The University of the State of New York

The State Education Department
State Review Officer
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No. 19-058

**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:**
The Brain Injury Rights Group, Ltd, attorneys for petitioners, by Karl Ashanti, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the International Institute for the Brain (iBrain) for the 2018-19 school year. The appeal must be sustained in part.

### II. Overview—Administrative Procedures

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

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

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

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

**III. Facts and Procedural History**

The student has received diagnoses of intractable seizures, quadriplegic infantile cerebral palsy, global developmental delays, oral-pharyngeal phase dysphagia, microcephaly, legal blindness, and cortical visual impairment (see Parent Exs. BB; CC; DD; FF; Dist. Exs. 7 at pp. 1, 3; 27 at p. 3). According to her physician, the student's medical condition has resulted in severe impairments in cognition, language, memory, attention, reasoning, abstract thinking, judgement, problem solving, sensory, perceptual and motor abilities as well as psychosocial behavior, physical functions, information processing, and speech (Parent Ex. CC at p. 13). The student's IEPs

describe her as both nonverbal and non-ambulatory, and she presents with vision deficits and significant delays in all areas of development (Dist. Exs. 3 at pp. 1-2; 4 at pp. 1-2; 7 at p. 4; 27 at p. 3). Specifically, she uses a wheelchair as her primary means of mobility, relies on adults for all activities of daily living, and uses facial expressions, vocalizations, and a single or two panel augmentative and alternative communication (AAC) device to communicate (Parent Ex. B at pp. 2, 9, 10; Dist. Exs. 3 at p. 1; 4 at p. 1; 7 at p. 3; see Tr. p. 418). The student has received special education since at least the 2014-15 school year (see Dist. Exs. 1; 2; 3; 4). She began attending the International Academy of Hope, or iHope in summer 2015, where she continued during the 2015-16, 2016-17, and 2017-18 school years (see Tr. p. 544; Parent Exs. B at pp. 1, 5; C; N; Y; Dist. Exs. 14; 15).[1]

On January 25, 2018, as part of the student's annual reevaluation process, a district social worker conducted a classroom observation of the student at iHope during an occupational therapy (OT) session (Tr. pp. 407-08; Dist. Ex. 30 at pp. 1-2). On January 29, 2018, the student's doctor completed a request for medical transportation accommodations for the student (Parent Ex. CC at p. 13). On February 28, 2018, the parent signed consent for the district to complete additional assessments of the student (Dist. Ex. 9).

As will be discussed in detail below, during spring 2018 the parents and district corresponded—but did not come to an agreement about—the date and time of the student's annual review CSE meeting in preparation for the 2018-19 school year (see e.g., Parent Exs. U; V at p. 1; Dist. Exs. 20; 21; 28 at p. 1; 29; 32 at pp. 1-4). The CSE convened without the parents in attendance on June 5, 2018 to develop the student's IEP for the 2018-19 school year and determined that the student was eligible for special education as a student with multiple disabilities (Dist. Ex. 27 at pp. 1, 9, 12, 15). The CSE recommended a 12-month 12:1+(3:1) special class placement and that the student receive related services including three 30-minute sessions per week of individual OT, physical therapy (PT), and speech-language therapy and two 30-minute sessions per week of individual vision education as well as the assistance of a full time 1:1 health paraprofessional and a 1:1 transportation paraprofessional (id. at pp. 9-10).[2] The June 2018 IEP also included strategies to address the student's management needs, annual goals with corresponding short-term objectives targeting her needs, and a recommendation for special education transportation (id. at pp. 4, 6-9, 12).

In a prior written notice dated June 21, 2018, the district notified the parents of the programming the June 2018 CSE recommended for the student for the 2018-19 school year and attached a school location letter indicating the location of the school where the student would receive her services (Dist. Exs. 6 at p. 1; 31 at pp. 1, 3; see Dist. Ex. 32 at p. 1).

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

[2] It appears that the 12:1+(3+1) setting means that up to 4 aides or paraprofessionals would be assigned to the class, but that groups of three students would share a particular aide. Its not clear from the hearing record whether, if a class only had 9 students enrolled rather than 12, whether there would be only three aides in the class as a practical matter.

In a letter sent via email dated June 21, 2018, the parents, through their attorneys,[3] provided 10-day notice to the district of the parents' intent to unilaterally place the student at iBrain for the 2018-19 school year and seek public funding for the placement, stating that the district had not yet offered the student an appropriate placement to address her needs for the 2018-19 school year (Parent Ex. H at p. 1).[4] The letter indicated that the district had not properly responded to the parents' request for a "Full Committee Meeting" with a district school physician at a mutually agreeable date and time to allow all mandated members of the IEP team to participate (id.). The letter further indicated that the parents remained willing and ready to entertain an appropriate district program and an appropriate public or approved nonpublic school placement (id.). The student began attending iBrain on July 9, 2018 (Tr. p. 544).[5]

**A. Due Process Complaint Notice**

In a due process complaint notice dated July 9, 2018 the parents sought an impartial hearing and alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (Parent Ex. A at pp. 1-2). The parents contended, in particular, that the June 2018 IEP "was not the product of any individualized assessment of all [of the student's] needs and will not confer any meaningful educational benefit for [the] 2018-2019 [school year]" (id. at p. 2). The parents also alleged that the resulting IEP "[did] not accurately state [the student's] IDEA disability classification as student with Traumatic Brain Injury" (id.). The parents asserted that the June 2018 IEP inadequately described the student's present levels of performance and management needs and contained immeasurable goals (id.). According to the parents, the student's June 2018 IEP was inappropriate because the district failed to conduct the CSE meeting with a "Full Committee" in accordance with the parent's April 20, 2018 meeting request and failed to conduct the CSE meeting at a mutually agreeable time with the required members including the parents (id.). The parents asserted that the district's reduction in the related services mandates and special class with a 12:1+(3:1) student-to-staff ratio recommended in the June IEP would cause substantial regression and that the ratio of the district's programming and placement was too large because the student required "constant" 1:1 support and 1:1 direct instruction to remain safe and make progress (id. at pp. 2-3). The parents asserted that the district failed to offer the student programming in the least restrictive environment, the district's programming was inappropriate because it did not address the student's highly intensive management needs, and that the IEP lacked "extended school day" services (id. at p. 3). As relief, the parents sought direct funding of iBrain for the cost of the student's tuition for the 2018-2019 extended school year, transportation costs

[3] William Frazier, who filed a 10-day notice and due process complaint notice on behalf of the parents in this proceeding, is typically identified in the hearing record as the "Chief of Staff" for the Brain Injury Rights Group, LTD., but he is apparently an attorney as well (see Tr. p. 145; IHO Ex. III).

[4] 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).

[5] According to the director of special education at iBrain, the school opened for the first time on July 9, 2018 (Tr. p. 544).

including a 1: 1 "travel aide," and to reconvene the CSE to conduct an annual review meeting for the student (id.).[6]

**B. Impartial Hearing Officer Decision**

An impartial hearing convened on August 9, 2018 and concluded on March 28, 2019 after eight hearing dates (Tr. pp. 1-744). The IHO issued an interim decision dated September 10, 2018 determining the student's pendency placement (IHO Ex. VII). In a final decision dated June 5, 2019, the IHO found that the district sought information regarding the student such as teacher or progress reports from the parents and the student's private school at the time, iHope, and that iHope did not provide any information to assist in drafting an IEP (IHO Decision at p. 17).[7] The IHO concluded that the "IEP team clearly indicated an understanding of the [s]tudent, based upon available information, and set forth [the s]tudent's areas of special education need and various diagnosis" (IHO Decision at p. 18). The IHO briefly discussed testimony offered by an iBrain witness with regard to classifying the student with a traumatic brain injury, noting that "[s]he requires extensive processing time, waiting time, to respond. She requires modified materials, so using like 3D materials as much as possible, tactile materials, materials specialized for her vision needs," but the IHO determined that there was no service identified that could not be delivered by the district (IHO Decision at p. 24). The IHO determined that the student met the criteria for classification as a student with multiple disabilities and that even if the student met the criteria for classification as a student with a traumatic brain injury, as the parents contended, it did not result in a denial of a FAPE to the student because the IEP was designed to address the student's needs, and was not developed based solely on, or otherwise restricted by, a disability classification (IHO Decision at p. 18).[8]

According to the IHO, the June 2018 IEP "included lengthy management needs to address [the s]tudent's areas of need" (IHO Decision at p. 19).[9] Although the IHO concluded that the student used a basic switch for "some communication, which the IEP did not include, he also found that the district's witness reasonably explained that such a low level assistive technology device was "programmatic" (IHO Decision at p. 19). With regard to annual goals, the IHO ruled that the goals in the IEP were developed to address the student's needs, and that the lack of information with regard to paraprofessional goals and nursing services did not deny the student a FAPE (IHO Decision at pp. 19, 21). The IHO recounted evidence regarding the student's related services, health and transportation paraprofessionals, 12-month extended school year services, special transportation services, and testimony to justify the 12:1+(3+1) special class placement and stated that the evidence was credible that the IEP would provide educational benefit to the student (IHO

[6] The parent also sought an interim decision directing the district to pay for iBrain as the student's pendency placement (Parent Ex. A at pp. 1-2). The student's pendency placement was the subject of a prior State-level review determination in Application of a Student with a Disability, Appeal No. 18-122.

[7] The IHO decision is not paginated, and all page references in this decision include the coversheet (as page 1) (IHO Decision).

[8] The IHO also concluded that the student could also have been found eligible under the categories of a student with a visual impairment, orthopedic impairment, or other health-impairment (IHO Decision at p. 18).

[9] It appears that the IHO was referring to the student's use of a single panel BIGmack switch (see, e.g., Tr. p. 251).

Decision at pp. 19-21). The IHO found that the iBrain programing for the student was deficient, noting that although the student attended for 8.5 hours per day, the student was allowed to rest or sleep for up to three hours per day and that there was insufficient evidence to support the need for an extended school day (IHO Decision at p. 23). The IHO described other documentary and testimonial evidence, including the testimony of a school psychologist, an occupational therapist, and the school principal and found the evidence credible and determined that the proposed school location was capable of implementing the IEP (IHO Decision at pp. 19-21).

With respect to procedural errors alleged by the parents, even if there was a delay in drafting the IEP, the IHO found that it did not result in harm to the student as the IEP was completed prior to the 2018-19 school year, and at least some of the delay was attributable to the parents (IHO Decision at p. 21). With respect to the insufficient evaluation claim by the parents, the IHO concluded that even if accurate, the parents did not act correctly by failing to provide information from the student's teachers at iHope (IHO Decision at p. 21). The IHO also rejected the parents' claim that a CSE meeting was not conducted at an agreeable time because the parents failed to set forth "any reasonable evidenced basis for the setting and changing of parameters for an acceptably scheduled meeting," or in other words, "[b]y continuously altering the parameters of the requested IEP meeting the [p]arent[s] kept challenging the [district] to meet new hurdles in setting a meeting" (IHO Decision at pp. 21, 23).[10] The IHO, although noting that the parents ultimately did not attend the meeting, weighed evidence regarding the process for scheduling and conducting the CSE meeting and found that the district sent meeting notices in the parents' native language, made multiple outreach attempts in scheduling the CSE meeting, telephoned the private school, and telephoned and left voicemail for the parents (IHO Decision at pp. 21-22). The IHO found that the parents requested the physician's attendance one day before the June 5, 2018 CSE meeting and that during her testimony the parent appeared unsure of why she requested that a doctor be present, indicating that it was more for the purpose of a medical consultation than for participation in an IEP meeting (IHO Decision at pp. 22-23).[11] The IHO also concluded that the parents' lack of attendance at the CSE meeting "did not result in a denial of [a] FAPE or any missed opportunity to review or consider any evaluative information" (IHO Decision at p. 23).

The IHO also touched on the direct funding aspect of the parents' request for the services that they privately obtained for the student, noting that the parents signed a contract with iBrain but that they seemed unaware of who would be responsible to pay for the student's private schooling if not the district (IHO Decision at p. 24).[12] The IHO concluded that there was

[10] The IHO stopped short of accepting the district's argument that the parents were intentionally trying to frustrate the conduct of the CSE meeting and IEP development process.

[11] The IHO also compared the district CSE's process to the processes used to develop the iHope and iBrain IEPs, noting that no physician participated in the development of the iHope IEP and the parents did not appear to have collaborated with iBrain staff in developing the student's iBrain IEP (IHO Decision at pp. 22-23).

[12] The IHO also noted that an affidavit was submitted by the parents regarding their responsibility for the student's transportation, but that a contract that was referenced regarding the student's transportation services was not offered into evidence (IHO Decision at p. 24). The IHO also noted that according to witness testimony "Sisters Transportation, via Senior Care vehicles" provided transportation for the student, but that there was no need for private transportation, determining that the district had previously provided the student with transportation while she attended iHope, that the district did not refuse to provide the student with transportation, and that the parents

insufficient evidence to support that the parents had a legal obligation to pay for the student's attendance at iBrain for the 2018-19 school year (id.). Finally, the IHO ruled that the district offered the student a FAPE and dismissed the parents' due process complaint notice (IHO Decision at p. 25).

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

The parents appeal. In sections "III" and "IV" of their request for review, the parents state facts and make written arguments expressing their disagreement with actions of the district; however, the only two allegations of error on the part of the IHO is that the "IHO failed to even address many of the allegations of procedural violations the [parents] raised" and that the IHO committed reversible error in failing to find that the reduction of all of the student's related services sessions from 60 minutes to 30 minutes in duration was a denial of a FAPE to the student.

In section "4" of their appeal, the parents allege that the IHO committed reversable error by admitting documents and a witness proffered by the district over the parents' objection in derogation of the five business-day rule for prehearing disclosure rather than precluding the district's witness and documentary evidence. The parents argue that the IHO also erroneously restricted the cross-examination of the district's witnesses, and argue that a possible reason for some of the limitations may have been because, during the impartial hearing, the IHO disclosed that an occupational therapist who was called to testify by the district previously provided treatment to the IHO's child at his house. The parent also alleged that the IHO committed reversable error because his decision in this matter was not issued in a timely manner.

In section "5" of the request for review, the parents allege that the IHO improperly relied on testimony from the school psychologist, occupational therapist, and an assistant principal called by the district as witnesses. The parents point to weaknesses in their testimony and contend that they were unreliable and questionably credible as witnesses.

As relief the parents request "full tuition at iBRAIN as well as cost for special transportation,…. In addition, the [p]arents respectfully request the hearing officer to nullify the [June 5] 2018 [district] IEP and remand this matter to the [CSE] to develop an appropriate IEP for [the student] for the 2018-2019 school year consistent with the iBRAIN IEP currently being implemented for [the student]. In addition, the [p]arents request the [student's classification] be changed back to Traumatic Brain Injury."

In its answer, the district generally responds to the parents' allegations with admissions, denials, or various combinations of the same and argues in favor of the IHO's determinations that the district offered the student a FAPE, iBrain was not an appropriate unilateral placement, and equitable considerations do not weigh in favor of the parents' requested relief.

The district also asserts that the SRO should reject the request for review because the pleading does not comport with regulatory requirements. Specifically, the district asserts that the

could seek transportation from the district at no cost (IHO Decision at p. 25).

request for review, which is limited by regulation to no more than 10 double-spaced pages, is not double-spaced, circumventing the 10-page limit.

The parents submit a reply, in which they address in relevant part, the district's claim that their request for review should be dismissed due to compliance failures. The parents assert that the error in font size was an "administrative ministerial error" that does not affect the substance of the claims, and furthermore, there is no prejudice to either party due to the error.

**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]).[13]

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

[13] 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).

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

As an initial matter, in its answer, the district asserts that the request for review should be dismissed for failure to comply with the regulatory pleading requirements. Specifically, the district asserts that the request for review was not double-spaced, and as a result, the parents circumvented the 10-page limit set forth in regulation. State regulations provide that the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). Generally, section 279.8 of the State regulations describes both the form and content requirements for pleadings and memoranda of law submitted to the Office of State Review in connection with the administrative review process (see generally 8 NYCRR 279.8). With respect to form requirements, section 279.8 requires, in part, that pleadings and memoranda of law must be typewritten with "text double-spaced" (8 NYCRR 279.8[a][2]). Another subparagraph of the same regulation requires that a request for review "shall not exceed 10 pages in length" (8 NYCRR 279.8[b]) Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents and the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13).

The district is correct. The request for review clearly fails to comply with the practice regulations as it circumvents the 10-page limit—it is already 10 pages and throughout it is less than double spaced as required. More troubling to me is that the pleading is difficult to follow in terms of identifying the actual challenges to the IHO's decision. The request for review does not use a single convention to enumerate the challenges to the IHO's decision and instead appears to touch on topics with a mixture of ordinal and Roman numerals. For example, the request for review's enumerated sections start with Roman numerals I-IV, then continues on with ordinal numbers 3-5 which does not adequately satisfy the requirement that "each issue [be] numbered and set forth separately … identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]). The conclusion also seeks relief from the "hearing officer" rather than a State Review Officer, and overall it appears that the request for review was hurriedly drawn by lifting portions of earlier briefing before the IHO. The primary purpose of a request for review is to engage and challenge specific aspects of an IHO's written decision that is, to "clearly identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the State Review Officer to the petitioner" (8 NYCRR 279.4[a]). A function of the request for review is to allow a party the opportunity to identify for the SRO, by citation, the relevant, convincing portion(s) of the hearing record upon which the party believes the IHO should have relied upon when deciding a particular issue (8 NYCRR 279.8[3]), albeit a State Review Officer examines the entire hearing record (34 CFR 300.514[b][2]).

The request for review does not comply with the practice regulations; however, as a matter within my discretion, I will not dismiss the request for review after weighing several considerations. First, I have considered the IHO's final decision, itself, for irregularities that could have led to any inability to comply with the practice regulations (see generally Application of a Student with a Disability, Appeal No. 19-009 [remanding matter to the IHO due to poorly drafted IHO decision precluding petitioner's ability to formulate a request for review that complied with practice regulations]). In this case, the IHO's decision did not prevent the parents from properly complying with the practice regulation. As further described below, the IHO made many findings that were adverse to the parents' case. Second, in weighing whether to dismiss the parents' appeal in this case for the failure to comply with the practice regulations described above, I have considered the counsel for the parents' history of compliance. An examination of decisions issued by State Review Officers yields no serious admonitions with respect to the pleading requirements of Part 279 (Application of a Student with a Disability, Appeal No. 18-113; Application of a Student with a Disability, Appeal No.18-116; Application of a Student with a Disability, Appeal No.18-122; Application of a Student with a Disability, Appeal No.18-132; Application of a Student with a Disability, Appeal No.18-133; Application of a Student with a Disability, Appeal No.18-134; Application of a Student with a Disability, Appeal No.18-139; Application of a Student with a Disability, Appeal No.18-147 Application of a Student with a Disability, Appeal No. 19-006). However, the parents' attorney is specifically cautioned that, "while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements" (Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Consequently, at this juncture, because neither the parents nor their attorney have engaged in a pattern of noncompliance, the lack of compliance in the instant appeal will not result in a dismissal of the parents' appeal in its entirety.

However, with the parents' pleading in its current state, I also cannot delve into every possible nook and cranny of the IHO's decision that was merely subject to appeal. There were numerous specific adverse findings by the IHO that went unchallenged by the parent. To the extent they were not challenged in the request for review, they have been abandoned by the parents and will not be further addressed by the undersigned (8 NYCRR 279.8[c][4]).[14] Significant portions of the request for review focus on the actions of the CSE or the district; however, they do not allege error on the part of the IHO. I will not sua sponte impute challenges to the IHO's decision that the parents have not clearly alleged, nor will I research or construct the appealing parties' arguments or guess what the parents may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. Am. Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009];

[14] In their reply the parents accuse the district of abandoning several issues, however the allegation is without merit—it is the parent, not the district, that is seeking to overturn the IHO's decision while leaving some of the IHO's adverse findings untouched.

L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Hawaii Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Adver., Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]).

The IHO, citing to the hearing record, reached many of the procedural issues raised in the parents' due process complaint notice. For example, in finding that the CSE did not procedurally deny the student a FAPE, the IHO found, among other things, the school psychologist's testimony "to be credible and supportive of the [district's] offer of FAPE", including testimony that the "IEP team was assembled, and meeting held on 06/05/2018 (T 306, Ex 27); Student documentation was reviewed (T 311-312, Ex 14 & 30); classification of multiple disabilities was considered and supported (T 317-318)." (IHO Decision at p. 17). The IHO noted that iHope did not provide documentation to assist in drafting the IEP, and that specific opportunities were available for the submission of further information, which the district sought out (id.). The IHO found that "the IEP team clearly indicated an understanding of the [s]tudent, based upon available information, and set forth [the s]tudent's areas of special education need and various diagnosis" (id. at p. 18). Further, the IHO, citing to the record, discussed substantive claims. For example, the IHO noted the IEP also included lengthy management needs to address the student's areas of need, including lighting and noise accommodations, directions, and frequent sensory stimulation "incorporating auditory, visual and gross motor input during academic sessions to maintain focus and arousal" (id. at p. 18). The IHO rejected the parents' assistive technology argument and claim that the district's classification of the student as a student with multiple disabilities denied the student a FAPE (id. at pp. 18-19). The IHO also found that the annual goals addressed the student's needs (id. at pp. 18-19).

Consequently, I will address those portions of the request for review in which the parents allege that the IHO erred by allowing the introduction of the district's witness and documentary list in violation of the "5-day rule"; placing unreasonable restrictions on the cross-examination of district witnesses; failing to recuse himself due to familiarity with one of the district's witnesses; failing to issue the final decision timely manner; improperly rejecting the parents' assertion that the student required 60-minute related services sessions and finding that the recommended 30-minute sessions were appropriate for the student in order to offer a FAPE; and placing undue weight on the testimony of district witnesses by finding their testimony credible.

With respect to the parents' claim that "the IHO failed to even address many of the allegations of procedural violations" that the parents raised, the parents fail to clearly specify the unaddressed procedural errors to which they refer, and the IHO did in fact render findings on many of the procedural aspects of the case. Out of an abundance of caution, I will address what appear to be the most egregious procedural allegations in the remainder of that paragraph of the parents' request for review; however, counsel for the parents is warned that such overbroad generalizations will not suffice in the future and will be subject to dismissal as abandoned. Accordingly, in this instance, I will also address allegations that the CSE held the June 2018 CSE meeting without the parents and their requested participants, conducted the meeting when it was not mutually agreeable to the parents; and failed to provide a list with the names of the expected participants prior to the CSE meeting.

Also, prior to turning to the disputed issues, I note that the parents attach two documents under one attachment cover, as a supplemental exhibit (see Supplemental Ex. GG). The documents

are, in order as presented, the parents' post-hearing brief, and a copy of an IHO decision which concerns a different student at iBrain (id.). The parents' post-hearing brief was made a part of the administrative record as IHO Exhibit XVIII and is therefore unnecessarily duplicative. The IHO decision is a courtesy copy of a March 19, 2019 unpublished, nonbinding decision in favor of another parent by a different hearing officer regarding another student. While the same witness testified in both proceedings, this is not evidence with respect to the student or the CSE meeting in this proceeding, but, as a matter within my discretion, I will consider the hearing officer's decision to the extent that the parents argue that similar facts should lead to similar results.

### B. Conduct of the Impartial Hearing

#### 1. Discovery and Admission of Evidence

The parents make two assertions with respect to the development of the hearing record by the IHO in this case. First is that the IHO improperly allowed witness testimony and documents in violation of the five-business day disclosure rule and second is that the IHO erroneously limited the cross-examination of district witnesses by the parents' counsel. I will address each in turn.

##### a. The Five-Day Exclusionary Rule

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). However, federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). Further, State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" or issue a subpoena if necessary (8 NYCRR 200.5[j][3][xii][c]; see 8 NYCRR 200.5[j][3][iv]).

However, courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

In this case, the hearing record shows that the first five hearing dates, from August 9, 2018 through November 8, 2018, consisted of administrative and prehearing matters, including the production of documentary evidence on November 8th (Tr. pp. 1-201). During the November 2, 2018 hearing date, the parents objected to the district's introduction of any documents due to noncompliance with the five-business day requirements (Tr. p. 133). However, the hearing record

also reveals that the IHO did not consider the admission of documentary evidence until several days later on November 8, 2018 (see generally, Tr. pp. 140-144), and the first witness did not testify until several weeks thereafter on December 3, 2018 (Tr. pp. 202-470).

During the impartial hearing on December 3, 2018, the IHO allowed a district occupational therapist to provide direct testimony who was not on the previously disclosed witness list, despite the objection from parents' counsel (Tr. p. 212). The district's attorney noted the occupational therapist's line of testimony was to focus on the issue of 30-minute versus 60-minute related service sessions as outlined in the due process complaint notice (Tr. p. 206). The parents objected to allowing the witness to testify and requested that, to the extent the witness was going to testify, that they be given the opportunity to cross-examine the witness at a later date (Tr. p. 213). The IHO, in allowing the witness to testify noted that if there were anything "so remarkable that you would need more time to prepare for it because we have the documents" … and "unless she comes up with something very unique that we think we need more time for, then I'm -- we'll see what her testimony is" (Tr. pp. 214-15). The IHO also stated that the parents could call a rebuttal witness instead, if they thought the testimony was "not proper," they had other "OT testimony that is not OT-valid," or they thought that the IHO "shouldn't lean upon [the testimony] for some reason" (Tr. p. 215). Upon completion of the parents' recross-examination of the witness, the IHO stated that if the parents required the witness' return for further questioning, she would be brought back, if the purpose for her returning was not already before the IHO (Tr. pp. 300-01). The parents did not seek to recall the witness.

Hearing officers are charged with making a determination of whether the student received a FAPE based on substantive grounds (20 U.S.C. § 1415[f][3][E][i]; 8 NYCRR 200.5[j][4][i]), and, if necessary, they must take steps to ensure that an adequate hearing record has been completed upon which to base a decision (see 8 NYCRR 200.5 [j][3][vii]). In this case, the IHO took appropriate measures to alleviate any undue surprise to the parents. Other than the technical defect, the parents have failed to articulate sufficient prejudice as a result of the IHO's discretionary determination to allow the district's documents into the hearing record as evidence or allow the district's witness to testify (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]; see Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016], aff'd, 700 F. App'x 25 [2d Cir. 2017] ["Like all procedural rules and deadlines, those set in this sort of administrative proceeding were set to ensure a fair and expedited process, not a summary 'gotcha' game. No prejudice from the failure to notice Assistant Principal Dinneny's testimony five days before the hearing (as opposed to the four days' notice given before her testimony) was articulated"]). The parents' arguments to the contrary are without merit.

**b. Witness Cross-Examination**

Turning next to the parents' assertion that the IHO prejudiced their rights by limiting the parents' cross-examination of district witnesses, interrupting their cross-examination, and otherwise preventing the parents' attorney from questioning witnesses, a review of the hearing record does not support this claim. The IDEA provides parents involved in a complaint with the "opportunity for an impartial due process hearing" (20 U.S.C. § 1415[f]). Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing

(Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice]). State regulation provides that an IHO "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][d]).

In this case, the parents point to two instances in which they allege that the IHO improperly limited cross-examination. In the first example, they assert that the IHO interrupted and directed parents' counsel to abandon a line of questioning in which the parents' attorney was questioning about the number of in-person meetings the district's attorney had with witnesses to prepare for the impartial hearing. The IHO indicated that the answers did not matter (Tr. pp. 265, 267). The IHO was correct and permissibly limited testimony that was of little, if any, relevance to the disputed issues in the case.

The parents' second example involved their attorney's attempted cross-examination concerning same witness' opinion on direct testimony that she would likely use a Hoyer lift instead of conducting a two-person transfer with the student (Tr. pp. 283-87). The parents are correct to the extent that the district's attorney first raised the topic when he briefly questioned the witness about whether there was a device that could be used with the student during transfers that in the witness' opinion could take up to 15 minutes (Tr. pp. 232-33). However, when the issue arose again the IHO ended the line of questioning, reasoning that it was not relevant because the IEP proposed by the CSE did not provide any recommendation as to the method of transfer or identify the need for equipment, and the IHO did not wish to go down an unnecessary path (Tr. pp. 284-86). The IHO did not preclude the district from the brief questioning on its direct examination of the witness, and perhaps, in hindsight he might have. However, it was not an abuse of discretion for the IHO to end the line of inquiry due to questionable relevance, much less reversable error.[15] The hearing record does not support a finding that the IHO improperly placed unreasonable restrictions on the cross-examination of district witnesses, interrupted the parents' cross-examination of witnesses, or otherwise impermissibly prevented the parents' attorney from questioning witnesses.[16]

### 2. Impartial Hearing Officer Recusal—Familiarity with Witness

Next, the parents assert that the IHO should have recused himself because he was familiar with the occupational therapist who was called to testify by the district during the impartial hearing. It is well settled that an impartial hearing officer must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student Suspected of having a Disability, Appeal No. 19-057; Application of a Student with a Disability, Appeal No. 19-055; Application of a Student with a Disability, Appeal No. 12-066), and must render a decision based

[15] To render the entire topic more relevant, if I were in the IHO's position, I might have exercised discretion to ask the witness to clarify whether the transfers of the student—regardless of the approach used—would count toward the 30-minute duration of the related services listed the student's June 2018 IEP, but no one attempted to ask the witness that particular question, and the IHO cannot be faulted under such a discretionary standard.

[16] The IHO asked both counsel questions in order to clarify the issue or to focus the line of questioning toward issues that were the subject of the impartial hearing (see, e.g., Tr. pp. 209, 214, 248, 253, 261, 267, 268, 274).

on the hearing record (see Application of a Student with a Disability, Appeal No. 17-008; Application of a Student with a Disability, Appeal No. 09-058). An impartial hearing officer, like a judge, must be patient, dignified and courteous in dealings with litigants and others with whom the impartial hearing officer interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (Application of a Student with a Disability, Appeal No. 17-008; Application of a Student with a Disability, Appeal No. 12-064).

The parents provide no authority that supports the proposition that the IHO was required to recuse in this case due to his familiarity with a witness. This is a quasi-judicial proceeding. If it was a judicial proceeding, a recusal determination would be reviewed under abuse of discretion standard (Williams v. City Univ. of New York, 633 F. App'x 541, 544 [2d Cir. 2015]).

> The relevant caselaw appears to reject the claim that circumstances comparable to those found in this case justify recusal, whether under the old subjective test or under the present 'reasonable man' standard. Thus, a number of courts have held that a judge's acquaintance with one or more attorneys in a pending litigation is not a basis for recusal. See, e.g., Parrish v. Board of Commissioners of Alabama State Bar, 524 F.2d 98, 102–04 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976) (citing cases and holding no recusal warranted under either sections 144 or 455 of Title 28); United States v. Ferguson, 550 F. Supp. 1256, 1257, 1260 (S.D.N.Y. 1982) (Judge Weinfeld notes that he had declined to recuse himself based upon role of former law clerk as a prosecutor); Miller Indust. Inc. v. Caterpillar Tractor Co., 516 F. Supp. 84, 87 (S.D. Ala. 1980); Smith v. Pepisco, Inc., 434 F. Supp. 524, 525–26 (S.D. Fla. 1977); cf. Huff v. Standard Life Ins. Co., 683 F.2d 1363, 1369–70 (11th Cir. 1982); Broome v. Simon, 255 F. Supp. 434, 438 (W.D. La. 1965). While close personal familiarity with witnesses whose credibility might be at issue could raise serious problems, see id. at 1260, but see Parrish v. Board of Commissioners, supra, 524 F.2d at 102–04, a judge's acquaintance with counsel simply is not a circumstance under which a reasonable member of the public, aware of all of the facts, might fairly question the Court's impartiality.

(Genesco v. T. Kakiuchi & Co., 1984 WL 413, at *1 (S.D.N.Y. May 24, 1984).

In this case, after cross-examination of the occupational therapist had already begun, the IHO interjected, noting that the occupational therapist "may" have provided his daughter with OT services at the IHO's house in the distant past:

> "I also think -- and she may not have realized it yet, but I'm realizing it now, she may have treated my daughter in OT about 15 years ago because once she said [the IHO's county of residence], she may have been -- I don't know if she was a P-3 provider back then. She may not remember because she -- she dealt with my wife, really. But I just remember the name is kind of uncommon, [her first name]. So she must have come to my house to do OT at some point." (Tr. pp. 261-62).

The district's attorney asked if the situation posed a problem, and the IHO responded "[n]ot to me," and the parents' counsel did not note any objection prior to continuing his cross-examination of the occupational therapist or the remainder of the witnesses' testimony (Tr. pp. 262-302).

The IHO's candor was appropriate and his objectivity could not be reasonably called into question in these circumstances. His approach to this issue was entirely professional. In this case, the IHO did not abuse his discretion in continuing to hear the case, especially under these circumstances in which the familiarity arose out of limited, if any, personal contact with the witness in the distant past and it was only the witness' uncommon name that eventually triggered the IHO's memory. It does not approach, much less cross, the line by which recusal would be required (see Lyman v. City of Albany, 597 F. Supp. 2d 301, 308 [N.D.N.Y. 2009] [judge as former employee of defendant and alleged familiarity with witness]; (United States v. Cole, 293 F.3d 153, 164 [4th Cir. 2002] [recusal was not warranted where key witness was the son of the trial judge's deceased godparents]); Hirschkop v. Virginia State Bar Ass'n, 406 F.Supp. 721 (E.D.Va. 1975) (judge's personal familiarity with witnesses insufficient to establish bias, prejudice or impropriety; but see, United States v. Ferguson, 550 F. Supp. 1256, 1257, 1260 (S.D.N.Y. 1982) [where the judge recused himself when his relationship with a witness was "so intimate, and my esteem for him so high" that the "average person on the street" might reasonably conclude that the witness' testimony will intrude itself into the court's judgment]).

**3. Timeliness of Impartial Hearing Decision**

The parents also argue that the IHO's decision should be reversed because the decision should have been issued no later than, or 45 days after the resolution period elapsed. Federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. §300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. §300.515[c]; 8 NYCRR 200.5[j][5][i]). Additionally, under State regulation, "[i]n cases where extensions of time have been granted beyond the applicable required timelines, the decision must be rendered and mailed no later than 14 days from the date the impartial hearing officer closes the record. The date the record is closed shall be indicated in the decision" (8 NYCRR 200.5[j][5]).

In this case, the parents' claim that a decision should be reversed because it should have been rendered no later September 24, 2018 is utterly baseless. The hearing record reveals that the IHO granted numerous extensions of the decision timeline at the request of a party, and that the parents' counsel joined in some of the requests (IHO Exs. IV-VI; XII-XVI; XIX-XX; Tr. pp. 117, 200, 469, 678). The hearing record shows that the last day of hearing was March 28, 2019 (Tr. pp. 683-744). The hearing record also shows that both parties agreed to extend the compliance date for closing the impartial hearing record to May 6, 2019, in order to allow the parties to receive the transcript and sufficient time thereafter to submit their post-hearing briefs (Tr. pp. 742-43). The "Actual Record Close Date" is listed in the IHO's decision as May 28, 2019 (IHO Decision at p. 1). Given these facts, the IHO was required to issue the decision no later than June 11, 2019 to honor the 14-day provision in State regulations. The IHO's decision is dated June 5, 2019, and thus was not late (id.).

However, even if the IHO had issued the decision late, a delayed decision in this instance would not warrant overturning the IHO's findings. Courts have found that as long as the student's substantive right to a FAPE is not compromised because of the late decision, an untimely administrative decision, by itself, does not deny the student a FAPE (Jusino, 2016 WL 9649880, at *6 citing J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000] ["Case law's emphasis on substantial vindication of substantive rights and ensuring a fair opportunity to participate is equally present in resolving disputes arising out of the decision deadline date. With respect to the 45–day deadline, "relief is warranted only if... [a] forty-five-day rule violation affected [the student's] right to a free appropriate public education"]; see A.M. ex rel. J.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660, 689 n.15 [E.D.N.Y. 2012] aff'd, 513 F. App'x 95 [2d Cir. 2013] [same]. According to the courts, the substance of an administrative decision is not flawed just because it is issued late (J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *14 [S.D.N.Y. Mar. 31, 2015], aff'd 643 F. App'x 31 [2d Cir. 2016] [noting that "(t)he untimeliness of the SRO's decision does not suggest a flaw in its logic and reasoning, however. Moreover, Plaintiffs have cited no authority supporting their assertion that an SRO decision is entitled to no deference when issued outside the '30–day statutory timeline.'"] citing M.L., 2014 WL 1301957, at *13 ["Although the Court agrees with Plaintiffs that the State Review Office's routine delays in issuing decisions is problematic, it has found no authority in IDEA cases that allows it to declare the SRO's decision a nullity"]).

In this case, the parents' decision to unilaterally enroll the student at iBrain preceded the initial decision due date by a significant margin, which lays to rest any allegation that that a procedural deficiency in the impartial hearing caused a denial of a FAPE to the student (Jusino, 2016 WL 9649880 at *7 ["Plaintiffs did not obtain a faster hearing because . . . plaintiffs later consented to two extensions of that deadline. . . . In any event, by the time the alleged procedural deficiencies occurred, plaintiffs had already elected to re-enroll W.J. at Seton"]).

### C. CSE Process

#### 1. Timeliness of the CSE Meeting

Turning to the issue of whether the CSE was late in conducting an annual review of the student's IEP, the parents cite to the English language version of the "MEETING NOTICE COMMITTEE ON SPECIAL EDUCATION" dated February 15, 2018, which contains the following language "The IEP Meeting must be held no later than: 02/11/2018" (Dist. Ex. 28 at p. 1).[17] That notice also states that the CSE meeting was scheduled for April 26, 2018 (id.).[18]

[17] In reviewing the entire hearing record, the evidence shows that the parent was also sent a notice of meeting in her native language (Dist. Ex. 28 at pp. 4-5). Unlike the English version of the form, the Spanish form sent to the parent does not include the phrase "The IEP Meeting must be held no later than: 02/11/2018" (id.). In fact, the Spanish form does not contain the date of February 11, 2018 or 02/11/18 (id.). The Spanish "AVISO DE REUNION COMITE DE EDUCACION ESPECIAL" form contains the date of the notice as (05/21/18) and the date and time of the meeting ("06/05/18, 10:00 AM") (id.). The student's mother testified that she reads Spanish and does not read English (Tr. p. 693), after which it becomes more difficult to understand the parents' allegation that the English version of the meeting notice was the cause of a procedural denial of a FAPE.

[18] The hearing record shows that the CSE previously met on August 23, 2017, and reviewed the student's IEP for the 2017-18 school year, and subsequently met on June 5, 2018 and created the student's IEP for the 2018-19

First, there was no allegation raised in the due process complaint notice that the CSE improperly delayed conducting an annual review of the student's IEP (see Parent Ex. A).[19] The issues raised in the due process complaint notice were that the CSE meeting was not scheduled at a time of day that was mutually agreeable to the parents and that the CSE lacked all of the members, including the parents, both which are further discussed below (id. at p. 2).

The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Under IDEA, parents of a disabled student must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function (C.F. v. New York City Dep't of Educ., 746 F.3d 68 [2d Cir. 2014]), and it has greater importance in a jurisdiction like New York, which shifts the burden of production and persuasion to school districts to show procedural and substantive compliance with the IDEA (Educ. Law § 4404[1][c]).

In this case, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice to add more disputes. Nor can it be said that the district "opened the door" to such claims by raising evidence as a defense to a claim that was identified in the due process complaint notice (M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]). Likely as a result of the parent's failure to raise the issue in their due process complaint notice, the IHO did not make a determination concerning the timeliness of the CSE meeting (see IHO Decision). Therefore, I will not review these issues raised for the first time on appeal.

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school year (Dist. Exs. 7 at pp. 1, 13; 27 at p. 12).

[19] The parents reference another notice that was not included as part of their claims in the due process complaint notice. The parents also cite to a May 21, 2018 prior written notice promulgated by the district, alleging a procedural denial of a FAPE because it failed to provide the parents with a response to their April 20, 2018 written request to have the CSE "conduct the necessary evaluations," facilitate their request that the CSE consider a nonpublic school placement, and that all evaluations be conducted prior to the CSE meeting (Parent Ex. U at p. 1; see Dist. Ex. 28 at pp. 1, 4). The parents also assert that the May 2018 prior written notice was a procedural denial of a FAPE because it failed to list the name or title of the following attendees: the district's physician, school psychologist, and an additional parent member. These contentions, which are raised for the first time on appeal, are outside the scope of my review and therefore, I will not consider them (see Educ. Law § 4404[2]; 34 C.F.R. § 300.508[d][1]; 8 NYCRR 200.5[i][3][1][iv]; M.D. v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *7 [S.D.N.Y. Mar. 21, 2013]; M.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 269 [S.D.N.Y. 2012]; Snyder v. Montgomery County. Pub. Sch., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]; Saki v. Hawaii, 2008 WL 1912442, at *6-*7 [D. Hawaii April 30, 2008]; Application of a Student with a Disability, Appeal No. 10-074; Application of a Student with a Disability, Appeal No. 09-145; Application of a Student with a Disability, Appeal No. 09-112).

### 2. Mutually Agreeable CSE Meeting Time

Next, an issue that was raised in the due process complaint notice was the parents' assertion that the district failed to schedule a CSE meeting at a time that was mutually agreeable to them. Federal and State regulations require school districts to take steps to ensure parent participation in CSE meetings, including: notifying the parent prior to the meeting, scheduling the meeting at a mutually agreed upon time and place, and the use of "other methods" such as teleconferencing (34 CFR 300.322[a], [c]; 8 NYCRR 200.5[d][1]). A district may conduct a CSE meeting without a parent in attendance if it is unable to convince the parents that they should attend; however, in such instances, the district is required to maintain detailed records of its attempts to ensure the parents' involvement and its attempts to arrange a mutually agreed upon time and place for the meeting (34 CFR 300.322[d]; 8 NYCRR 200.5[d][3], [4]).

In this case, as describe previously, the district sent a notice in English to the parents in a February 15, 2018 CSE meeting notice that a CSE meeting was scheduled for Thursday April 26, 2018 at 10:00 a.m., to review the results of the reevaluation and to develop an IEP for the student for the 2018-19 school year (Dist. Ex. 29 at p. 1). The notification included a list of the names and titles of the district personnel who would be attending the meeting (id. at p. 2). According to the district's computerized Special Education Student Information System (SESIS) log, the notice was denominated a "second notice" (Dist. Ex. 32 at p. 4). The SESIS log also showed that on February 15, 2018, the district emailed the iHope associate program director (associate director) to inform iHope of the scheduled CSE meeting and requested that iHope provide the district with any teacher and related service providers' progress reports, student work samples, assessments, a report card and any relevant materials prior to the CSE meeting (id. at pp. 3-4).

In a letter written in English dated April 20, 2018 that was copied to another attorney representing the parents, the parents informed the CSE chairperson that they were requesting the upcoming CSE meeting be a "Full Committee Meeting" and that a district physician participate in the meeting in person (Parent Ex. U at p. 1). The letter contained a list naming the student's special education teacher and her related service providers at iHope and indicated that the parents wanted any meeting notices regarding their daughter sent to those people (id.). The parents further requested that the meeting take place at iHope and indicated they were "available to schedule this meeting anytime on Mondays" (id.). The letter further indicated that once a meeting was scheduled for a mutually agreeable date and time, they would provide the student's most recent progress reports and any other documentation for the CSE's consideration (id. at p. 2). The parents asked that the CSE send them a few proposed dates and times via email or mail (id.).[20] The parents also requested that the CSE consider a nonpublic school placement, and that it conduct the necessary evaluations for such consideration, as well as any other evaluations prior to scheduling the meeting (id. at p. 1).

On April 25, 2018 the CSE chairperson emailed the associate director of iHope reminding her of the CSE meeting scheduled for the student for the following day and requesting a phone

[20] The parents' letter indicated that they wrote the letter to follow up on their recent April 16, 2018 email regarding the student's IEP meeting; however, this email does not appear to be in the hearing record and does not appear to be documented in the SESIS log (Parent Ex. U at p. 1; see Dist. Ex. 32).

number for a school conference call (Dist. Ex. 32 at p. 3). She also asked the associate director to let the CSE know if the school would be providing progress reports (id.). In a response shortly thereafter, the associate director indicated that the parents had requested that iHope staff not attend the CSE meeting scheduled for Thursday April 26, 2018, and that it was her understanding that the parents intended to reschedule for a time when they could participate (id.).[21] She added that the CSE chairperson should contact the parents directly regarding the documents she inquired about (id.). According to the SESIS log, the parents did not appear for the April 26, 2018 CSE meeting and the parents did not answer when they were telephoned (id.).

The hearing record shows that the CSE thereafter sent a meeting notice to the parents dated May 21, 2018, indicating a CSE meeting had been scheduled for Tuesday June 5, 2018 at 4:00 p.m. for the purpose of reviewing the results of the student's reevaluation, to determine the student's continued eligibility for special education services, and to develop an IEP for the student for the 2018-19 school year (Dist. Ex. 28 at pp. 1, 4).[22] The English version of the notice provides the same list of expected attendees that are found on the Spanish version of the form, including those persons from iHope that the parents requested, as well as an unnamed district physician "TBD" (id. at p. 1).[23] According to the SESIS log, on May 22, 2018 the CSE chairperson emailed the parents and iHope a "third" notice of the CSE meeting, which was scheduled for June 5, 2018 IEP meeting at 4:00 p.m. (Dist. Ex. 32 at pp. 2-3; see also, Dist. Ex. 20).[24]

In a June 4, 2018, letter to the CSE chairperson, [25] the parents' attorney followed up on the parents' previous written request on April 20, 2018 for an annual review for the 2018-19 school year (Parent Ex. V at p. 1; see Dist. Ex. 22).[26] The parents' attorney stated that the scheduled CSE meeting should not proceed, and referenced the May 21, 2018 meeting notice the CSE had sent the parents for a June 5, meeting at 4:00 p.m. (Parent Ex. V at p. 1). The attorney outlined all the reasons that the meeting should not take place, beginning with that the meeting notice failed to

[21] This was not the first time that the parents (and the iHope staff) failed to attend or otherwise participate in a scheduled CSE meeting (see Dist. Ex. 7 at p. 16).

[22] This notice was provided to the parent in Spanish as well as English (Dist. Ex. 28 at pp. 1, 4).

[23] The copy of the document in evidence contains check boxes next to each name that are illegible, except for the special education teacher (Dist. Ex. 28 at p. 1). In contrast, in the Spanish version of the notice, the check boxes are legible and checked off (id. at p. 4).

[24] The May 22, 2018 email from the district to the parent and iHope indicated it had attached "important information" regarding the student's IEP meeting; however, that attachment was not included in the exhibit (see Dist. Ex. 20 at p. 1).

[25] While not dispositive, I note that the district CSE chairperson claimed that the parents' counsel waited until 3:58/3:59 P.M on June 4 to advise the district that the parents would not be attending the June 5 CSE meeting (see Dist. Exs. 21 at p. 2; 22).

[26] The parents' attorney emailed the district CSE chairperson advising her of the attorney's attached letter response to the CSE meeting notice (Dist. Ex. 22). The attachment was not introduced into evidence. Further, the SESIS log does not indicate that the CSE received the attorney's email or attachment (Dist. Ex. 32 at p. 2). The IHO noted that no letter was included in the district's evidence packet, and the district's counsel stated that it was a series of emails (Tr. p. 163). Parents' counsel made no remark concerning the document (id.).

include a prior written notice (id.). He reiterated the points that the parents had made in their April 20, 2018 letter to the CSE, and indicated that the CSE failed to provide the parents with "a few proposed dates and times in writing," provide a meeting date when the parents were available meet with the CSE anytime on Mondays, or ensure the attendance of an additional parent member and a district school physician who would participate in person (id.). The parents also accused the CSE of failing to conduct "any evaluations necessary when considering a nonpublic school placement" and suggest a violation of a district policy manual (id. at pp. 1-2).[27] Finally, the letter included a request that a draft agenda of the IEP meeting be provided in writing at least seven days prior to the IEP meeting (id. at p. 2).

The district responded to the parents' June 4, 2018 objections to the CSE meeting with a prior written notice dated June 4, 2018 (Dist. Ex. 21 at p. 1). The notice indicated that the parents' requests to "reschedule" the CSE meeting and that the CSE meeting take place at iHope were denied, while their request that an "OSH" physician participate was granted (id.). An explanation, including a summary of events describing why the CSE made those determinations, was included in the prior written notice and a copy of the procedural safeguards notice was enclosed with the letter (id.). The district members of the CSE convened the meeting on June 5, 2018 in the parents' absence, and developed the student's 2018-19 IEP, which was to be implemented on July 5, 2018 (Dist. Ex. 27 at pp. 1, 12).

The hearing record shows that the student was a 12-month student, and the CSE had last met on August 23, 2017, albeit the IEP showed an initiation date of July 5, 2017 (Dist. Ex. 7 at p. 13). With regard to the parents' claim that the CSE meeting had not been scheduled at a mutually convenient time, the evidence shows that the parents requested not once, but twice to schedule the CSEs meeting "anytime on Mondays" (Parent Exs. U;V); however, there is no evidence that the CSE acknowledged or attempted to accommodate that request, or in lieu of accommodating it, provided the parents with a valid reason such a request could not be accommodated in this instance. The student's mother testified that the student's father wanted to be present at the meeting, suggesting that there was some reason that either he or both of the parents had some circumstance that prevented them from attending a CSE meeting on a day other than a Monday, but the issue was left insufficiently developed in the record, which does not support a finding in favor of the district on the requirement of attempting to find a mutually agreed time for a CSE meeting (see Tr. pp. 697-98). In accordance with the foregoing, I find that the parents prevail on the issue of scheduling the CSE meeting at a mutually agreeable time to the extent that there is no evidence that the district acknowledged or addressed their request to schedule the CSE anytime on a Monday.[28] I will address the consequence of that procedural violation next.

[27] The parents' attorney advised the district that "the parent must indicate in writing if she agrees to a mandated [m]ember of the IEP Team to NOT participate in person" (Dist. Ex. 16 at p. 2). The attorney provides no authority for this proposition; however, the regulations provide that "all members of a [CSE]…shall attend a meeting of such committee" unless the parent and district may agree that the member's attendance is not necessary (8 NYCRR 200.3[f]). There is no regulatory requirement that CSE members appear in person.

[28] There is no authority holding that a CSE is required provide a list of "proposed dates" to parents for a CSE meeting, although it is not impermissible either. Additionally, the parents' remaining objections to the scheduling of the CSE meeting, namely, any alleged defect in the meeting notices or the lack of any evaluations or attendees that the parents believed necessary does not result in a violation of the requirement to schedule the CSE meeting

### 3. CSE Composition

The parents assert that the June 5, 2018 CSE team was improperly composed, as it did not contain the parents, school psychologist, social worker, special education teacher or related service provider of the student, school physician, or an additional parent member as participants.[29] The State regulation states, in pertinent part, that a CSE must be composed of the following persons: parents; regular education teacher of the student whenever the student is or may be participating in the regular education environment;[30] not less than one special education teacher of the student, or, if appropriate, not less than one special education provider of the student; a school psychologist; district representative who shall serve as the CSE chairperson; individual who can interpret the instructional implications of evaluation results; a school physician if requested in writing 72 hours prior to the meeting; an additional parent member if requested in writing 72 hours prior to the meeting; other persons having knowledge or special expertise regarding the student, and if appropriate, the student (8 NYCRR 200.3[a][1]).

As noted above, the district provided the parents with notice of the June 2018 CSE meeting in Spanish (Parent Ex. U at pp. 4-5). The list of the expected attendees included all of the required attendees, including a school physician, except that the notice did not indicate whether an additional parent member would attend (id. at p. 4). In this case, the CSE sent an email to the parents and iHope on Friday, June 1, 2018 to remind both of the upcoming CSE meeting (Dist. Ex. 32 at p. 2). As discussed in greater detail above, the parents' counsel notified the district on June 4, 2018, via an emailed letter that the parents would not be attending, and that they were requesting the meeting be rescheduled (Dist. Ex. 16). In a prior written notice emailed by the district also dated June 4, 2018, the district notified the parents that their request from earlier in the day to reschedule the June 5, 2018 hearing was denied, that their request to have a district physician participate in the CSE meeting was approved, and their request to have the CSE meeting held at iHope was not granted (Dist. Ex. 21 at p. 1). In the explanation section, the district recounted its attempts to schedule CSE meetings and to provide reminders of those meetings (id. at p. 1). The prior written notice also indicated that for the June 5 meeting, the parents' counsel did not advise the CSE of the parents' expected absence until 3:59 p.m. (id. at p. 2).[31] Finally, the district advised the parents that the CSE was unable to reschedule the meeting, and that to ensure that the student received appropriate and timely services, the CSE would hold the meeting as scheduled, and that a district physician would also be available to participate in the meeting (id.).

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at a mutually agreeable time.

[29] The parents also assert that, after requesting that the district conduct evaluations of the student, the prior written notice did not contain the correct names or titles of the persons who ultimately attended the June 2018 CSE meeting. As noted above, the parents received the notice of the CSE meeting in Spanish, and in this case, the Spanish version contained the names and titles of the expected attendees including the student's then current iHope teachers and related services providers (Dist. Ex. 28 at p. 4). The name of the district's physician was listed as "TBD" (id.). There was no name or title for the additional parent member (id.).

[30] There was no indication by either party that they were considering a general education setting for this student in light of the number of special education needs to be addressed regardless of whether she attended a public or a private setting.

[31] The e-mail states 3:58 P.M (District Ex. 22).

The hearing record shows that on June 5, 2018 the only participants at CSE meeting were the district representative, who also served in the role of school psychologist, and a district related services provider/special education teacher (Tr. pp. 303, 306; Dist. Ex. 27 at p. 15). According to the SESIS log, shortly after 4:00 p.m. on June 5, 2018, the district staff tried to call the student's parents to gain their participation, but received no answer and a voicemail message was left notifying the parents that the CSE was convening and would proceed as scheduled (id.). The CSE also called iHope to gain the participation of the staff members who were requested by the parents; however, the CSE was informed that no one from the school would be participating (id.). The parents did not participate in the CSE meeting at all (Dist. Exs. 17 at p. 15; 32 at p. 2).

As described above, the district made numerous efforts aligned with federal and State regulations to secure the parents' participation in the June 2018 CSE, including multiple notices, a rescheduling of the CSE meeting, and telephoning the parent on two occasions. However, none of the district's efforts were directed at gaining the parents' participation at a CSE meetings "anytime on Mondays", which the parents had first requested on April 20, 2018 and reminded the district again on June 4, 2018, which, as described above, was a violation of the requirement to conduct a CSE meeting at a mutually agreed upon time.

While such a procedural violation does not automatically constitute a denial of a FAPE, a procedural violation will constitute a denial of a FAPE 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]). In this case, where the parents requested that a CSE meeting occur anytime on Mondays well before the CSE meeting convened, the CSE did not respond to that request (or produce evidence at the impartial hearing), and the parents ultimately did not attend, I find that the procedural violation was sufficient to significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student and thus constituted a procedural denial of a FAPE.[32]

**D. June 2018 IEP**

In the resultant June 2018 IEP the CSE recommended that the student be found eligible for special education as a student with multiple disabilities and recommended a 12-month 12:1+(3:1) special class placement (Dist. Ex. 27 at pp. 1, 9). The CSE also recommended the student receive related services including three 30-minute sessions per week of individual OT, PT, and speech-language therapy and two 30-minute sessions per week of individual vision education as well as the assistance of a full time 1:1 health paraprofessional and a 1:1 transportation paraprofessional (id. at pp. 9-10).

[32] I do not reach the issue of the lack of an additional parent member or the school physician at the June 5, 2018 CSE meeting, but had the parents been at fault for not attending the meeting, I would be hard pressed to understand how it could rise to a level of a denial of a FAPE when it was the parents that sought their participation. I also find very troubling that the parent specifically asked the district to include iHope staff in the CSE meeting and that the iHope associate director testified that they were specifically told by the parents not to cooperate with the district. It is not directly relevant to whether the district addressed the parents' attendance and participation, but would be a significant factor in equitable considerations.

### 1. Duration of Related Services

Here, the parties do not dispute that the student required the related services of OT, PT, speech-language therapy, and vision education services during the 2018-19 school year. Rather, on appeal, the parents assert that the IHO "committed reversible error" when he determined that the reduction in duration of the student's related service sessions from 60 to 30 minutes was not a denial of a FAPE. The district argues that the documentation the CSE reviewed and the resultant IEP supports the IHO's decision that the district offered the student a FAPE.[33]

The district school psychologist who served as the district representative at the June 5, 2018 CSE meeting indicated that the CSE reviewed the proposed iHope IEP for the 2017-18 school year and a January 25, 2018 classroom observation of the student (Tr. pp. 308, 311-13; Dist. Ex. 27 at p. 15; see Dist. Exs. 14; 30).[34] The school psychologist testified that she also had relied on "preexisting information in lieu of not having any updated information to work with" and that iHope had not provided the CSE with any more recent progress or evaluation reports regarding the student other than what had been provided for prior IEP meetings (Tr. pp. 321, 344). Consistent with this, she testified that she reviewed information from the student's 2015-16 and 2017-18 IEPs, a March 23, 2016 "school" report, and the February 21, 2017 psychoeducational evaluation report, and the June 5, 2018 IEP reflected aspects of the information contained in the materials identified by the school psychologist (Tr. p. 320; Dist. Ex. 27 at pp. 1-4; see Dist. Ex. 11).[35]

Review of the information available to the June 5, 2018 CSE indicated that the student's level of fatigue was a factor in her performance and ability to participate in activities and related service sessions (see Dist. Exs. 11 at pp. 2, 3; 14 at pp. 5-6, 11; 30). For example, the proposed 2017-18 iHope IEP stated that the student's performance during speech-language therapy sessions depended "highly" on her level of fatigue, as well as her engagement and interest in the activity presented (Dist. Ex. 14 at pp. 5-6). The proposed iHope IEP also indicated that the student could become frustrated and fatigued when continuously prompted to complete a difficult task, such as

[33] Review of the district's August 23, 2017 IEP for the 2017-18 school year shows that the CSE's recommendations for 30-minute related services sessions was carried forward by the district (Dist. Ex. 7 at pp. 10, 13). Therefore, it appears the parents' contention that the June 5, 2018 CSE "reduced" the length of the student's related service sessions is based upon the parentally-selected 60-mintue sessions she had received at iHope, not a proposal for services authored by the CSE from the prior school year (see Dist. Ex. 14 at p. 29). To be clear, a public school is not required to mimic the services provided by a nonpublic school, merely because the parents were able to obtain the services they preferred (M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018] [noting that while "the district's proposed program would not have replicated the class size, structure and supports available at [the unilateral placement]. . . . that is not the standard the statute imposed on the CSE"]). A district is not required to replicate the preferred setting, when the district's recommendation is appropriate (see, e.g., Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004]).

[34] During the impartial hearing, the district's attorney referred to the January 25, 2018 classroom observation report as having been marked "District Exhibit 4" (see Tr. pp. 227; 312-13). However, the classroom observation of the student that is dated January 25, 2018 was entered into the hearing record as District Exhibit 30, not District Exhibit 4, which is a 2014-15 IEP.

[35] The hearing record does not indicate whether the information reflected in the June 5, 2018 IEP came from the student's previous district IEPs or her iHope IEPs, nor does it contain the March 23, 2016 school report.

reaching for a single or two-panel switch, and that improvement in the student's level of fatigue would enhance the student's performance in her ability to communicate and answer questions (id. at p. 11). Additionally, the evaluator reported that during the February 21, 2017 psychoeducational evaluation the student presented as "notably tired and sleepy" (Dist. Ex. 11 at pp. 1-3).[36]

In the report of a January 25, 2018 classroom observation of the student, which took place during an OT session, a district social worker indicated that initially during the observation, the student's eyes were closed and her head had fallen forward (Tr. p. 409; Dist. Ex. 30 at p. 1). The occupational therapist then scratched the student's back and placed a fan with a large red button on the student's lap (Dist. Ex. 30 at p. 1).[37] The student's eyes opened once the occupational therapist began to sing but closed again when she raised the student's head so she could look at her classmates (id.). The observation report indicated that although the occupational therapist pushed the student's arms toward the button to activate the fan, the student "continued to sleep" (id.). The report also noted that the student was working on "maintaining arousal which [was] a work in progress" (id. at p. 2).

Turning to the June 5, 2018 CSE meeting, the school psychologist testified that she did not recall the specific discussion regarding the length of the student's related service sessions (Tr. pp. 336-39). Rather, she testified that there were different factors that contributed to the decision-making process with regard to allocating appropriate services and that the CSE typically discussed the student's needs and any circumstances that were pertinent to developing the IEP (Tr. p. 338). She indicated that CSEs typically do consider increases in frequency and duration of related services (Tr. p. 337).

Although in this instance the school psychologist did not recall the CSE's discussion about the duration of the student's related service sessions, the district's OT supervisor provided testimony at the hearing that gave some insight into the duration of related service recommendations on the IEP (see Tr. pp. 219, 227). I have reviewed her testimony as opinion evidence in support the contents of the June 2018 IEP as written as opposed to evidence of what occurred at the CSE meeting (R.E., 694 F.3d at 186-87 [rejecting a rigid "four-corners rule" that would prevent consideration of evidence explaining the written terms of the IEP]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 411 (S.D.N.Y. 2017)). Specifically, the OT supervisor indicated that her review of the January 2018 classroom observation report led her to believe that the student was having difficulty attending during the session and that it appeared that the therapist was trying to arouse the student via singing and scratching her back in order to help her attend (Tr. pp. 227-28). However, the student did not respond to those attempts to arouse her and "remained very sleepy and closed her eyes" (Tr. p. 228). The OT supervisor stated that the student's lack of

[36] The February 21, 2017 psychoeducational evaluation report reflected that as per the parents, the student used a continuous positive airway pressure (CPAP) machine to assist her in sleeping, that her sleep patterns were fair, and that she slept nine to ten hours per night using the CPAP machine, but that she typically appeared tired and irritated in the morning, although this usually went away when she got ready for the day (Dist. Ex. 11 at p. 2). This information was carried over to the June 5, 2018 IEP (compare Dist. 11 at p. 2, with Dist. Ex. 27 at p. 2). The June 2018 IEP also indicated that the student was administered melatonin "to help her sleep" and that she "has sleep apnea" (Dist. Ex. 27 at p. 3).

[37] The school psychologist testified that the red button was likely a communication device (Tr. p. 413).

response to the sensory stimulation indicated that the student may just have been tired (Tr. p. 229).[38]

In addition, the OT supervisor testified with regard to the role of a student's paraprofessional in assisting with OT goals and generalization of OT techniques, that "[m]ost of the para[professional]s do carry over the skills that are taught within the occupational therapy scope of practice" (Tr. pp. 236-37). She explained by giving examples, such as, if a student was working on using a grasp device, the paraprofessional would be trained on how to assist the student to hold and use the device, and if the student required a sensory diet or needed arousal strategies incorporated into her day, the district would train the paraprofessional to provide those interventions (Tr. p. 237). The OT supervisor testified that the paraprofessional could "carry [those] skills over to the classroom so that a licensed therapist [was] not always required to be with that student when she need[ed] [those] interventions" (id.). Therefore, although the OT supervisor did not attend the June 2018 CSE meeting, she provided her professional opinion as to why the recommendation for 30-minute sessions in the June 2018 IEP were appropriate for the student in juxtaposition to the 60-minute OT session lengths sought by the parents.[39]

With respect to OT services the hearing record generally supports the IHO's determination that the district presented a credible witness to explain the CSE's recommendation for the duration of OT sessions (IHO Decision at p. 20). Notwithstanding that determination, although the IHO determined that "no evidence was presented that the [s]tudent could not benefit from the 30-minute sessions proposed by the [district]," the hearing record is devoid of information regarding how 30-minute PT, speech-language therapy, and vision education session lengths were an appropriate

[38] The OT supervisor was also asked to review the student's iBrain IEP for the 2018-19 school year—a document not reviewed by the June 5, 2018 CSE—for the purpose of opining on the appropriateness of the recommended frequency and duration of OT sessions at iBrain (Tr. pp. 224-27, 229-30; Parent Ex. F; see Tr. p. 545). After reviewing certain documents pertaining to the student and her educational program, when asked to comment on the appropriateness of the recommendation in the student's 2018-19 iBrain IEP for four 60-minute OT sessions per week, the OT supervisor opined that the intensity of the services was "a little too much for this student," and that there was "a lot of duplication of services" (Tr. pp. 222, 226). She further testified that the student's "endurance [was] pretty low, and her attention span [was] low. So it just seem[ed] to be a lot for [the] student to handle" (Tr. p. 226). When presented with information from the 2018-19 iBrain IEP indicating that the student rested an average of three hours per school day, the OT supervisor opined that this was "very telling when it comes to therapeutic intervention" and that "[t]he intensity just might be too much for [the student], where she's getting too tired from receiving that level of therapy throughout the day" (Tr. pp. 229-30; see Parent Ex. F at p. 14).

[39] Alternatively, the director of special education at iBrain—who did not attend the June 5, 2018 CSE meeting—testified the related services at iBrain were offered for durations up to 60 minutes, because the students who attended the school exhibited management needs requiring "extended time in the therapy" (Tr. pp. 538, 543). Regarding this student, the director testified that she required 60-minute related service sessions because of her specialized needs, which increased the amount of time it took for her to be able to benefit from and participate in therapies (Tr. p. 564). Specifically, the director explained that the student required longer related service sessions because of the length of time it took for her to transfer to and use the various equipment during sessions, she required a significant amount of processing time to respond to questions or directions and to visually attend, she processed visual information slowly, it required effort and time for her to coordinate her physical response to what she was asked to do, and, she needed brief rest breaks after completing a physically demanding task (Tr. pp. 564-69).

level of services to support the student's needs. In cases such as this I would expect testimony from related service providers and/or a special education teacher having experience with a district 12+1:(3+1) special class about the degree of benefit they would expect a similarly situated student to receive from the quantity of related services offered in the June 2018 IEP.[40] Given the paucity of information in the hearing record about related services other than OT,[41] it is difficult to conclude that the district established that the related services recommended in June 2018 IEP other than OT offered the student a FAPE.

**E. Weight of the Evidence-Credibility of Witnesses**

Last, I will address the parents' contention that the IHO erred in his credibility findings inasmuch as he relied upon the testimony of the school psychologist, occupational therapist, and an assistant principal to render his decision. Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16-*17 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]).

Here, as discussed below, the evidence in the hearing record does not present a reason to disturb the credibility determinations of the IHO. The parents point to several pieces of testimony in support of their assertion. First, according to the parents, the district's representative/school psychologist testified that the June 2018 IEP did not include a provision for an assistive technology device, despite being aware of the student's need for an assistive technology device to communicate (Tr. pp. 427-29). However, the witness also testified that the reason she made the mistake was her reasoning was that the entry-level devices which are considered low-tech devices are "programmatic" within the district's specialized schools, and that if the student had not developed the skills to use high-tech devices, there was no point [in marking the box for the need of assistive technology] (Tr. p. 427). While the parent may have pointed to a technical error on the IEP, an error of this type does not require the IHO to find that the witness not credible, especially when she conceded her error when pointed out to her.

The parents also assert that the IHO should not have relied on the testimony of the district's occupational therapist, because she purportedly testified that she did not review the student's vision assessment prior to testifying and qualified her testimony with a lot of "maybes," while also testifying that it was important to "coordinate and collaborate" with the occupational therapist to make sure that they're not contradicting each other when it comes to treatment strategies when a

[40] Documents that were obtained by or offered to the CSE about the value of the PT, speech-language therapy, and vision education offered at iHope during the 2017-18 school year may have also been probative, but as described above, it appears that the parents inhibited the production of that particular information, so the district was responsible to look to other means of making its case.

[41] The assistant principal's testimony from the assigned public school was not relevant in helping to establish the district's case with respect to related services; however, as further described below, that does not render the testimony incredible as to whether the IEP could be implemented at the proposed school site.

student [such as this student] has visual impairments (Req. for Rev. at p. 10). First, the witness testified on direct that she reviewed "certain documents" relating to the student and the student's educational program prior to testifying (Tr. p. 222). A review of the testimony shows that, with respect to the use of "maybes," the witness was providing scenarios for which the student's therapy would be modified and adjusted throughout the school year (Tr. p. 257).[42] The testimony also shows that, contrary to the parents' assertion that the witness did not review the student's assessment prior to testifying, the witness actually testified that she had no personal knowledge of, or experience with, the student (Tr. p. 256; see Tr. pp. 257-58 [no testimony found that the witness did not review the student's assessment]).

The parents also point to the testimony of the principal at the particular public school to which the district assigned the student at for the 2018-19 school year. The parents' issue with the principal's credibility is that, although the principal testified that there was an opening for the student at the recommended placement, she "could not answer basic questions about the overall program." A review of the testimony shows that the principal confirmed that the school could have provided the mandated health paraprofessional, the transportation paraprofessional, students such as the student in this appeal would be educated on the first floor (of the three story building), all of the 12:1+(3:1) classes are on the first floor, and that there were four or five of those classes, depending on the current summer session (Tr. pp. 489-91, 497-98). Further, the hearing record shows that the witness could not state with certainty: which of the 12:1+(3:1) classes the student would have been placed in, because she did not have that information in front of her, and that the placement officer would have had that information (Tr. pp. 491-94). As noted previously, while the testimony does not explain why the related services were of an appropriate duration, it does not render the testimony valueless. A review of the hearing record, including the specific examples cited by the parents, does not support the parents' contention that the IHO's witness credibility determinations should be overturned. It is only the quantity and type of proof presented by the district that I find is lacking, which in turn requires reversal of IHO's specific finding that "no evidence was presented that the [s]tudent could not benefit from the 30-minute sessions proposed by the [district]".

**F. Unilateral Placement—iBrain**

Having found that the parents prevail in the first part of the Burlington/Carter test regarding a FAPE, it is then the parents' obligation to prove that the unilateral placement they selected for the student was appropriate. However, the parents' request for review fails to assert any challenges to the IHO's other adverse findings such as that the student's program at iBrain for the 2018-19 school year "contain[ed] several areas of deficiency," that equitably the parents' cooperation with the CSE process was "somewhat muddled," and that "sufficient evidence was not presented to establish" that the parents were under any legal obligation to pay tuition at iBrain for the 2018-19 school year (IHO Decision at pp. 22-24). As described above with respect to the district's programming, the parents did not engage with these aspects of the IHO's decision in their request for review, and consequently, the issues have been abandoned. Accordingly, the IHO's determinations on these issues have become final and binding on both parties and it will not be

[42] While counsel stated that the witness "threw out a lot of maybes," the witness provided two alternative options to the 4x60 individual mandates, the first being placing the student in a group of her peers, and the second, placing the student in an assistive technology group (Tr. p. 257).

further reviewed on appeal (34 CFR 300.514 [a]; 8 NYCRR 200.5 [j][5][v]; see M.Z., 2013 WL 1314992, at *6-*7, *10).

**VII. Conclusion**

Based on the foregoing, I find that the district failed to offer the student a FAPE because it significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student and failed to establish the sufficiency of the PT, speech-language therapy, and vision education offered to the student. However, the parents request for the costs of the tuition at iBrain for the 2018-19 school year fails in the absence of any challenges to the IHO's adverse determinations with respect to the requested relief.

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

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

**Dated: Albany, New York**
**September 5, 2019**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**