussion of the remaining issue; namely whether the student's unilateral placement at iBrain met her educational needs thus establishing it as an appropriate placement. For the reasons set forth below, the evidence in the hearing record sufficiently supports a finding that the iBrain education plan reflected instruction and services specially designed to meet the student's unique needs and, therefore, was an appropriate unilateral placement for the student for the 2022-23 school year.

The iBrain director described the student as having "very complex needs but many strong capabilities as a student" (Tr. pp. 92, 114). She indicated that, due to the student's cerebral palsy diagnosis, bilateral blindness, brain-based conditions, and global delays, "all of the essential functions for cognition and executive functions" were impaired (Tr. p. 93). The iBrain director testified that decision making, problem solving, making inferences, understanding/comprehension, and expressive language were affected by the conditions the student faced (id.). Additionally, the iBrain director reported that the student was "physically excited," energetic, very active, and that it was important to incorporate her need for physical activity into her day (id.). Given the student's need for physical activity, her "mix of really significant" cognitive and language delays, and "absence of any functional vision," the student required a "highly specific environment for learning" (id.). According to the iBrain director, the student also required a lot of repetition, tactile supports, very direct instruction for how to complete tasks, tactile modeling, and cueing because visual supports would not be helpful to her (Tr. p. 94). In addition, the iBrain director noted it was important to consider that the student was sweet, generally outgoing, and tended to get along with providers (id.). Further, it was important to provide the student with a lot of consistency with how people responded to her for purposes of rapport, trust, and security, and individual support and attention (id.).

Review of the May 2022 iBrain education plan revealed detailed information about the student's severe impairments in cognition, academics, language/communication, feeding and activities of daily living, social development, physical development, vision, and management needs (see Parent Ex. E at pp. 1-39). The iBrain education plan included evaluative information from which the student's team identified the student's present levels of performance and developed an individualized health plan, which indicated that the student required a 1:1 paraprofessional to ensure her safe participation in the educational and therapeutic activities throughout the school day (id. at pp. 1-39, 59). As the student lacked safety awareness, she needed close monitoring for travel throughout the school building, to monitor her potential seizure activity, to maintain attention and engagement in activities, and to assist with all activities of daily living (id. at p. 59). Multiple annual goals and short-term objectives or benchmarks were aligned to the student's needs while taking into consideration her preferences (i.e., music) and need for accommodations, and supplementary aids and services (i.e., AAC, assistive technology software and devices) during a 12-month school year (id. at pp. 39-59, 62-63). In connection with related services, the iBrain education plan indicated the student needed PT, OT, speech-language therapy, vision services, hearing education services, and music therapy (id. at p. 62).[15] The education plan also included

[15] Although it was determined above that the student did not require music therapy to receive a FAPE, the evidence in the hearing record demonstrates that music therapy, along with the student's other related services, was

rationales for the recommended services and/or changes to frequency and duration of recommended services (see id. at pp. 43, 46, 47, 51, 52, 54-59).

According to the May 2022 iBrain education plan, "[d]ue to the degree of [the student's] physical and cognitive impairments, she require[d] intensive interventions, specifically designed instruction, modifications and adaptations to have access to the general curriculum in a way that [wa]s relevant and appropriate for her" (Parent Ex. E at p. 33). Additionally, the iBrain education plan indicated that the student was "not able to participate in a general education classroom due to the severity of her impairments, which ma[de] such an environment physically dangerous to her, socially overwhelming and academically inappropriate due to lack of individualized support and instruction" (id.). Further, the iBrain education plan stated that the student's physical and cognitive impairments "necessitate[d] a small, quiet environment, individual academics at her level, and the need for similar peers," also noting that she was able to participate in trips to the community given appropriate support from iBrain and its staff (id. at p. 59).

2. Specially-Designed Instruction

The iBrain director testified that iBrain was a specialized educational program that focused on serving students who were nonverbal, non-ambulatory "for the most part," and who had brain injuries or brain-based disorders (Tr. p. 90). The student population ranged between the ages of 5 and 21 years (id.). According to the iBrain director, iBrain provided "extensive related services," including PT, OT, speech-language therapy, vision education services, services for the deaf and hard of hearing, assistive technology services, and music therapy (id.). iBrain had an extended school day that enabled it to "get a lot of services in the day" (id.). The director reported that at iBrain classes consisted of either six or eight students, all students had a 1:1 paraprofessional, and about 40 percent of the students at iBrain had 1:1 nursing services as well (id.).[16] The iBrain director described iBrain as "a very intensive program with quite a lot of individualized support for students" (id.).

The May 30, 2022 iBrain education plan included recommendations that the student receive a 12-month program in an 8:1+1 special class with 1:1 paraprofessional and school nurse services (Parent Ex. E at pp. 61-62). The iBrain education plan stated that the basis for the 8:1+1 recommendation was to meet the student's "need for advanced social interaction, appropriate models for language development and social/behavioral skills, and AAC use" (id. at p. 60). The special class was also recommended to support the student's "significant management needs" so she could participate in the classroom while meeting her sensory needs (id.). Furthermore, the iBrain education plan stated that as the student had made previously made progress in that setting "there [wa]s no need to consider a more restrictive placement" and "[l]ess restrictive options [were] rejected at that time" (id.).

The iBrain director testified that students received daily, individualized support from the teacher using a direct instruction model, which focused on individualized academic programing

beneficial to the student with respect to frustration tolerance, self-regulation, and receptive and expressive language skills (Tr. pp. 115-16; Parent Ex. E at p. 32).

[16] The student did not have a 1:1 nurse (Tr. p. 103).

that scaffolded steps one by one (Tr. pp. 90-91). The iBrain director noted that direct instruction was very sequential, and staff did not move on to the next step until the student mastered the previous step (Tr. p. 91). The director reported that there were correction procedures and errorless learning techniques used which supported iBrain students who had significant executive functioning delays, by presenting information and pairing it closely with new information (Tr. pp. 91-92). She indicated that the classroom teacher worked 1:1 with a student using these techniques every day for at least 30 minutes, and that this work was in addition to the time a student might be in push-in sessions with therapists and the time they might be participating in small group activities with their class (Tr. p. 92).

With regard to related services, iBrain staff recommended that the student receive five 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, five 60-minute sessions per week of individual speech-language therapy, two 60-minute sessions per week of individual music therapy, one 60-minute session per week of music therapy in a group, and four 60-minute sessions per week of individual hearing education services, all on a push in/pull out basis depending on the activity (id. at p. 62). In addition, the iBrain plan included one 60-minute session per month of individual/group parent counseling and training in various environments depending on need, and two 60-minute individual, indirect assistive technology service sessions per week across all environments (id.). With respect to assistive technology, the iBrain plan listed recommendations for a "[h]igh tech" speech generating device and Proloquo2Go software to be used throughout the day in all environments (id. at p. 63). The recommended supports for school personnel on behalf of the student in school included feeding training, AAC training as needed, safe ambulation, and training "regarding trust-based supports for social learning" (id.).

Additional testimony by the iBrain director indicated that related service sessions were 60 minutes long because the student required a significant amount of time preparing for activities including navigating to the session, working on her environmental awareness, helping her navigate the school environment safely, providing sensory input to help her remain regulated, setting up positioning equipment, and providing increased processing time and repetition (Tr. pp. 107-10). The director reported that the student's team, which included related service providers, worked closely together by having multiple meetings to discuss the student's needs and how to best support her (Tr. p. 99). Review of the iBrain education plan shows that it provided the student's related services on a push in/pull out basis, and the director testified that related service providers co-taught and provided push-in sessions throughout the student's day (Tr. pp. 99-100; Parent Ex. E at p. 62). The iBrain director testified that the push-in and pull-out models were "critical" because they enabled the teacher to see, learn, carry over, and integrate into the classroom activities techniques that therapists used to support a student (Tr. p. 104). Push-in sessions also helped providers know about and support what was going on in the classroom, and in the student's case, the push-in sessions provided her with more practice on a particular skill (Tr. pp. 104-05).

With regard to evidence of progress in the unilateral placement, there is some general statements of progress that did not specify a time frame, or it related to the 2021-22 school year rather than the 2022-23 school year under consideration. A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B.

v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v Ne. Sch. Dist., 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). The evidence regarding progress does not weigh heavily as a factor in this case.

During the impartial hearing, the district did not make any particular arguments regarding the appropriateness of iBrain for the student.[17] Similarly, in its answer to the parent's request for review, beyond a general denial of the parent's statement that iBrain was appropriate, the district does not make any argument about its inappropriateness (see Req. for Rev. ¶ 38; Answer ¶ 1). Accordingly, considering the "totality of the circumstances," the evidence in the hearing record supports a finding that the student's placement at iBrain reasonably served the student's individual needs, providing educational instruction specially designed to meet the unique needs of the student (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

D. Equitable Considerations

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

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the

[17] Although the IHO offered both parties the opportunity to submit a post-hearing brief (see Tr. pp. 133-34), the district did not submit a brief.

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, 315 F.3d at 27; see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

In the present matter, the district has not raised any equitable considerations that would warrant a reduction or denial of the parent's requested tuition reimbursement. Moreover, the evidence in the hearing record shows that the parent attended the May 2022 CSE meeting, participated during the meeting, shared information from iBrain with the CSE, and provided the district with timely notice of his intent to unilaterally place the student at iBrain (see Parent Exs. F-G). Accordingly, I find that equitable considerations weigh in favor of the parent's requested relief.

E. Parent's Financial Obligation and Ability to Pay

The parent has requested that the district fund the student's attendance at iBrain by directly paying iBrain, rather than by reimbursing the parent for the out-of-pocket costs of the student's tuition.

It is well settled that parents who reject a school district's IEP and choose to unilaterally place their child at a private school without consent or referral by the local educational agency do so at their own financial risk (Burlington, 471 U.S. at 373-74; Carter, 510 U.S. at 14; Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020], cert. denied, 141 S. Ct. 1075 [2021], reh'g denied, 141 S. Ct. 1530 [2021]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 356-58 [S.D.N.Y. 2009] [finding the parent in that matter had no financial standing to sue for direct retrospective payment to private placement where terms of enrollment contract absolved her of responsibility for paying tuition]). In such instances, retroactive reimbursement to parents by a school district is an available remedy under the IDEA (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). Alternatively, with regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014] [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). It has been held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to

pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]).

With respect to the parent's financial obligation, the hearing record includes an enrollment contract signed by the student's father on June 11, 2022 for the student's attendance at iBrain for the 2022-23 school year (Parent Ex. I). The contract with iBrain set out a base tuition that included the cost of academic programming, a school nurse, and an individual paraprofessional for the student (id. at pp. 1-2). The contract further indicated that related services were not a part of the base tuition and would be billed monthly at a specified rate (id. at p. 1). The contract also indicated that assistive technology devices were not included in the base tuition (id.). The contract provided that the parent would be responsible for the tuition and supplemental costs for the student's attendance at iBrain (see id. at pp. 2-3). Further, the hearing record includes a transportation service agreement with Sisters Travel and Transportation Services, LLC for the transportation of the student to and from iBrain for the 2022-23 12-month school year that the parent executed on June 16, 2022 (see Parent Ex. J). Here, the iBrain contract is sufficient to demonstrate that the parent incurred a financial obligation to pay the costs of the unilateral placement inclusive of related services and transportation.

With regard to the parent's ability to pay, since the parent selected iBrain as the unilateral placement and his financial status is at issue, it was the parent's burden of production and persuasion with respect to whether he had the financial resources to "front" the costs of the services (Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041). As discussed above, the parent has established a financial obligation for the costs of the student's tuition at iBrain; however, the parent has not demonstrated an inability to pay. For example, there is no evidence in the hearing record regarding the parent's financial resources, such as a copy of a recent tax return or evidence regarding the parent's assets, liabilities, income, or expenses. Given the lack of information in the hearing record regarding the parent's financial resources, tuition reimbursement, as well as reimbursement for the costs of transportation, shall be awarded for the student's attendance at iBrain during the 2022-23 school year upon proof of payment for services delivered.[18]

F. Independent Educational Evaluation

The parent contends that the IHO erred in failing to award district funding of an independent neuropsychological evaluation.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a

[18] As the parent has prevailed in his request for tuition reimbursement, including the costs of transportation, it is unnecessary to address the district's cross-appeal of the IHO's order, which found the student was "entitled to special transportation between home and school pursuant to New York Education Law § 4402(4)(d)" (see IHO Decision at p. 28).

disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).[19]

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

It is also generally within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merrion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]).

Here, in the parent's July 2022 due process complaint notice, in connection with alleging that the district failed to offer a FAPE for the 2022-23 school year, the parent asserted that the district failed to evaluate the student in all areas of suspected disability and more specifically "failed to conduct appropriate testing of [the student's] cognitive abilities in light of her complex diagnoses, such as a neuropsychological evaluation" (Parent Ex. A at p. 5). The parent seems to suggest that an independent neuropsychological evaluation would lead to the conclusion that the student must be provided with music therapy and hearing education services (id.). The parent

[19] Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

requested as part of the final relief an order directing district funding of an independent neuropsychological evaluation (id. at p. 6).

The IHO took issue with the parent's inclusion of the request for an IEE in the due process complaint notice in the first instance (see IHO Decision at pp. 25-26). The IHOs concerns are legitimate. While in past decisions SROs have held that a parent may request a district funded IEE in a due process complaint notice in the first instance (see Application of a Student with a Disability, Appeal No. 19-094), this is not the process contemplated by the IDEA and its implementing regulations (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). As the Second Circuit observed, at no point does a parent need to file a due process complaint to obtain an IEE at public expense (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 168-69 [2d Cir. 2020]).[20] My own study of the judicial guidance and administrative guidance on the topic has not yet let me to a decision on whether to outright bar the approach of allowing the parent to initially disagree with a district evaluation and request an IEE in a due process complaint notice (without attempting to raise such disagreement with the district first), but I am convinced in this case that the parent delayed the IEE request in favor of including it in the due process complaint or including the request for an IEE in the due process complaint notice as an afterthought. This is an improper use of the due process procedures.

In particular, the parent faults the district in its request for review for failing to initiate an impartial hearing to defend its evaluations, but district cannot be faulted for that because there is no evidence that parent requested an IEE or articulated any disagreement with a district evaluation prior to seeking the IEE in the due process complaint notice, and he did not identify which district evaluation he disagreed with, and did not further articulate the statement of disagreement during the impartial hearing. The parent's failure to follow the process outlined in the IDEA and its implementing regulations for seeking an IEE in this case convinces me that the IHO did not err in denying the request. The parent's failure to follow the process is further compounded by the manner in which the allegations about the evaluations were framed in the due process complaint notice, i.e., as a procedural violation underlying a denial of a FAPE, instead of as a separate articulation of disagreement with a district evaluation underlying a request for an IEE (Parent Ex. E at pp. 5, 6).The IHO considered the parent's allegation that the district did not conduct sufficient evaluations of the student but found that the May 2022 CSE had several sources of information, which were sufficient for the CSE to develop the student's IEP (IHO Decision at p. 25). Given the manner in which the purported insufficiency of the district evaluations issue was raised by the parent (in the due process complaint notice as an allegation arising the context of the May 2022 CSE's review of the student's programming), as well as the fact he seeks an IEE via a due process complaint notice while blaming the district for not initiating due process, I decline to disturb the IHO's denial of an IEE at public expense in this instance.

While the parent's request for an independent neuropsychological evaluation at district expenses is denied, if the parent still desires that the student undergo a neuropsychological evaluation, he should request that the district conduct such evaluation. Upon receipt of such

[20] The court in Trumbull speculated that a "hypothetical scenario in which a parent might need to file a due process complaint for a hearing to seek an IEE at public expense is if the school unnecessarily withheld a requested IEE or failed to file its own due process complaint to defend its challenged evaluation as appropriate (Trumbull, 975 F.3d at 169).

request, the district must consider whether it would be appropriate to conduct the evaluations to assess the student's special education needs and, after due consideration, provide the parent with prior written notice describing, if applicable, its reasons for concluding that additional evaluative data of the student was unnecessary (8 NYCRR 200.5[a]; see 34 CFR 300.503, 300.305[d]). If the parent is dissatisfied with the district's response or evaluation, the parent may then submit a request to the district that it fund an IEE in the manner contemplated by the IDEA, as discussed above.

VII. Conclusion

Having found that the district failed to offer the student a FAPE for the 2022-23 school year, that the parent met his burden to prove that iBrain was an appropriate unilateral placement for the student, and that no equitable considerations warrant a denial or reduction of relief, the parent is entitled to tuition reimbursement for the cost of iBrain and transportation expenses for the 2022-23 school year. However, the parent's request for relief in the form of district funding for the costs of the student's attendance at iBrain during the 2021-22 school year and for an IEE are denied for the reasons set forth above.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO decision, dated October 4, 2022, is modified reversing that portion of the decision that found the district offered the student a FAPE for the 2022-23 school year; and

IT IS FURTHER ORDERED that, upon proof of payment shown, the district shall be required to reimburse the parent for the costs of the student's attendance at iBrain for the 2022-23 school year, including tuition and costs for related services, 1:1 paraprofessional, transportation, and fees.

Dated: **Albany, New York**
January 9, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER