The University of the State of New York

The State Education Department
State Review Officer
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No. 19-060

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Karl Ashanti, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, Esq.

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). 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 attended a 6:1+1 classroom at a nonpublic school—the International Academy of Hope (iHope)—during the 2015-16, 2016-17, and 2017-18 school years (see Parent Exs. B at pp. 3-5; C at p. 1; D at pp. 1, 12; Dist. Ex. 16 at p. 1).[1] According to the evidence in the hearing

[1] By due process complaint notice "filed on or about November 27, 2017," the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year, in part, because the district did not conduct a CSE meeting or develop an IEP for the student for that school year (see Parent Ex. B at p. 3). At that impartial hearing, the district conceded that it failed to offer the student a FAPE for the 2017-18 school year (see id.).

record: iHope provided a 12-month school year program with "extended school hours" to enable students to "meet their education and related services needs in a multidisciplinary environment"; each student at iHope received the services of a 1:1 paraprofessional; and iHope offered "a physical therapy ('PT') department, an occupational therapy ('OT') department, speech, vision, counseling department[s], and [a] conductive education department" (Parent Ex. B at p. 5).[2]

On January 11, 2018, in preparation for the student's annual review, the district conducted a classroom observation of the student (see Dist. Ex. 7 at pp. 1, 3). The 30-minute classroom observation took place at iHope during the student's speech-language therapy session (id. at p. 1).[3]

In a meeting notice dated January 22, 2018, the district invited the parent to attend the student's annual review scheduled for February 8, 2018 at 11:30 a.m. (see Dist. Ex. 2 at p. 1).[4] Shortly thereafter, the iHope program director contacted the CSE chairperson to remind her that meetings to develop IEPs for students currently enrolled at iHope—such as the student in this case—needed to be scheduled beginning in March 2018 as per an agreement to facilitate the cooperation of iHope (see Tr. pp. 338-42). The iHope program director also informed the CSE chairperson that, at that time, the parent asked for the student's annual review to be held "in April" (Tr. pp. 341-42). In consideration of these requests, the district issued a second meeting notice, dated March 1, 2018, scheduling the student's annual review for April 10, 2018 at 10:00 a.m. (see Dist. Ex. 3 at p. 1).[5, 6]

In an email to the district dated April 9, 2018, the parent—through her attorney—requested that the CSE chairperson "reschedule the IEP meeting previously planned for April 10, 2018" (Dist. Ex. 12 at p. 3; see Tr. p. 343).[7] In addition, the email indicated that the parent would "be in

[2] 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).

[3] Although the classroom observation occurred in January 2018, the report arising from that observation was dated March 7, 2018 (see Dist. Ex. 7 at pp. 1, 3). Based upon a review of the report, it appears that the student's speech-language therapy session took place somewhere outside of the student's classroom because the report reflected that the "[e]xaminer followed [the] para[professional] as she pushed [the student's] stroller to his session" and then left after bringing the student "to the speech therapist" (id. at p. 1).

[4] The January 2018 meeting notice identified, by name and title, the parent, a district special education teacher, and a district representative as individuals expected to attend the meeting (see Dist. Ex. 2 at p. 2).

[5] The March 2018 meeting notice identified the parent, a district special education teacher, a district general education teacher, a district representative, and a school psychologist as individuals expected to attend the meeting (see Dist. Ex. 3 at p. 2). In the March 2018 meeting notice, the same individual was listed as fulfilling the roles of both the district representative and the school psychologist for the April 10, 2018 CSE meeting (id.). The same individuals were identified as attendees for both the February 2018 and the April 2018 CSE meetings, with the exception of the district general education teacher who was only listed as an attendee at the April 2018 CSE meeting (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 3 at p. 2).

[6] In an email to the district dated April 6, 2018, the iHope program director provided the district with copies of the student's iHope IEP for the 2018-19 school year (dated April 2, 2018), a second quarter iHope progress report (dated January 12, 2018), assorted medical forms, and a transportation accommodation form in anticipation of the student's annual review on April 10, 2018 (see Dist. Ex. 12 at p. 4; see generally Dist. Exs. 16; 17).

[7] The April 9, 2018 email was documented in the district's "events log" in an entry dated April 11, 2018, the day

touch directly with the CSE within the week to find a mutually agreeable date and time to reschedule the meeting" (Dist. Ex. 12 at p. 3).[8] In a meeting notice dated April 13, 2018, the district invited the parent to attend the student's annual review rescheduled to April 27, 2018 at 9:00 a.m. (see Dist. Ex. 4 at p. 1).[9] In a prior written notice dated April 17, 2018, the district responded to the parent's April 9, 2018 request to reschedule the student's IEP meeting and summarized the attempts made to date to schedule and hold the meeting (see Dist. Ex. 11 at pp. 1-2).

In a letter to the CSE chairperson dated April 19, 2018, the parent wrote "to follow up on rescheduling [the student's] IEP meeting" (Parent Ex. T at p. 1). In particular, the parent requested that the "IEP meeting be a Full Committee Meeting" and that "a [district] School Physician participate in person" (id.). The parent also requested that the student's then-current special education teacher and related services providers at iHope (identified in the letter) be included on "any IEP Meeting Notice" and be sent a meeting notice (id.). The parent noted her availability for a meeting "Monday through Friday after 3:00 pm" and requested that the meeting be held at iHope (id.). In addition, the parent asked that "the CSE consider a placement in a non-public school and conduct the necessary evaluations for such consideration and any other evaluations prior to scheduling the meeting" (id.). The parent asked the CSE chairperson to "send [her] a few proposed dates and times in writing, either via email" or by mail to avoid any potential confusion when attempting to schedule a meeting "through the telephone" and advised that she would "provide the most recent progress reports and any other documentation for your consideration" once a meeting had been scheduled on a "mutually agreeable date and time" (id. at p. 2). Finally, the parent requested that the CSE meeting "be recorded" (id.).

Within the same week, the parent sent the district CSE chairperson a second letter dated April 24, 2018, which was the same as the parent's April 19, 2018 letter, verbatim (compare Parent Ex. U, with Parent Ex. T).

In a prior written notice dated April 26, 2018, the district responded to the parent's request to reschedule the student's CSE meeting and summarized the attempts made, to date, to schedule and hold the meeting (see Dist. Ex. 14 at pp. 1-2). The district also declined the parent's request to hold the CSE meeting at iHope "without further information regarding [the] request" but granted

after the meeting scheduled for April 10, 2018 (see Tr. pp. 344-45; Dist. Ex. 12 at p. 3).

[8] At the impartial hearing, the CSE chairperson testified that neither the parent nor the parent's attorney reached out to the CSE with dates or times to reschedule the meeting (see Tr. p. 345). She further testified that on April 17, 2018—and as reported in the district's "events log"—a district social worker contacted the parent to inquire about a date for the CSE meeting "that she would be able to participate in" (Dist. Ex. 12 at p. 3; see Tr. pp. 345-46; see also Tr. pp. 343-44). According to the events log, the parent "reported that her legal counsel [was] handling this and directed the [social worker] to follow up with them" and that her legal counsel would be "sending the information to her" (Dist. Ex. 12 at p. 3; see Tr. pp. 345-47).

[9] The April 2018 meeting notice identified the parent, a district special education teacher, and a district representative as individuals expected to attend the meeting (see Dist. Ex. 4 at p. 2). The individuals listed as the district special education teacher and the district representative differed from those expected to fulfill those roles identified in previous meeting notices (compare Dist. Ex. 4 at p. 2, with Dist. Ex. 3 at p. 2, and Dist. Ex. 2 at p. 2).

the parent's request for the participation of a district physician (id. at p. 2). In a meeting notice dated April 27, 2018, the district invited the parent to attend the student's annual review rescheduled to May 8, 2018 at 3:15 p.m. (see Dist. Ex. 5 at p. 1).[10] Shortly thereafter, the district sent a revised meeting notice, dated April 30, 2018, that included the names of the iHope staff members the parent had requested to be included on the meeting notice for them to attend the CSE meeting (compare Parent Ex. V at p. 1, with Dist. Ex. 5 at p. 2, and Parent Ex. U at p. 1; see also Tr. p. 351).[11]

On May 7, 2018 at approximately 1:00 p.m., the CSE chairperson received a letter via email from the parent's attorney (see Dist. Ex. 18 at p. 1).[12] The letter, also dated May 7, 2018, requested that a CSE reconvene to address the student's IEPs for the 2017-18 school year, as well as for the 2018-19 school year (id. at p. 2).[13] The parent's attorney further advised that, based upon the April 26, 2018 prior written notice, the May 8, 2018 CSE meeting "should not proceed" and listed the following as reasons to cancel that meeting: contrary to the parent's request, the meeting notice failed to offer more than one proposed date and time for the meeting; the proposed date and time for the meeting did not "work" for the parent and the parent could now attend a meeting scheduled "on any workday except Wednesdays, between the hours of 11 am and 4 pm" (excluding May 16, 2018); the meeting notice did not identify a parent member or a district school physician who would attend the meeting; and finally, the prior written notice did not indicate whether the district school physician would participate in person "at the proposed reconvene meeting to address the 2017-2018 IEP" (id. at pp. 2-3). The parent's attorney also reminded the district that, based upon the district's own "Standard Operating Procedures Manual (SOPM)," evaluations were necessary in order to consider the student's placement in a nonpublic school, and he requested that the district provide a "Draft Agenda of the IEP Meeting in writing at least seven [7] days" before the meeting (id. at pp. 3-4).

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[10] This second April 2018 meeting notice identified the parent, a district special education teacher, and a district representative as individuals expected to attend the meeting (see Dist. Ex. 5 at p. 2). In this instance, only the district special education teacher listed as an expected attendee was the same individual included on two of the three previous meeting notices; the individual listed as the district representative differed from the district representatives identified in previous meeting notices (compare Dist. Ex. 5 at p. 2, with Dist. Ex. 4 at p. 2, and Dist. Ex. 3 at p. 2, and Dist. Ex. 2 at p. 2).

[11] At the impartial hearing, the CSE chairperson testified that both the April 30, 2018 meeting notice, as well as the prior written notice, were sent to the parent via email on April 30, 2018 (see Tr. p. 353; Dist. Ex. 12 at p. 3). She further testified that on May 3, 2018, a district social worker attempted to contact the parent via telephone to remind her about the CSE meeting scheduled for May 8, 2018 (see Tr. p. 354; Dist. Ex. 12 at pp. 2-3). According to the district's "events log," the social worker left a message for the parent, inquiring about her participation at the upcoming CSE meeting and reminding her that "if [she was] going to participate assessments and progress reports w[ould] be needed" (Dist. Ex. 12 at p. 3).

[12] According to the email, the parent's attorney also attached a copy of the parent's previous letter and an IHO decision issued with respect to the parent's November 2017 due process complaint notice and impartial hearing (see Dist. Ex. 18 at p. 1; see generally Parent Ex. B).

[13] The parent's attorney noted that the "purpose" of the letter was to follow up on the parent's "written request"—via letter dated April 24, 2018—to reconvene a CSE meeting for both school years (Dist. Ex. 18 at p. 2). To be clear, the April 24, 2018 letter made no mention of reconvening a CSE meeting for the 2017-18 school year (see generally Parent Ex. U).

On May 8, 2018, the CSE convened to conduct the student's annual review and to develop an IEP for the 2018-19 school year (see Dist. Ex. 1 at pp. 1, 14; see Tr. pp. 355-56). Attendees at the May 2018 CSE meeting included a district special education teacher and a district representative; neither the parent nor the staff from iHope attended or otherwise participated in the meeting (Dist. Ex. 1 at pp. 1, 16).[14, 15] Finding that the student remained eligible for special education as a student with multiple disabilities, the May 2018 CSE recommended a 12-month school year program in 12:1+(3:1) special class placement with the following related services: three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of speech-language therapy in a small group, and one 30-minute session per week of individual vision education services (id. at pp. 1, 10-11).[16, 17] In addition, the CSE recommended that the student receive the "group service[s]" of a full-time (health) paraprofessional, as well as a full-time paraprofessional for transportation (id. at p. 11). The May 2018 IEP also included strategies to address the student's management needs, annual goals with corresponding short-term objectives, and a recommendation for special transportation services (id. at pp. 5-10, 13).

In a prior written notice to the parent, dated June 19, 2018, the district summarized the special education program recommendations and enclosed a school location letter identifying the particular district public school site to which the district assigned the student to attend for the 2018-19 school year (assigned public school site) (see Dist. Ex. 9 at pp. 1-2; 10 at p. 1).

By letter dated June 21, 2018, the parent—through her attorney—notified the district of her intention to unilaterally place the student at iBrain for the 2018-19 school year at district

[14] The district special education teacher and district representative who attended the May 2018 CSE meeting differed from the individuals listed for those roles on the April 30, 2018 CSE meeting notice (compare Dist. Ex. 1 at p. 16, with Parent Ex. V at p. 1).

[15] At approximately 1:00 p.m. on May 8, 2018, the CSE chairperson sent an email to the iHope program director to remind the school about the student's CSE meeting scheduled for that afternoon and that iHope should "feel free to submit any updated progress reports" to the district (Dist. Ex. 12 at p. 2). At the impartial hearing, the CSE chairperson testified that iHope staff did not attend or participate at the May 2018 CSE meeting (see Tr. pp. 357-58). The district school psychologist who attended the May 2018 CSE meeting testified at the impartial hearing that the district special education teacher made telephone calls to both the parent and iHope during the CSE meeting in attempts to get their respective participation at the meeting (see Tr. pp. 127-33; Dist. Ex. 12 at p. 2). According to the district's "events log," the iHope program director was involved in another meeting at the time of the May 2018 CSE meeting and the school expressed that it had no knowledge "'about this meeting'" and advised the district special education teacher to "'please call back tomorrow'" (Dist. Ex. 12 at p. 2). In addition, the CSE chairperson testified that iHope—throughout its communications with the district—had made it "very clear . . . that, unfortunately, they were not going to be able to participate because they did not have consent from the parent or the parent's attorney" (Tr. pp. 357-58).

[16] According to the IEP, the May 2018 CSE recommended that all related services be delivered to the student in a separate location (see Dist. Ex. 1 at pp. 10-11).

[17] Although the student's eligibility for special education is not in dispute, the parent contends that the student should be eligible for such programs and services as a student with a traumatic brain injury (TBI) (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]; see also Parent Ex. A at p. 2), and not as a student with multiple disabilities (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

expense (see Parent Ex. G at p. 1).[18, 19] In the letter, the parent alleged that the district had not conducted a CSE meeting for the student and had not "offered" the student a program or placement that could "appropriately address his educational needs" for the 2018-19 school year (id.). The parent also indicated that she had "repeatedly requested the CSE to conduct a Full Committee Meeting" with a district school physician in attendance in order to develop the student's IEP but that the district had "not properly responded to this request" (id.). The parent also indicated that she was "still requesting the CSE schedule an appropriate IEP meeting at a mutually agreeable date and time to allow for all mandated members of the IEP team to participate" (id.).[20]

A. Due Process Complaint Notice

By due process complaint notice dated July 9, 2018, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (see Parent Ex. A at pp. 1, 2). Specifically, the parent asserted that the district committed "several substantive and procedural errors" in the development of the May 2018 IEP and regarding the "subsequent placement recommendation" at the assigned public school site (id. at p. 2). The parent noted that she rejected both the May 2018 IEP and the assigned public school site "in their entirety" (id.). The parent alleged that the May 2018 CSE failed to hold the "annual review meeting at a time that was mutually agreeable" with the parent and that complied with the parent's request for a "Full Committee meeting" to discuss the student's needs for the "extended school year" (id.). Relatedly, the parent contended that the May 2018 IEP was not appropriate because neither the parent nor "any of the mandated members" attended the May 2018 CSE meeting held to develop the IEP (id.). Next, the parent asserted that the student would be "expose[d]" to substantial regression as a result of the "12:1+(3:1)" special class placement recommended in the May 2018 IEP and due to the "significant and unsubstantiated reduction in the related services mandates" in the IEP (id.). With respect to the "recommended program and placement," the parent alleged that it failed to meet the student's "highly intensive management needs [that] requir[ed] a high degree of individualized attention and intervention," it did not constitute the student's least restrictive environment (LRE), and the student-to-teacher ratio of the special class placement—here, "12:1(3:1)"—was "too large a ratio to ensure the constant 1:1 support and monitoring" the student required to "remain safe" (id. at pp. 2-3). The parent also alleged that the student-to-teacher ratio did not "offer the 1:1 direct instruction and support" the student required to make progress (id. at p. 3). The parent further asserted that the May 2018 IEP was not based upon "any individualized

[18] The parent sent the June 21, 2018 letter—or 10-day notice—to a CSE that had not been previously responsible for scheduling or conducting the student's annual review for the 2018-19 school year because iBrain—the nonpublic school the parent selected for the student to attend for the 2018-19 school year—was not physically located within the same geographic boundaries served by the CSE responsible for the student's programming when he attended iHope during the 2017-18 school year (see Tr. p. 270; compare Parent Ex. G at p. 1, with Dist. Ex. 2 at p. 1, and Dist. Ex. 3 at p. 1, and Dist. Ex. 4 at p. 1, and Dist. Ex. 5 at p. 1, and Parent Ex. V at p. 1).

[19] 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).

[20] The parent executed an enrollment contract with iBrain for the student's attendance during the 2018-19 school year, which began on July 9, 2018 (see Parent Ex. N at pp. 1, 6). Although it is unclear from the document itself whether the parent executed the agreement on June 7, 2018 or July 7, 2018 (id. at p. 6), the IHO entered the enrollment contract into evidence with a date of "7/7/18" (Tr. pp. 82, 87-89; see Tr. pp. 628-30).

assessment" of all of the student's needs and, thus, would fail to "confer any meaningful educational benefit" to the student during the 2018-19 school year (id.).

In addition, the parent alleged that the May 2018 IEP was not appropriate because it failed to identify the student's eligibility category as traumatic brain injury (TBI) (see Parent Ex. A at p. 2). The parent also alleged that the May 2018 IEP failed to adequately describe the student's present levels of performance and management needs and also failed to include measurable annual goals (id.). As a result, the parent contended that the May 2018 IEP did not reflect the student's "individual needs" (id.). Finally, the parent asserted that the district's "specialized program" did not offer an "extended school day" that was "necessary to implement the related services" recommended in the May 2018 IEP (id. at p. 3).

As relief, the parent requested an order directing the district to directly pay iBrain for the costs of the student's full tuition for the 2018-19 school year, to pay the student's transportation costs that included the costs of a 1:1 travel aide, and to reconvene a CSE meeting for the student (see Parent Ex. A at p. 3).

B. Impartial Hearing Officer Decision

On July 20, 2018, the parties proceeded to an impartial hearing and presented evidence regarding the student's pendency (stay-put) placement and services (see Tr. pp. 1-61). In an undated, interim order, the first IHO assigned to this matter determined that the following constituted the student's pendency placement and services retroactive to the date of the due process complaint notice: the student's attendance at iBrain funded by the district either via direct payment to iBrain, or, as reimbursement to the parent for the 12-month, 2018-19 school year, together with round-trip special education transportation with a transportation paraprofessional, three 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, three 60-minute sessions per week of individual vision services, four 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of speech-language therapy in a group, and one 60-minute session per month of parent counseling and training services (see IHO Ex. IV at pp. 5-6).[21]

On August 13, 2018, the parties resumed the impartial hearing, which concluded on March 27, 2019, after seven total days of proceedings (see Tr. pp. 1-688). In a decision dated June 12, 2019, the IHO found that the district offered the student a FAPE for the 2018-19 school year and dismissed the parent's due process complaint notice (see IHO Decision at pp. 13-26).[22]

[21] The "first IHO" assigned to this matter recused herself at some point after the impartial hearing was held to address the student's pendency placement and services and after issuing the interim order on pendency; thereafter, a second IHO resumed the matter and issued the final decision on the merits (compare Tr. pp. 1-61, and IHO Ex. IV at pp. 1, 6, with Tr. pp. 62-688, and IHO Decision at pp. 1, 26). Given the minimal participation of the first IHO in this proceeding and for purposes of clarity in this decision, other than this singular passing reference to the "first IHO," all other references to "the IHO" throughout the decision pertain to the second IHO who issued the final decision on the merits and will not be further distinguished as, for example, "IHO 1" or "IHO 2."

[22] The IHO's decision was not paginated (see generally IHO Decision). For ease of reference, citations to the IHO's decision will reflect pages numbered "1" through "30," with the cover page identified as page "1."

In support of the conclusion that the district offered the student a FAPE for the 2018-19 school year, the IHO initially noted that the district presented "several witnesses and documents" and determined, in particular, that he found the district school psychologist's testimony "to be credible and supportive" of the district's offer of a FAPE (IHO Decision at p. 17). Relying upon the school psychologist's testimony, the IHO indicated that: an "IEP team was assembled"; a meeting was held on May 8, 2018; and "[s]tudent documentation was reviewed" (id.). According to the IHO, the May 2018 IEP created at the meeting included the following: the student's "classification of multiple disabilities"; a detailed classroom observation of the student; February 2017 testing results; information obtained from a March 2017 "school report"; the CSE's consideration of "assistive technology"; and "detailed areas of diagnosis and conditions affecting [the] [s]tudent's special education needs such as severe global intellectual and developmental delays, seizure disorder, ocular atrophy, dependen[cy] in all areas of daily living, non-ambulatory, nonverbal, [and] communicate[d] via facial expressions, verbalizations, and switches" (id.). The IHO also indicated that the May 2018 IEP included "detailed management needs including continual 1:1 support, 1:1 paraprofessional, [and] school nurse services" as well as annual goals addressing the student's needs (id.).

After reporting the recommendations in the May 2018 IEP, the IHO indicated that the district witnesses "explained, and supported the IEP recommendations" (IHO Decision at p. 17). Turning to specific aspects of the IEP, the IHO found that the May 2018 CSE's decision to identify the student as eligible for special education as a student with multiple disabilities—as opposed to the TBI category used by iBrain on the student's 2018-19 iBrain IEP—was supported by the evidence (id. at pp. 18-19).[23] The IHO similarly found that the district witness testimony offered a "reasonable basis for the recommendation" of the 12:1+4 special class placement, and furthermore, supported a finding that this recommendation was neither "predetermined, nor the only type of program considered" (id. at pp. 17-18). Next, the IHO found that the May 2018 CSE based the related services recommendations in the IEP on the "information available" and that the related services addressed the student's "areas of need" (id. at p. 18). With respect to the parent's contention that the student required "full time nursing services," the IHO indicated that the CSE required "additional documentation" from the parent to "consider this service" (id.).

In addition, 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). While noting that the May 2018 IEP was not created "under ideal circumstances"—to wit, "without [p]arent attendance"—the IHO also noted that the IEP was developed based upon the "available information and evidenced consideration of the [s]tudent's special education needs and services to address each need," even if the IEP did not "perfectly" address each area of the student's needs (id. at p. 19). Moreover, the

[23] Referencing State regulations, the IHO concluded that the student could also have been found eligible under the categories of a student with a visual impairment, an orthopedic impairment, or an other health-impairment (see IHO Decision at pp. 18-19). Moreover, relying upon case law, the IHO found that the district demonstrated that the "program" recommended in the IEP "addressed the student's needs and was not developed based solely on his disability category classification, or otherwise restricted by any such classification" and therefore, the "disability category assigned to the student" did not require a finding that the district failed to offer the student a FAPE (id. at p. 19). Although the IHO referenced "the 06/05/2018 IEP," it is presumed that this was a typographical error and he meant the May 2018 IEP (id.).

IHO indicated that the parent "was able, at any time, to provide additional information" to the CSE and to "communicate a more willing desire to conduct an IEP meeting" (id. at p. 19).

Turning to the procedural allegations that the district failed to conduct a "timely meeting" and "properly notice" the May 2018 CSE meeting, the IHO initially opined that, since no CSE meeting had been held for the student for the 2017-18 school year, "any allegation related to timeliness must be viewed in light of the commencement of the July 2018 school year" (IHO Decision at pp. 19-20). The IHO found that, in this instance, the district began "planning for the IEP meeting as early as January 2018, and continuously" thereafter until the May 2018 CSE meeting took place—which, according to the IHO, allowed "enough time prior to" the start of the 2018-19 school year (id. at p. 20). The IHO also noted that during this timeframe the district met with the "school" and conducted a classroom observation of the student (id.).

Next, the IHO found no deficiencies in the May 2018 IEP related to the parent's allegation that the district failed to conduct "proper evaluations" prior to the CSE meeting (IHO Decision at p. 20). With respect to the insufficient evaluation claim by the parent, the IHO also concluded that, even if accurate, such insufficiency "could have been exposed" if the parent had provided "additional consistent . . . communication and cooperation through the process" and if the parent had provided "additional information for consideration" at the meeting from the student's then-current nonpublic school and service providers (id.). The IHO also rejected the parent's claim that the district failed to conduct the CSE annual review meeting at a "mutually agreeable date and time" (id.). On this point, the IHO found that the parent was not willing "to consider any [district] placement" and, according to the IHO, it appeared as though the parent "neither reviewed nor considered" the May 2018 IEP or the district's "offer of placement" (id.). Addressing the parent's testimony that she would not consider a district placement due to her concerns about the student's need for '"hands on attention,'" the IHO found that, if the parent had reviewed the May 2018 IEP, she would have noted "many areas" in the IEP documenting the student's "need for extensive individualized attention" (id.). In light of the foregoing, the IHO concluded that the May 2018 IEP offered the student a FAPE (id.).

Before drawing this ultimate conclusion, however, the IHO indicated—as further discussed within the decision—that the district had "made any [sic] legally required, and reasonable, efforts to obtain [p]arent participation and [to] keep up with the continuously changing parameters of the [p]arent meeting requirements" (IHO Decision at p. 20). Thereafter, the IHO considered the parent's allegations related to the composition of the May 2018 CSE and the meeting notices (id. at pp. 20-23).

With regard to the May 2018 CSE composition, the IHO explained that the evidence revealed the district's "early attempts to coordinate IEP meeting[s] with [iHope], and then [iBrain]," beginning in January 2018 (IHO Decision at p. 20). According to the IHO, the district met with iHope staff to prepare for the student's meeting, conducted a classroom observation, and began the task of scheduling the meeting (id. at pp. 20-21). The IHO noted that district witnesses "detailed some historical difficulties with setting up" CSE meetings for students who attended iHope but that, during the January 2018 meeting, the district received reassurances from iHope staff regarding their full commitment to work with the district and the parents '"so that we c[ould] have meetings with full participation'" (id. at p. 21). In addition, in March 2018 iHope staff

"indicated they would help facilitate scheduling and [p]arent attendance at the anticipated IEP meeting" (id.).[24]

The IHO indicated in the decision that the district—in January 2018—"began numerous communications [with the parent, the parent's attorney, and iHope] regarding actually trying to set up a meeting date" (IHO Decision at p. 21). In addition, the IHO found that, consistent with a parental request, the district had a physician available for the student's annual review meeting, which was ultimately scheduled for, and held on, May 8, 2018 (id at pp. 20-21).[25, 26] The IHO noted that the May 2018 CSE meeting was held without the parent or iHope staff in attendance, but only after making "[u]nsuccessful attempts" to reach the parent via telephone and upon receiving communication from iHope that the school "was unaware of the meeting and [the district was] told to call back the next day" (id. at pp. 21, 23).[27]

Next, the IHO recounted in detail much of the parent's testimony at the impartial hearing (see IHO Decision at pp. 21-23). Overall, the IHO found that, based upon the parent's testimony, she had not attended a meeting to develop an IEP for the student since May 2016 (id. at p. 21). The IHO also noted that the parent had "missed other [district] appointments, such as a social history appointment" scheduled most recently for February 2019 (id.). The IHO indicated that, according to the parent's testimony, she recalled receiving a notice for the May 2018 CSE meeting but she could not provide a reason for her failure to attend the meeting (id. at pp. 21-23). In addition, the IHO found that the district sent the parent an "appropriate meeting notice" on April 30, 2018 (id. at p. 23).[28]

More generally, the IHO found that the parent did not provide "any particular reason for any IEP meeting parameter in any letter," and moreover, the parent's conduct of "continuously setting meeting parameters and then cancelling the scheduled meeting" served to frustrate the district and its attempts to obtain "her participation in the IEP meeting throughout the process" (IHO Decision at pp. 22-23). While the IHO stopped short of accepting the district's argument that the parent, through her conduct, intentionally tried to "thwart" its efforts to "develop an IEP,"

[24] In the decision, it appears that the IHO mistakenly referred to March "2017," rather than March 2018 as reflected in the witness's testimony (compare IHO Decision at p. 21, with Tr. p. 337).

[25] In the decision, the IHO appeared to compare the process used by the district's CSE to develop the student's IEP with the process used for the development of the student's IEP at iBrain for the 2018-19 school year, noting in particular that neither a physician nor the parent participated in, or collaborated with, iBrain staff in the development of that IEP (see IHO Decision at p. 20).

[26] In the decision, the IHO noted that the hearing record did not include any evidence regarding the "[n]ecessity" of the physician's attendance at the student's annual review, other than the request made by the parent to secure a physician's attendance (IHO Decision at p. 20).

[27] As noted by the IHO, the evidence in the hearing record reflected that, in early April 2018, iHope—as the nonpublic school the student was attending during the 2017-18 school year—provided the district with "some information" in anticipation of the "upcoming IEP meeting" (IHO Decision at p. 23).

[28] The IHO also deemed "any failure to include a party" in a meeting notice to be "minor" and that the district "did continuously communicate" with iHope and the parent "throughout the process attempting to obtain input and attendance for the IEP meeting intended for the [20]18-19 school year" (IHO Decision at p. 19).

the IHO concluded that the parent's lack of attendance at the CSE meeting "cannot be used to fault the IEP developed" at the May 2018 CSE meeting and "any deficiencies in the IEP related to information the [p]arent and/or school could have provided" would not be attributed to the district (id. at p. 23).

As a final point, the IHO discussed equitable considerations related to the parent's request for tuition reimbursement (see IHO Decision at pp. 24-25). Here, the IHO noted that, although the parent acknowledged her signature on the enrollment contract for the student's attendance at iBrain, the parent "evidenced a lack of understanding of the contract and any amounts due thereunder" (id. at p. 24). The IHO also noted that the parent seemed "unaware" of who would be responsible to pay for the student's tuition costs, if not the district (id.).[29] In light of the foregoing, the IHO concluded that the hearing record did not include sufficient evidence to support that the parent had a legal obligation to pay for the student's attendance at iBrain for the 2018-19 school year, and therefore, equitable considerations did not weigh in favor of the parent's requested relief (id. at p. 25). In accord with these determinations, the IHO ruled that the district offered the student a FAPE and dismissed the parent's due process complaint notice (id. at p. 26).

IV. Appeal for State-Level Review

The parent appeals, arguing initially that the district's failure to present any witnesses to establish the assigned public school site's ability to implement the May 2018 IEP must result in a finding that the district failed to offer the student a FAPE for the 2018-19 school year. The parent contends that the IHO violated her due process rights by ignoring the absence of such evidence in the hearing record and concluding nonetheless that the district offered the student a FAPE. Next, the parent argues that the procedural violations—which the IHO failed to address—impeded the student's right to a FAPE, significantly impeded the parent's ability to participate in the decision-making process regarding the provision of a FAPE, and caused a deprivation of educational benefits. The parent contends that the IHO ignored these procedural violations and the evidence in the hearing record supports a finding that the alleged procedural violations denied the student a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding a provision of a FAPE, and/or caused a deprivation of educational benefits.

Characterized as substantive violations, the parent argues that the May 2018 CSE failed to include mandated members—a district school physician, a district social worker, a parent member, a parent or guardian, and a special education teacher of the student—and the parent did not provide written consent to excuse the attendance of any CSE members. Next, the parent points to an alleged error in the May 2018 IEP, which reported that the student's then-current nonpublic school, iHope, failed to provide the CSE with any teacher or provider progress reports and failed to participate in the CSE meeting to develop the student's IEP. The parent also asserts that the May 2018 CSE improperly changed the student's eligibility category from TBI to multiple disabilities. In addition, the parent asserts that: the May 2018 CSE failed to address the student's highly

[29] The IHO also noted that, although the parent entered an affidavit into the hearing record as evidence of her responsibility, via "contract," for the student's transportation costs, no such contract regarding the student's transportation services was offered into evidence (see IHO Decision at p. 24). The IHO also noted, however, that the hearing record failed to include any evidence that the district denied the parent's request for transportation services and moreover, failed to include any evidence that the parent was obligated to pay for the student's transportation costs (id. at pp. 24-25).

intensive management needs by recommending a 6:1+1 special class placement, consistent with requirements set forth in State regulation and in a district brochure; the CSE failed to recommend any assistive technology services; the CSE failed to "mandate a school [nurse]" notwithstanding the recommendation for nursing services within the management needs section of the May 2018 IEP; the CSE "failed to mandate" parent counseling and training services; the CSE improperly reduced the duration of the student's related services from 60-minute to 30-minute sessions and required all related services to be delivered in a separate location or on a pull-out basis, severely curtailing the providers' discretion for conducting the therapies; the CSE failed to create annual goals for the 1:1 paraprofessional; and the CSE failed to consider a nonpublic school for the student, ignored the parent's concerns, and thus failed to demonstrate the requisite open-mindedness in making its recommendations.

Finally, the parent argues that the IHO failed to conduct the impartial hearing in accordance with State regulation by allowing the district to present documentary and testimonial evidence that the district failed to disclose at least five business days prior to the impartial hearing. The parent also argues that the IHO made adverse inferences against the parent, improperly limited cross-examination of witnesses, and unfairly interrupted questioning of witnesses. The parent asserts that the IHO also issued the final decision beyond the 45-day timeline pursuant to State regulation and relied upon district witness testimony that was not credible in reaching his conclusions.[30]

As relief, the parent seeks an order finding that the district failed to offer the student a FAPE for the 2018-19 school year and directing the district to fund the student's tuition and related services costs at iBrain and transportation costs. The parent also seeks an order directing the district to change the student's eligibility category to TBI. In addition, the parent seeks findings that she sustained her burden to establish the appropriateness of the student's unilateral placement at iBrain and that equitable considerations weigh in favor of the parent's claims.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. In addition, the district alleges that the parent's request for review should be dismissed for failure to comply with the practice requirements governing appeals to the Office of State Review. The district further argues that the parent raises several claims on appeal that were not raised in the due process complaint notice.

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[30] The parent attaches additional documentary evidence to the request for review for consideration on appeal (see generally Req. for Rev. Ex. DD). In its answer, the district opposes the parent's request (see Answer at ¶ 27 n.2). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Upon review, the parent sought to submit the same documentary evidence at the impartial hearing in an attempt to impeach the district school psychologist's testimony that she was physically present at the May 2018 CSE meeting based upon a comparison of her signatures when she was allegedly present at a meeting versus when she allegedly attended a meeting via telephone, and the IHO denied the parent's request (see Tr. pp. 278-88). Because the parent now attempts to submit the same information for the same purpose on appeal (see Req. for Rev. at p. 10), the issue will be addressed within the context of the "Credibility" section of the decision below.

In a reply, the parent asserts that, because the district failed to claim prejudice as a result of the alleged procedural irregularities, the district's defense should fail.[31]

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).

[31] A reply is restricted by State regulation to addressing "any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal." (8 NYCRR 279.6[a]). With the exception of the reply to the district's defense that the request for review failed to comply with the practice requirements, the reply exceeds the scope of permissible content by impermissibly rehashing arguments set forth in the request for review.

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 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]).[32]

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

[32] 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).

F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district contends that the request for review must be dismissed for failure to comply with State regulation governing the form requirements for pleadings (see 8 NYCRR 279.8[a][2]). In particular, the district asserts that the text in the request for review was not double-spaced and, as a result, the parent circumvented the 10-page limit set forth in regulation, warranting the dismissal of the appeal.

State regulation provides 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]).

Here, even a cursory review of the parent's request for review demonstrates that, consistent with the district's contention, the parent's pleading violates the form requirements as it was not drafted with text double-spaced (see generally Req. for Rev.). When compared to the district's answer—which, appropriately double-spaced, includes approximately 23 lines of text per page—the parent's request for review includes approximately 32 lines of text per page (compare Answer at p. 7, with Req. for Rev. at p. 4). Without question, if the parent filed the same request for review with just 23 lines of text per page, the parent's pleading would far exceed the 10-page limit in violation of the form requirements. Thus, as argued by the district, the parent's failure to use double-spaced text effectively circumvents the 10-page limit and violates the requirements of the regulation.

While these form violations, alone, may not warrant an outright dismissal of the request for review, the parent's more egregious noncompliance—with regard to content requirements in State regulations—requires further consideration. In describing content requirements, section 279.8 of the State regulations requires that a request for review shall set forth:

(1) the specific relief sought in the underlying action or proceeding;

> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number

(8 NYCRR 279.8[c][1]-[3]). The regulation further states that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][4]).

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 or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]).[33] However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

In determining whether the parent's request for review violates the practice regulations, it may be necessary, at times, to review evidence in the hearing record and the IHO's final decision, itself, for irregularities that may have led to the parent's 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]). To this end, the IHO's decision has been summarized in detail above. Unlike the facts and circumstances in Application of a Student with a Disability, Appeal No. 19-009, the IHO's decision in this proceeding—while perhaps not the most artfully composed decision—resolved a number of issues in the district's favor with support for those findings drawn from the evidence in the hearing record (see IHO

[33] Because the parent's attorney has practiced before the Office of State Review in approximately 12 prior appeals and prepared pleadings that complied with State regulations in those matters, it is altogether unclear why the parent's attorney did not take the same care in preparing this appeal and replicate previous compliance. The undersigned SRO—as well as an SRO in a nearly identical appeal prepared by the parent's attorney and filed with the Office of State Review virtually simultaneously (Appeal of a Student with a Disability, Appeal No. 19-058)—contemplated rejecting the parent's request for review for its lack of compliance, and, as discussed more thoroughly in the decision, outright dismissing of the parent's appeal. Ultimately, while the merits of some issues in the request for review will be addressed, the parent's attorney is strongly cautioned that the failure to comply with the practice regulations in the future may result in dismissal of an appeal, in its entirety, and with prejudice.

Decision at pp. 17-25). In the event that an IHO's decision is not clear with regard to whether language within the decision constitutes an actual finding or determination by the IHO, it is up to the petitioning party—here, the parent—to err on the side of caution and to identify and appeal, with specificity, any and all issues that could be deemed to be findings or determinations; otherwise, the petitioning party runs the risk of having those issues deemed abandoned.[34] Upon review, the parent—through her attorney—does not assert that the IHO's decision was unclear or that any confusion arose as to what language constituted an actual IHO finding or determination that would make it difficult for the parent to draft a pleading that complied with the practice regulations (see generally Req. for Rev.).

Turning to the parent's pleading, State regulation requires that a request for review "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" (8 NYCRR 279.4[a]). Tethered closely to this requirement is the State regulation, set forth above, which mandates that a request for review set forth a "clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c][2]). Here, although it appears that the parent elected to organize the request for review in outline form using a combination of Roman numerals, letters of the alphabet, and numbers, State regulations call for the parent to use a numbering system to clearly "identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" in the request for review (compare Req. for Rev., with 8 NYCRR 279.8[c][2]). And while the parent's use of this organization scheme does not directly offend State regulations, the parent did not use the system selected to separately list the issues and identify the IHO's conclusions or findings being appealed; rather, the parent's organization scheme includes broad topic headings for the arguments contained thereunder that (with some limited exceptions discussed below) are phrased in terms of district or CSE error, rather than IHO error (see generally Req. for Rev.).[35]

For example, within section "III" of the request for review—titled "Argument"—the parent asserts the following: "A. [The District] Failed to Offer a FAPE to [the Student]" (Req. for Rev. at p. 3). This statement does not satisfy State regulation because it fails to identify the IHO's finding to which the parent takes exception or that the parent challenges, nor does the supporting statement thereafter identify any error made by the IHO; instead, the parent alleges that the district's failure "to present a witness to support its defense of [the] school location it offered" must result in a determination that the district failed to offer the student a FAPE (id.). The parent makes the same

[34] If the parent, or the parent's attorney for that matter, requires additional guidance on how to prepare pleadings in compliance with practice regulations, assistance, including samples forms for what is expected in a request for review, is available on the Office of State Review's website (see https://www.sro.nysed.gov/book/prepare-appeal).

[35] And while State regulations do not require that a request for review include a verbatim recitation of an issue as set forth by an IHO in a final decision, the parent's decision to largely ignore the IHO's findings in setting forth the issues presented on appeal in the request for review makes it difficult—if not impossible at times—to discern the IHO's specific "findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding" and the "precise rulings, failures to rule, or refusals to rule presented for review" consistent with State regulations (8 NYCRR 279.4[a]; 279.8[c][2]).

assertion in support of the heading set forth as section "III.A.3."—which the parent titled "CSE Failed to Recommend an Appropriate School Placement that Could Implement [the District's] IEP" (compare Req. for Rev. at p. 3, with Req. for Rev. at p. 7).[36] Consequently, the parent's abject failure to comply with the content requirements set forth in regulations within these two sections of the request for review (i.e., "III.A." and "III.A.3.") precludes review (8 NYCRR 279.4[a]; 279.8[c][2]).[37]

Within the same section "III," the parent, under subparagraph "A.1" titled "Procedural Violations," appears at first glance to move somewhat closer to compliance with the content requirements of the practice regulations (Req. for Rev. at p. 3). For example, while the parent continues to state facts and written arguments expressing her disagreement with the district's actions, the parent does manage to include one allegation of error on the part of the IHO: the "IHO failed to address many of [the allegations of procedural violations]" as raised by the parent (id. [emphasis added]). However, upon further inspection, the parent fails to clearly specify the unaddressed procedural errors to which she refers, and it appears that the IHO did in fact render findings on most, if not all, of the procedural allegations raised in the parent's due process complaint notice (compare IHO Decision at pp. 17-23, with Parent Ex. A at p. 2).

For example, with respect to the parent's claim that the May 2018 CSE meeting was not timely, the IHO found that, because a CSE meeting was not conducted during the prior school year, assessment of the timing for the meeting would be based on the 2018-19 school year and the May 2018 IEP was timely because it was in place prior to the start of the 2018-19 school year (IHO Decision at p. 20). Rather than contesting the IHO's specific finding, the parent repeats her initial claim that the CSE meeting notices referenced February 9, 2018 as the date by which the student's CSE meeting had to be held (Req. for Rev. at pp. 3-4). The parent's request for review does not identify the IHO's actual finding on this issue nor does it offer any grounds for departing from the IHO's finding; accordingly, it is not in compliance with the practice requirements set forth in regulations, precluding review (8 NYCRR 279.4[a]; 279.8[c][2]).

Additionally, the IHO made other determinations from which the parent has not specifically asserted any error on the part of the IHO. The IHO addressed the parent's attendance at the May 8, 2019 CSE meeting and found that the district made "legally required, and reasonable, efforts to obtain Parent participation and keep up with the continuously changing parameters of the Parent meeting requirements" (IHO Decision at p. 20). Within that determination, the IHO also reviewed the actions by the district and parent in scheduling and rescheduling the student's CSE meeting and found "the conduct of the Parent did serve to frustrate the DOE by continuously setting meeting parameters and then canceling the scheduled meeting" (id. at pp. 20-23). Rather than challenging the IHO's determinations regarding the parent's conduct or providing any reason why the parent's conduct should not have been considered by the IHO in making his determination, the parent's request for review merely reasserts errors in the district's notices (Req. for Rev. at pp. 3-5). As a consequence of the parents appeal of the IHO's purported failure to consider issues, rather than "identifying the precise rulings, failure to rule, or refusals to rule presented for review"

[36] The parent asserts the very same argument, again, in the beginning of section "III.A.4."—titled "IHO Violated Petitioners' Rights"—as support, in part, for the more general contention that the IHO mishandled the impartial hearing process (see Req. for Rev. at p. 7).

[37] Even if sufficiently plead, as set forth below, this "issue" falls outside the scope of review.

(8 NYCRR 279.8[c][2]), the parents have failed to "clearly specify the reasons for challenging the [IHO's] decision" (8 NYCRR 279.4[a]).

The use of broad and conclusory statements or allegations within a request for review does not act to revive any and all procedural violations the parent believes the IHO did not address without the parent specifically identifying which procedural violations meet this criterion (M.C., 2018 WL 4997516, at *23 [finding that "the phrase 'procedural inadequacies,' without more, simply does not meet the state's pleading requirement"]).[38] However, to the extent that this section of the request for review (i.e., "III.A.1.") focuses largely on a recitation of the parent's claim relating to the sufficiency of the CSE meeting notices and, to the extent the parent elsewhere in the request for review alleges more explicitly that the IHO "showed a . . . concerning permissive approach towards . . . procedural violations regarding meeting notices" (Req. for Rev. at pp. 7-8), this particular issue will be discussed below.

In section "III.A.2."—identified as "Substantive Violations Within IEP"—the parent merely reargues district errors and violations as a basis for the appeal and fails to identify even one error committed by the IHO (compare Req. for Rev. at pp. 3-5, with Req. for Rev. at pp. 5-7). Specifically, other than issues outside of the scope of review, discussed below, the parent reiterates CSE or district violations relating to CSE composition, the student's eligibility category, the ratio of the special class recommended in the IEP, and the duration of the recommended related services. However, as described in detail above, the IHO addressed these issues (see IHO Decision at pp. 17-23) and the parent has simply reiterated arguments presented to the IHO (compare Req. for Review at pp. 5-7, with IHO Ex. IV at pp. 13-23), without articulating why or how the IHO erred in his rejection of or failure to address those arguments. Appellate review is not designed for a party to have a second bite at the apple by simply relitigating a prior argument; on the contrary, the allegations must be clearly aimed at the findings in the IHO's decision (see 8 NYCRR 279.4[a]; 279.8[c][2]; cf. DiPilato v. 7-Eleven, Inc., 662 F. Supp. 2d 333, 340 [S.D.N.Y. 2009] [articulating a similar expectation for objections to a magistrate's report and recommendation]). Consequently, the parent's abject failure to comply with the content requirements set forth in State regulations within this section of the request for review (i.e., "III.A.2.") precludes review (8 NYCRR 279.4[a]; 279.8[c][2]).[39]

In the remaining sections of the request for review—section "III.A.4," titled "IHO Violated Petitioners' Rights" and section "III.A.5," titled "Witness Credibility," the parent's arguments are

[38] In order to comply with State regulations, the parent should instead identify an IHO's finding related to an alleged procedural violation, such as "The IHO Erred in Finding that the May 2018 CSE was Properly Composed" or "The IHO Erred in Finding that the May 2018 CSE was Not Required to Include a School Physician," and then include arguments with citations to the evidence in the hearing record to support why the IHO's finding should be reversed or vacated or somehow modified.

[39] In a similar vein, on the case information statement required by State regulation (8 NYCRR 279.2[e]), the parent also failed to accurately check the correct boxes pertaining to issues that she intended to raise in her request for review. With the exception of three issues, the parent checked every issue available on the form case information statement, including issues that were not even peripherally related to or raised at the impartial hearing, such as independent evaluations and child find. While the case information statement does not bind the parent to those issues checked, in this instance, the lack of care with which the case information statement was prepared further reflects the parent's attorney's cavalier approach to achieving a clear articulation of issues for which the parent seeks review on appeal.

more specifically targeted at the conduct of the impartial hearing and the IHO's decision and, therefore, come closer to complying with the practice requirements. Accordingly, the allegations set forth therein are discussed, in turn, below.

Finally, in weighing whether to dismiss the parent's appeal outright for the failure to comply with both the form and content requirements set forth in the practice regulations described above, another consideration is the parent or the parent's attorney's history of compliance. An examination of decisions issued in previous State-level administrative appeals in which the parent's attorney appeared yields no serious admonitions with respect to the pleading requirements of Part 279 (see Application of a Student with a Disability, Appeal No. 19-058 [listing cases]). However, the parent's 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 or a particular attorney'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, taking into account that the parent and her attorney have not engaged in a pattern of noncompliance in proceedings before this Office, the lack of compliance in the instant appeal will not result in a dismissal of the parent's appeal in its entirety but will severely circumscribe the issues to be addressed on the merits.

Overall on appeal, the parent does not grapple with the IHO's determinations within the request for review, but instead, reargues the district's alleged errors and violations as a basis for the appeal (see generally Req. for Rev.).[40] I will not sua sponte impute challenges to the IHO's decision that the parent has not clearly alleged, nor will I research and construct the appealing party's arguments or guess what the parent 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]; 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.

[40] Furthermore, to the extent that the parent elaborates or expands upon arguments in support of the issues in the request for review within the memorandum of law, or argues additional grounds upon which to conclude that the district failed to offer the student a FAPE for the 2018-19 school year solely within the memorandum of law, the parent's attorney is reminded that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of the Dep't of Educ., Appeal No. 12-131). State regulation directs that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered by [an SRO], except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). Thus, any arguments included solely within the memorandum of law have not been properly raised and will not be considered or addressed in this decision.

23, 2007]). Consequently, I will address only those portions of the request for review in which the parents allege that the IHO erred, as detailed above.

2. Scope of Review

Before addressing the merits, a further determination must be made regarding which claims are properly before me on appeal. To the extent discrete issues may be discerned from the request for review, the parent challenges, among other things, the appropriateness of the May 2018 IEP based upon whether the assigned public school site could implement the student's May 2018 IEP; the sufficiency of the district's prior written notice; the CSE's failure to recommend assistive technology services, nursing services, and parent counseling and training in the IEP; the failure to include annual goals for the paraprofessional in the IEP; the improper recommendation for all related services to be delivered to the student in a separate location (or on a pull-out basis); whether the CSE impermissibly engaged in predetermination by failing to consider the parent's concerns and the parent's request to consider a nonpublic school for the student's attendance during the 2018-19 school year; and the CSE's failure to reconvene subsequent to the parent's June 21, 2018 letter (see Req. for Rev. at pp. 3, 5-7). In its answer, the district asserts that the parent's failure to raise several issues in the July 2018 due process complaint notice precludes the parent from raising the same for the first time on appeal (see Answer ¶ 20).[41]

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b], 300.508[a]; 8 NYCRR 200.5[j][1]; Application of a Student with a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141). Under the IDEA and its implementing regulations, 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[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 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5,

[41] The district also asserts in its answer that the parent did not raise the CSE's alleged failure to "consult a doctor regarding the [s]tudent's classification" as an issue in the due process complaint notice and, therefore, that the parent cannot now raise this issue on appeal for the first time (Answer ¶ 20). Assessing how this allegation could be construed highlights some of the problems with the parent's request for review. This statement could be taken, as either, an issue being improperly raised for the first time on appeal, or alternatively, as an argument in further support of the parent's contention that the district improperly changed the student's eligibility category from TBI to multiple disabilities, or as merely support for the parent's contention that the CSE meeting notice(s) failed to list a physician as a committee member anticipated to attend the May 2018 CSE. If raised for the first time on appeal, the contention must be dismissed; if argued in support of the alleged improper classification issue, the parent did not sufficiently identify this as an issue to be reviewed on appeal and it must, therefore, be dismissed; and finally, if argued in support of the CSE meeting notice issue, it is addressed further below.

2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 Fed. App'x 65 [2d Cir. Jan. 30, 2014]; DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]).

In this instance, the parent—as the party requesting the impartial hearing—had the first opportunity to identify the range of issues to be addressed at the impartial hearing. Upon review, I find that the parent's due process complaint notice cannot reasonably be read to include the following challenges as issues to be resolved at the impartial hearing: whether the assigned public school site could implement the student's May 2018 IEP; the sufficiency of the district's prior written notice; the CSE's failure to recommend assistive technology services, nursing services, and parent counseling and training in the IEP; the failure to include annual goals for the paraprofessional in the IEP; the improper recommendation for all related services to be delivered to the student in a separate location (or on a pull-out basis); whether the CSE impermissibly engaged in predetermination by failing to consider the parent's concerns and the parent's request to consider a nonpublic school for the student's attendance during the 2018-19 school year; and the CSE's failure to reconvene subsequent to the parent's June 21, 2018 letter (see Parent Ex. A at pp. 2-3). Moreover, a review of the hearing record shows that the district did not agree to expand the scope of the impartial hearing, and the parent did not seek to amend the July 2018 due process complaint notice or seek permission from the IHO to amend the due process complaint notice prior to the impartial hearing to include such allegations as issues to be resolved at the impartial hearing (see generally Tr. pp. 1-688; Parent Exs. A-Z; AA-CC; Dist. Exs. 1-5; 7; 9-14; 16-18; 23; IHO Exs. I-XV).[42, 43]

[42] Nor could it be deemed that the district opened the door to such issues during the impartial hearing (see M.H., 685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018], appeal dismissed [2d Cir. Aug. 16, 2018]; see generally Tr. pp. 1-688; Parent Exs. A-Z; AA-CC; Dist. Exs. 1-5; 7; 9-14; 16-18; 23; IHO Exs. I-XV).

[43] At the impartial hearing, the district was prepared to present a witness "from the [assigned public] school [site] to testify that the IEP could be implemented" at another impartial hearing date (Tr. pp. 154-55). The IHO stated that he understood the "implementation" issue to be a "personnel issue," and furthermore, the IHO thought the parent's main contention was that the IEP was "not appropriate" no matter "where you take this IEP" (Tr. p. 155). The parent's attorney confirmed the IHO's characterization of the parent's "main contention": the IEP was not appropriate for the student's needs (Tr. p. 155). The parent's attorney also stated that "at that time" the parent was not "mak[ing] any judgment . . . as to whether or not a particular school . . . could have implemented it, but the main issue [was] the fact that the IEP itself—the recommended program" consisting of a 12:1+4 special class placement was "not appropriate" (Tr. pp. 155-56). As a result, the IHO opined that a witness for this purpose was not needed because "no one's raised that issue" (Tr. p. 156). During further discussion of the matter, the district's attorney noted that "some recent federal district cases" cite the district's obligation to make an "affirmative showing" with respect to the assigned public school site's ability to implement the "entire IEP" (Tr. p. 156). The district's attorney also noted, however, that the parent in this matter did not visit the assigned public school site and the district intended to argue those facts as equitable considerations (Tr. pp. 156-57). Through continued discussions, the parent's attorney stated that "it certainly wouldn't be incumbent upon [the parent] to visit a school to implement an improper IEP" (Tr. pp. 157-58). Ultimately, the parent's attorney acknowledged that it was not necessary for the district to present a witness from the assigned public school site (see Tr. pp. 158-161). The IHO also noted that whether the district needed such a witness may depend upon the parent's own testimony (see Tr. p. 160). Thus, although the district did not present a witness with respect to the assigned public school site's ability to implement the May 2018 IEP, it must also be noted that the parent did not raise this as an issue in the

Where, as here, the parent did not seek the district's agreement to expand the scope of the impartial hearing to include these issues and otherwise failed to raise these issues in the July 2018 due process complaint notice, the issues are not properly subject to review. To hold otherwise would inhibit the development of the hearing record for the IHO's consideration, and render the IDEA's statutory and regulatory provisions meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011] [internal quotations omitted]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the SRO because it was not raised in the party's due process complaint notice]). Consequently, the allegations—pertaining to whether the assigned public school site could implement the student's May 2018 IEP; the sufficiency of the district's prior written notice; the CSE's failure to recommend assistive technology services, nursing services, and parent counseling and training in the IEP; the failure to include annual goals for the paraprofessional in the IEP; the improper recommendation for all related services to be delivered to the student in a separate location (or on a pull-out basis); whether the CSE impermissibly engaged in predetermination by failing to consider the parent's concerns and the parent's request to consider a nonpublic school for the student's attendance during the 2018-19 school year; and the CSE's failure to reconvene subsequent to the parent's June 21, 2018 letter—raised by the parent now, for the first time on appeal, are outside the scope of my review, and therefore, these allegations will not be considered (see B.M., 569 Fed. App'x at 58-59; N.K., 961 F. Supp. 2d at 584-86; C.H., 2013 WL 1285387, at *9; Snyder v. Montgomery County Pub. Schs., 2009 WL 3246579, at *7 [D. Md. Sept. 29, 2009]).

B. Conduct of Impartial Hearing

1. Evidentiary Issues

The parent contends that the IHO's failure to preclude the district's introduction of witnesses and documentary evidence at the impartial hearing that the district did not timely disclose to the parent in accord with the five business day rule violated her rights. In addition, the parent asserts that the IHO "prejudiced [her] rights" by restricting the cross examination of the

due process complaint notice—which the IHO indicated during the impartial hearing (see Tr. p. 156; see generally Tr. pp. 1-688; Parent Ex. A). Moreover, the parent testified that she had never visited any district public school sites to which the student was assigned to attend based on a CSE's recommendations because she had not had the "opportunity" (Tr. p. 669).

district's witnesses, interrupting the cross examination, and otherwise preventing the parent's attorney from questioning witnesses.[44]

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 sets 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, any 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]).

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. Apr. 9, 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]).

With respect to the five-business day disclosure rule, the parent alleges that the IHO improperly admitted an affidavit offered by the district on the last day of the impartial hearing in contravention of the regulations, thereby violating her rights. Although the district did submit documentary evidence—an affidavit—on the final day of the impartial hearing, the district did so primarily at the request of the IHO and without any objection from the parent's attorney (see Tr. pp. 568-69; Dist. Ex. 23). At the penultimate impartial hearing date, the district's attorney indicated that he was prepared on that date to call a witness related to the parent's request to be reimbursed for the costs of the student's transportation (see Tr. pp. 319, 435-36, 449). However, given the limited information to be obtained from this district witness, the IHO stated that he

[44] In stark contrast to the allegations made on appeal, the parent—in the post-hearing memorandum she submitted to the IHO at the conclusion of the impartial hearing—did not raise any issues related to the conduct of the impartial hearing; rather, the parent indicated that "[b]oth the [p]arent and the [district] were afforded the opportunity to offer witness testimony, cross-examine opposing witnesses, and offer documentary evidence in support of their respective positions" (IHO Ex. XII at p. 5).

preferred that the district's attorney "make up an affidavit" for the witness and submit that document (Tr. pp. 437-49). The parent's attorney agreed with the IHO's suggestion, noting his preference for an affidavit as opposed to live testimony from the witness, and stating at one point that he would "likely ignore it" (Tr. pp. 449-52; see Tr. pp. 452-60, 463).

Before concluding the final day of the impartial hearing, the district's attorney inquired about whether the parent's attorney wished to cross-examine the affiant (see Tr. pp. 685-88). The parent's attorney stated that, while "we had already decided that the [district] would be allowed to admit these documents," he needed some time to decide whether cross-examination of the affiant was necessary (Tr. pp. 685-86). The IHO asked the parent's attorney to so advise him and the district prior to May 12, 2019 (see Tr. pp. 686-87). The hearing record does not contain any evidence that the parent's attorney expressed any need to cross-examine the affiant pursuant to the IHO's directive (see generally Tr. pp. 1-688; Parent Exs. A-Z; AA-CC; Dist. Exs. 1-5; 7; 9-14; 16-18; 23; IHO Exs. I-XV).

Given these facts, it appears that the parent waived any objection to the district's submission of the affidavit consistent with the five business day rule; moreover, the parent fails to articulate any prejudice as a result of the IHO entering the affidavit into the hearing record as evidence despite the district's alleged violation of the five business day rule (see, e.g., Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016] [explaining that, "[l]ike 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'" and finding "[n]o prejudice from the failure to notice [a witness's] testimony five days before the hearing (as opposed to the four days' notice given before her testimony) was articulated"], aff'd, 700 Fed. App'x 25 [2d Cir. July 7, 2017]). Consequently, the parent's contention on appeal is without merit and must be dismissed.

With respect to the argument that the IHO "prejudiced" the parent's rights by improperly interfering with cross-examination of the district witnesses, a review of the testimonial evidence does not support the parent's argument. In pertinent part, State regulation provides that an IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "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][c], [d]). Turning to the examples cited by the parent, when the IHO allegedly "cut off" the line of questioning relating to whether the parent's consent had been obtained in order to conduct the January 2018 classroom observation, the IHO explained that that part of the process was not relevant to determining whether the IEP was appropriate (Req. for Rev. at p. 8; see Tr. pp. 191-94). The IHO, upon his own questioning of the witness, learned that the witness was not responsible for obtaining consent for the observation and thus, according to the IHO, it did not "matter" whether the witness knew if consent was required (Tr. pp. 192-93). Based upon the evidence, the IHO properly exercised his discretion to exclude such testimonial evidence as irrelevant pursuant to his authority (see 8 NYCRR 200.5[j][3][xii][c], [d]). To the extent that the parent asserts on appeal that this information was relevant to the IHO's analysis of equitable considerations, the parent's argument is not persuasive because, in its opening statement, the district did not raise the parent's conduct—that is, whether or not she provided consent for the observation—as a factor to consider when weighing equitable considerations (see Tr. pp. 109-

10).[45] Instead, the district raised factors, such as the parent's failure to attend the CSE meeting, iBrain's registration status as a "domestic" not-for-profit charity rather than a school, and the parent's attorney's potential conflict of interest in the outcome of the administrative hearing process, for the IHO's consideration (Tr. pp. 109-10).

As for the parent's contention that the IHO prevented her from establishing the district's "responsibility for deficiencies" in the CSE meeting notices by "curtailing" her attorney's line of questioning, the hearing record reveals—similar to the foregoing analysis—that the IHO found this information to be irrelevant and duplicative of what the meeting notices, themselves, reflected (Req. for Rev. at pp. 8-9; see Tr. pp. 200-04). Counsel for the parent asked the district school psychologist if "the parent [would] be entitled to rely upon this document only in terms of its information concerning the scheduling of the IEP meeting?" (Tr. p. 201). At the impartial hearing, the parent's attorney explained to the IHO that this line of questioning was necessary in order to elicit testimony that it was the district's "position . . . that the parent should rely on [the meeting notice], [and] not any other outside communication" (Tr. p. 202). Initially, counsel for the parent was requesting the district school psychologist's opinion regarding the consequences of the notice, rather than factual information such as whether the notice was sent, or if the information contained in the notice was accurate (see, e.g., Kaye v. Tee B. Corp., 151 A.D.3d 1530, 1531-32 [3d Dep't 2017] [questions disallowed as a part of a deposition because the challenged questions addressed the ultimate legal contentions, rather than factual issues]). Additionally, the parent provided testimony by affidavit and testified during the hearing; however, parent's counsel never questioned her as to whether she relied on the meeting notices or as to what specific information she relied on in preparation for the CSE meeting (Tr. pp. 679-77; Parent Ex. BB). In light of this, the IHO properly exercised his discretion in limiting the witness' testimony based on relevance pursuant to State regulation (8 NYCRR 200.5[j][3][xii][c], [d]).[46]

With regard to the parent's argument that the IHO improperly "interrupted" questioning that precluded her from establishing that the district had "no justifiable reason" for deficiencies in the March 2018 meeting notice—that is, the failure to include the names of the student's special education teacher and related services providers—this argument, too, is not supported by the evidence in the hearing record (Req. for Rev. at p. 9; see Tr. pp. 378-81). Initially, the question to which the district objected was repeated by parent's counsel and answered (compare Tr. p. 378, with Tr. p. 382). Further in discussing this point, the IHO stated that, to the extent that the district "failed to meet their obligation" on the March 2018 meeting notice by including these individuals as attendees, it was irrelevant as to "why" those individuals were not included (Tr. pp. 378-83; see generally Dist. Ex. 3). In addition, the evidence in the hearing record reveals that the parent did not request the attendance of the iHope teachers and staff until she sent a letter to the district, dated April 19, 2018 (see Parent Ex. T at p. 1). Based upon the evidence, the IHO properly exercised his discretion pursuant to State regulation (8 NYCRR 200.5[j][3][xii][c], [d]).

Finally, the evidence in the hearing record does not support the parent's contention that the IHO improperly "cut off questioning" related to the "availability of a [district] physician for

[45] Moreover, the parent did not allege in the due process complaint notice that the district failed to obtain her consent for the January 2018 classroom observation (see generally Parent Ex. A).

[46] Further, the parent's arguments relating to the CSE meeting notices are discussed in detail below.

participation" at the May 2018 CSE meeting (Req. for Rev. at p. 9; see Tr. pp. 390-93). Here, it is undisputed that a school physician did not attend or participate in the May 2018 CSE meeting (see Dist. Ex. 1 at p. 16); however, the CSE chairperson testified at the impartial hearing that, based upon the parent's request for the school physician's attendance made in her April 19 and April 24, 2018 letters, the CSE took steps to arrange for a school physician's participation at the meeting (see Tr. pp. 383-86; Parent Exs. T-U). The CSE chairperson also testified that there was no reason for the school physician's participation at the May 2018 CSE meeting because the parent—and the parent's attorney—who had requested the physician's attendance did not attend or participate in the meeting (see Tr. pp. 386-87). However, if the parent had attended the CSE meeting, the CSE chairperson testified that a school physician would have been available (see Tr. pp. 387-93). As the parent's attorney tried to follow up on whether there was documentation as to the availability of a physician for the CSE meeting, the IHO did cut off the line of questioning determining that no further information regarding the physician was required from the witness because "[w]e know there wasn't [a physician] at the meeting and we don't have any documents to tell us that one was available" (Tr. pp. 391-92).[47] While, in rendering his decision regarding the meeting notices, the IHO may have found that the witness's testimony that a physician was available at the May 2018 CSE meeting outweighed the lack of documentary evidence supporting such an assertion, in rendering my determination herein, I do not rely on this part of the witness' testimony, but ultimately reach the same outcome as the IHO on this issue. Accordingly, any error on the part of the IHO in not allowing additional questioning on this issue is not determinative.

2. Timeliness of Impartial Hearing Officer's Decision

As for the timeline for the impartial hearing, the IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). However, extensions may only be granted consistent with regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). Pursuant to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

In this matter, after the IHO's appointment in August 2018 (see IHO Ex. I), the evidence in the hearing record reveals that the IHO granted a total of approximately seven extensions to the compliance date (see generally IHO Exs. I; V-VI; VIII-X; XIV-XV). The parent, alone, initiated three extensions to the compliance date (see IHO Exs. V at p. 1; VIII at p. 1; IX at p. 1), and joined with the district in seeking the remaining four extension requests (see IHO Exs. VI at p. 1; X at p. 1; XIV at p. 1; XV). Upon review of the entire hearing record, there is no evidence that the parent, at any time, voiced an objection to further extensions to the compliance date beyond the timeframe set forth in federal regulation (see generally Tr. pp. 1-688; Parent Exs. A-Z; AA-CC; Dist. Exs. 1-5; 7; 9-14; 16-18; 23; IHO Exs. I-XV). Moreover, the extensions to the compliance date inured

[47] The April 26, 2019 prior written notice sent to the parent indicated that a physician would be present at the May 8, 2019 CSE meeting as per the parent's request (Dist. Ex. 14 at p. 2).

most favorably to the parent and student in this case, by extending the district's pendency obligations through the conclusion of the entire 2018-19 school year at issue and, in effect, providing the parent with most of the relief she requested in the due process complaint notice (compare IHO Ex. IV at pp. 5-6, with Parent Ex. A at p. 3). As a final point, after the final day of the impartial hearing, both parties submitted post-hearing briefs (dated May 6, 2019) to the IHO, and the IHO identified the actual record close date as "May 28, 2019" (see IHO Exs. XII at p. 30; XIII at p. 18; IHO Decision at p. 1). Given the actual record close date and the IHO's decision being issued on June 12, 2019, it appears that the decision was issued within 15 days—one day outside of compliance with the requirement that the decision be issued within 14 days—of the actual record close date (see 8 NYCRR 200.5[j][5]). However, notwithstanding the late issuance of the IHO's decision, the parent does not allege any basis for relief on this purported violation because she does not indicate how, if at all, the failure to issue the decision past the deadline affected the student's right to a FAPE (see Jusino, 2016 WL 9649880, at *6-*7 [explaining that "[c]ase 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 [FAPE]'"], quoting J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 671, 689 n.15, 689-90 [E.D.N.Y. 2012] [same], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]).

Further, in this matter, the parent's decision to unilaterally enroll the student at iBrain preceded the initial decision due date for the IHO to issue a decision 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 [the student] at [the unilateral placement]"]).

C. CSE Process—Meeting Notices

Generally, a school district is required to notify a parent of a CSE meeting on a form prescribed by the Commissioner of Education that, among other things:

> (i) inform[s] parent of the purpose, date, time, and location of the meeting and the name and title of those persons who will be in attendance at the meeting;
>
> (ii) indicate[s] that the parent(s) has the right to participate as a member of the committee on special education with respect to the identification, evaluation and educational placement of his or her child;
>
> (iii) state[s] that the parent(s) has the right to invite such individuals with knowledge or special expertise about his or her child, including related service personnel as appropriate, as determined by the parent(s); [and]

> (iv) for meetings of the committee on special education, inform[s] the parent(s) of his or her right to request, in writing at least 72 hours before the meeting, the attendance of the school physician member and an additional parent member of the committee on special education at any meeting of such committee pursuant to section 4402(1)(b) of the Education Law and include a statement, prepared by the State Education Department, explaining the role of having the additional parent member attend the meeting

(8 NYCRR 200.5[c][1], [2][i]-[iv]; see 34 CFR 300.322[b][1][i]-[ii]).

Both the IDEA and State and federal regulations specify the individuals required to fully compose a CSE (see 20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). Under State regulations, a CSE is required to include the parents of the student; one regular education teacher of the student if the student is, or may be, participating in a general education environment; one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a school psychologist; a district representative; an individual capable of "interpret[ing] the instructional implications of evaluations results"; a school physician if requested "in writing . . . at least 72 hours prior to the meeting"; an additional parent member if requested "in writing . . . at least 72 hours prior to the meeting"; "other persons having knowledge of special expertise regarding the student"; and "if appropriate, the student" (8 NYCRR 200.3[a][1]; see 8 NYCRR 200.1[xx] [defining "special education provider" as an "individual qualified . . . who is providing related services . . . to the student"]; 8 NYCRR 200.1[yy] [defining "special education teacher" as a "person . . . certified or licensed to teach students with disabilities"]).[48]

Here, the parent complains that the deficiencies in all of the meeting notices—more specifically, the failure to include the names and titles of the student's special education teacher and related services providers from iHope, a district school physician, a district social worker, and an additional parent member in the meeting notices—denied the student a FAPE (see Req. for Rev. at pp. 3-4; see generally Parent Exs. T-V; Dist. Exs. 2-5).[49] In addition, the parent complains that, although the January 2018 meeting notice purported to notify the parent about a CSE meeting scheduled for February 9, 2018, "this was not a real IEP meeting" because: the district made "no attempt to hold an IEP meeting"; and the district was not "prepared to proceed" on this date as the

[48] As a "city school district in a city having a population in excess of 125,000 inhabitants," the district had the option to appoint a subcommittee on special education (CSE subcommittee) to conduct the student's meeting (8 NYCRR 200.3[c]), which does include either a school physician or an additional parent member as a required member (8 NYCRR 200.3[c][2]). There is no indication in the hearing record that the CSE meeting notices—issued prior to the parent's April 19, 2018 letter specifically requesting a "Full Committee Meeting"—were intended to inform the parent that a CSE subcommittee would be conducting the student's meeting (see Dist. Exs. 2-4).

[49] To be clear, the parent indicates that, as set forth in the district's own "SOPM," the CSE was required to include the attendance of the district social worker who conducted the January 2018 classroom observation (Req. for Rev. at pp. 3-4; see generally Parent Ex. V; Dist. Ex. 7); however, there is no similar requirement for the participation of a social worker at a CSE meeting set forth in State or federal regulations (see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]).

classroom observation conducted in January 2018 had not been finalized (Req. for Rev. at p. 3; see generally Dist. Ex. 2). The parent also argues that the district cancelled the February 2018 CSE meeting "without any parental input" (Req. for Rev. at p. 3).[50]

Upon review, the evidence supports a finding that none of the CSE meeting notices included the names and titles of all of the individuals required to properly compose a CSE for the student's annual review (compare 8 NYCRR 200.3[a][1], with Dist. Ex. 2, and Dist. Ex. 3, and Dist. Ex. 4, and Dist. Ex. 5, and Parent Ex. V). However, any deficiency related to the failure to include the specific names and titles of either the student's special education teacher and related services providers, a district school physician, or an additional parent member can only be attributed to the meeting notices dated April 27 and April 30, 2018, as the parent had not previously identified the iHope providers she wanted to attend the CSE meeting or made a request in writing for the participation of the physician or an additional parent member until she provided the district with her letter dated April 19, 2018 (compare Parent Ex. T, with Dist. Ex. 2, and Dist. Ex. 3, and Dist. Ex. 4, and Dist. Ex. 5, and Parent Ex. V). Further, the April 30, 2018 CSE meeting notice—the last meeting notice sent prior to the May 2018 CSE meeting going forward—listed the student's iHope special education teacher and providers, as well as a district special education teacher/related service provider, a district representative, and the parent (Parent Ex. V at p. 1). Accordingly, the only deficiency in the April 30, 2018 CSE meeting notice was that it did not identify a school physician or an additional parent member (id.).

Nevertheless, any procedural violation, would only result in a finding that the student did not receive a FAPE if the procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Initially, the parent has not set forth an argument as to how the district's failure to identify a school physician or an additional parent member impeded the student's right to a FAPE or significantly impeded the parent's opportunity to participate in the decision-making process.[51] Additionally, the hearing record does not contain any evidence upon which to determine that any meeting notice deficiency warrants such a conclusion, especially when the individuals who would have provided the most pertinent information about the student—to wit, the parent and iHope staff—failed to attend the CSE meeting even though they had been properly included on the April 30, 2018 meeting notice

[50] The parent also complains that all of the meeting notices included a statement indicating that the student's "'IEP Meeting must be held no later than 02/9/2018" (Req. for Rev. at pp. 3-4; see generally Parent Ex. V; Dist. Exs. 2-5).

[51] The parent asserts on appeal that a doctor was needed at the CSE meeting because the CSE improperly changed the student's disability classification from a classification of traumatic brain injury to one of multiple disabilities (Req. for Rev. at p. 6). Similar to other arguments that were found not to be permissible appeals, the request for review does not challenge the IHO's findings with respect to classification. The IHO not only found that a classification of multiple disabilities was appropriate for the student, but also found that "absent convincing evidence that the student's program was inappropriately developed based solely on her classification as a student with multiple disabilities, rather than her needs, the disability category assigned to the student does not require a finding that the district failed to offer the student a FAPE" (IHO Decision at p. 19). As the parent does not challenge this finding, it is final and binding (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]) and I cannot find that the district denied the student a FAPE by changing the student's classification.

(compare Parent Ex. V, with Dist. Ex. 1 at p. 16).[52] Accordingly, any error in the meeting notices did not result in a denial of FAPE to the student.

D. Credibility

As a final issue, the parent asserts that the IHO improperly relied upon the district school psychologist's testimony, as this witness lacked credibility. In support of this contention, the parent alleges that the May 2018 IEP includes an inaccurate statement, contradicted by the evidence in the hearing record, and as an individual responsible for creating "this false information" in the IEP, the district school psychologist's testimony was "less than credible" (Req. for Rev. at p. 9). In addition, the parent accuses the district school psychologist of "not [being] truthful" about whether she physically attended the May 2018 CSE meeting as a basis to attack the witness's credibility and the IHO's credibility finding (id. at p. 10).

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 [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. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). As discussed below, the evidence in the hearing record does not present a reason to disturb the credibility determinations of the IHO.

Regarding the student's May 2018 IEP, the parent contends that the following statement was not true: iHope "did not provide Teacher/Provider Progress Reports, nor did they participate in the scheduled IEP Meeting" (Dist. Ex. 1 at p. 1).[53] The parent argues that evidence in the hearing record contradicts this statement, noting in particular that the district's "events log" documented that iHope provided the district—attached to an email dated April 6, 2018 and related to the CSE meeting scheduled for April 10, 2018—copies of the student's 2018-19 iHope IEP, a second quarter progress report, medical forms, and a transportation accommodation form (see Req. for Rev. at p. 9; Dist. Exs. 12 at p. 4; see also Dist. Exs. 16-17). At the impartial hearing, the parent's attorney pointed to the statement in the May 2018 IEP and asked the district school psychologist if that statement was, in fact, not correct (see Tr. pp. 309-10). After the district's attorney objected to the question, the IHO discussed the issue and indicated that, perhaps, a better question for the witness would be what was intended by that statement in the IEP because the IHO stated that the hearing record included a "series of notes going back, emails and letters, asking for additional

[52] The IHO determined that the parent "perhaps not intentionally, frustrated attempts to obtain her participation in the IEP meeting throughout the process"; another determination that the parent has not appealed from. Accordingly, even though there were procedural inadequacies in the meeting notices, considering the IHO's finding, I would be unable to find that the procedural inadequacies substantially impeded the parent's ability to participate in the CSE meeting. Additionally, there does not appear to be support for such a finding in the hearing record. Although the parent's attorney sent an e-mail the day before the May 2018 CSE meeting listing reasons for it to be rescheduled, the parent testified that she believed that she asked for the May 2018 CSE meeting to be rescheduled but did not remember the reason why (Tr. p. 625).

[53] It is undisputed that iHope staff did not participate at the May 2018 CSE meeting and the parent does not challenge this portion of the statement as being inaccurate or as reflecting on the witness's credibility (see Dist. Ex. 1 at pp. 1, 16; Req. for Rev. at pp. 9-10).

reports" and those reports "never made it to the meeting" (Tr. pp. 310-12). Although the parent's attorney did not ultimately take up the IHO's suggestion to ask a different question of the witness, the parent's attorney did confirm with the school psychologist that the CSE had the student's second quarter progress report from iHope (dated January 2018) (see Tr. pp. 312-13). The parent's attorney concluded the cross-examination of the school psychologist at that time (see Tr. pp. 313-14).

Therefore, while the evidence reveals that, contrary to the statement in the IEP, the district did receive at least one progress report from iHope and the student's 2018-19 iHope IEP, this fact, alone, does not undermine the IHO's finding in the decision that the district school psychologist's testimony was "found to be credible and supportive" of the district's offer of a FAPE to the student (IHO Decision at p. 17). This is also true because, as the IHO noted during the impartial hearing, the district requested updated information from the parent and iHope and those updated reports "never made it to the meeting" (Tr. pp. 310-12; see Dist. Ex. 12 at pp. 2-3 [seeking updated "assessments and progress reports" from the parent and/or iHope program director for May 8, 2018 meeting]).

With respect to whether the district school psychologist attended the May 2018 CSE meeting physically in person, the hearing record does not contain non-testimonial evidence justifying a contrary conclusion, nor does the hearing record, read in its entirety, compel a contrary conclusion. At the impartial hearing, the district school psychologist testified that she attended the May 8, 2018 CSE meeting with her "team" member (a district special education teacher), she described the physical location where the meeting was held, she identified those attending the CSE meeting through the attendance sheet attached to the student's May 2018 IEP, she verified her signature on the attendance sheet, and she described her roles at the CSE meeting as both the school psychologist and the district representative (see Tr. pp. 114, 117-18, 121, 123-24, 135, 144, 174-78; Dist. Ex. 1 at p. 16). More specifically, the school psychologist testified that her signature was denoted on the attendance sheet as the letter "I in the circle"—and further clarifying that her signature may "look[] like a T but it's typically an I in the circle" (Tr. p. 124; Dist. Ex. 1 at p. 16).

Upon cross-examination, the district school psychologist testified that, although she did not recall testifying during her direct examination that she physically attended the May 8, 2018 CSE meeting, she confirmed that she was "physically present" at the meeting (Tr. pp. 277-78, 281, 285-86). She further acknowledged that she "put [her] name" on the IEP attendance sheet, noting that it was her "handwriting" (Tr. p. 278; Dist. Ex. 1 at p. 16). At this point during cross-examination, the parent's attorney attempted to enter documents into the hearing record as evidence of "examples of this witness'[s] signature at IEP meetings for which she was present," which according to the parent's attorney, "varie[d] from what [was] indicated" as the school psychologist's signature on the attendance sheet for the May 2018 CSE meeting (Tr. pp. 278-79). The parent's attorney pointed out that the evidence was necessary as it related to the school psychologist's "credibility issue" (Tr. p. 279). Instead of admitting the documents, the IHO questioned the school psychologist about the meaning behind what appeared to be a "T with a circle around it" on the proffered evidence, which the IHO noted as typically referring to a party who "appeared by telephone" (Tr. pp. 279-80). Without seeing the documents in question, the school psychologist responded that she had handwritten both her name and "bilingual school psychologist" on the attendance sheet attached to the May 2018 IEP (Tr. p. 280). The IHO then asked "who wrote the T next to it" on the attendance sheet, and the school psychologist admitted

that she could have written it and that it was "very similar to how [she] sign[ed] [her] name, which [was] usually an I with a circle" (id.).

After a lengthy discussion about entering the proffered documents as evidence in the hearing record, the IHO declined to do so (see Tr. pp. 280-85).[54] Generally, the IHO declined to admit the documents proffered by the parent's attorney on this issue because, as he stated at the impartial hearing, he did not "need any documents to tell" him that the parent contended that the school psychologist was not physically present at the May 2018 CSE meeting (Tr. pp. 281-83). The IHO also stated that he was "not going to take a signature about what [the school psychologist] might have done in another meeting, because [he] wasn't there at that meeting and [he was] not going to start asking her about these dates and those meetings . . . and why she might have a put a T here" (Tr. pp. 282-83). The IHO also stated that it did not "matter to [him] what she signed or not" because the school psychologist testified that "she wrote her name here and for some reason, wrote a T" (Tr. p. 285). Thereafter, the parent's attorney continued the cross-examination of the district school psychologist, and upon further questioning, the witness testified that she "never appeared by telephone" at a CSE meeting and that all of the CSE meetings took place at her office at the location described during her direct examination (Tr. pp. 285-86; compare Tr. p. 286, with Tr. p. 121).

When reviewing the district school psychologist's signature on the attendance sheet, it is unclear whether her signature is represented by an "I" or a "T" with a circle around it (Dist. Ex. 1 at p. 16). Had this been the only evidence offered in support of whether the school psychologist attended the May 2018 CSE meeting in person, it presents a much closer call on this issue. However, the hearing record also includes evidence through the school psychologist's repeated testimony that she attended the meeting in person, as well as the handwritten language added to the attendance sheet—namely, her participation as a bilingual school psychologist and her handwritten name (see Tr. pp. 171, 277-78, 281, 285-86). Thus, when read in its entirety, the hearing record does not contain evidence justifying or compelling a contrary conclusion with regard to the school psychologist's credibility and, as such, due deference to the credibility findings of the IHO is warranted.[55]

VII. Conclusion

Having determined that the evidence in the hearing record establishes that the district offered the student a FAPE for the 2018-19 school year, the necessary inquiry is at an end and

[54] The parent submitted the same documents for consideration on appeal (Req. for Rev. Ex. DD); however, for much of the same reasons identified by the IHO, the documents are not relevant to the issue as to whether the school psychologist was physically present at the May 2018 CSE meeting.

[55] It may have been a better strategy for the parent's attorney to subpoena the district special education teacher who attended the May 2018 CSE meeting on this point, rather than attempting to introduce documents that would have required some sort of handwriting analysis to discern any distinctions between the purported signatures on these documents.

there is no need to reach the issue of whether iBrain was an appropriate unilateral placement for the student (Burlington, 471 U.S. at 370).[56]

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 25, 2019

STEVEN KROLAK
STATE REVIEW OFFICER

[56] On a final note, although the IHO found that the district offered the student a FAPE for the 2018-19 school year, the IHO also went on to address equitable considerations and found that the parent's conduct along with other factors weighed against any award of tuition for the 2018-19 school year (IHO Decision at p. 25). In the request for review, the parent did not appeal the IHO's decision on equitable considerations, and therefore, that determination is final and binding and it is unclear what relief, if any, I could award the parent even if I disagreed with the IHO's determination that the district offered the student a FAPE.