The University of the State of New York

The State Education Department
State Review Officer
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No. 19-076

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Cynthia Sheps, Esq.

Brain Injury Rights Group, attorneys for respondent, by Allison L. Corley, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for his daughter's tuition costs at the International Institute for the Brain (iBrain) for the 2018-19 school year. The parent cross-appeals from the IHO's determination which denied his request for full reimbursement of the student's attendance at iBrain. The appeal must be sustained in part. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student has been the subject of prior State-level administrative appeals of interim decisions rendered by impartial hearing officers (IHOs) regarding the student's pendency placement after the parent rejected the district's offer of a public school placement and unilaterally placed her at iBrain for the 2018-19 school year (see Application of the New York City Dep't of Educ., Appeal No. 19-039; Application of a Student with a Disability, Appeal No. 18-119). This State-level appeal relates to an interim decision on the issue of the district's offer of a free

appropriate public education (FAPE) rendered by a second impartial hearing officer (IHO 2) in the same proceeding, as well as an appeal from IHO 2's final decision.

The student has a history of traumatic brain injury due to Shaken Baby Syndrome, which resulted in a severe disability with respect to cognitive, language, social, and motor abilities in addition to cortical visual impairment (Dist. Ex. 21 at pp. 1, 6). The student is nonverbal, non-ambulatory, dependent in all areas of adaptive daily living skills and has diagnoses of seizure disorder, hip dysplasia, and scoliosis (Dist. Exs. 20 at p. 1; 21 at p. 1; 36 at p. 1).

By way of background, for the 2016-17 school year, a CSE, including the parent, convened on March 29, 2016 and developed an IEP for the student that recommended a 12-month school year program consisting of a 6:1+1 special class placement in a State-approved nonpublic school, the support of a 1:1 paraprofessional, special transportation, and the following related services: three 60-minute sessions of individual occupational therapy (OT); five 60-minute sessions of individual physical therapy (PT); five 60-minute sessions of individual speech-language therapy; and two 60-minute sessions of individual vision education services (Parent Ex. C at pp. 26-27, 30-31, 34). For the 2017-18 school year, a CSE convened on June 13, 2017 and, without the parent's attendance, developed an IEP for the student that recommended a 12-month school year program consisting of a 12:1+(3:1) special class placement in a specialized school, the support of a 1:1 paraprofessional, special transportation, and the following related services: three 40-minute sessions of individual OT; three 40-minute sessions of individual PT; three 40-minute sessions of individual speech-language therapy; and two 40-minute sessions of individual vision education services (Dist. Ex. 36 at pp. 13-14, 16-17, 19).

For the 2017-18 school year, the student was unilaterally placed at the International Academy of Hope (iHope), a nonpublic school, where she had been attending since September 2013 (Parent Exs. B at p. 3; D at p. 14). An IEP developed by iHope, dated March 13, 2017, reflected that the student's program consisted of 12-month services in a 6:1+1 special class with a 1:1 paraprofessional, special transportation, nursing and related services consisting of three 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, five 60-minute sessions per week of individual speech-language therapy, two 60-minute sessions per week of individual vision education services, two 60-minute sessions per week of individual assistive technology programming services, and one 60-minute session per month of group parent counseling and training (Parent Ex. D at pp. 1, 31, 32).

The June 2017 CSE and resultant IEP were the subject of a prior impartial hearing, which resulted in an IHO decision dated April 30, 2018 that found that the district failed to offer the student a FAPE for the 2017-18 school year, that iHope was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for relief (see Parent Ex. B at pp. 9, 11-12). The IHO in that matter ordered that the district fund the costs of the student's attendance at iHope, as well the costs of the student's related services, nursing services, and transportation for the 2017-18 school year, (id. at pp. 12-13). The IHO also ordered that the CSE reconvene to review the student's program within 30 days (id. at p. 30).

In preparation for educational planning for the 2018-19 school year, the district scheduled and re-scheduled appointments for a social history update and a psychoeducational evaluation of the student for January 20, 2018, March 11, 2018, May 29, 2018 (Dist. Exs. 18 at pp. 1-2; 19 at

pp. 1-2; 22; 23). Additionally, the district scheduled and re-scheduled a CSE meeting for April 16, 2018, June 1, 2018, and June 14, 2018 (Dist. Exs. 7 at pp. 1-2; 8 at pp. 1-2; 9 at pp. 1-2; 10 at pp. 1-2). The hearing record includes evidence of various correspondence between the parent and the district, district's computerized Special Education Student Information System (SESIS) log, as well as prior written notices from the district, regarding the attempts to schedule the evaluations, obtain teacher/progress reports from iHope, and schedule a CSE meeting, including the parent's requests for that the meeting notice list specific individuals to attend the CSE meeting (see Dist. Ex. 5 at pp. 4-10; 26 at pp. 1-3; 27 at pp. 1-3; 30 at pp. 1-5).

With respect to evaluations of the student, on February 9, 2018, the district conducted a classroom observation of the student at iHope (Dist. Ex. 13 at pp. 1-3). On May 29, 2018, the district completed a level I vocational interview with the parent as the informant (Dist. Ex. 16 at pp. 1-3). A psychoeducational evaluation was also conducted on May 29, 2018 (Dist. Ex. 21 at pp. 1-6).

On June 7, 2018 the parent signed an enrollment contract with iBrain for the student's attendance for the 2018-19 school year (Parent Ex. F pp. 1-6).[1]

The CSE convened on June 14, 2018 as planned to develop an IEP that would become effective July 1, 2018 for the 2018-19 school year (Dist. Ex. 1A at pp. 1, 13-14, 17). In attendance at the CSE meeting was a special education teacher, a school psychologist who also served as the district representative, an additional parent member,[2] and via telephone, a district physician (Dist. Exs. 2A; 3A at p. 1). Neither the parent nor the staff from iHope attended (see Parent Ex. 2A).[3] Having found that the student was eligible for special education services as a student with a traumatic brain injury, the CSE recommended a 12-month district program in a 12:1+(3:1) special class in a specialized school with related services to include three 40-minute sessions per week of individual OT, three 40-minute sessions per week of individual PT, three 40-minute sessions per week of individual speech-language therapy, and two 40-minute sessions per week of individual vision education services (Dist. Ex. 1A at pp. 1, 13-14). Additionally, the June 2018 CSE recommended individual, full time paraprofessional services for transportation and health (feeding) (id. at p. 14). The resultant IEP indicated that, because of the student's intensive management needs that required a high degree of individualized attention and intervention to

[1] 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).

[2] The "additional" parent member is a State rather than a federal requirement and, as referenced in this decision, means "an additional parent member of a student with a disability residing in the school district or a neighboring school district, provided that the additional parent member may be the parent of a student who has been declassified within a period not to exceed five years or the parent of a student who has graduated within a period not to exceed five years, if specifically requested in writing by the parent of the student, the student or by a member of the committee at least 72 hours prior to the meeting" (8 NYCRR 200.3[a][1][viii]).

[3] Noting that the parent did not cooperate with the "many attempts" to schedule the annual review and after repeated notices, the June 14, 2018 CSE review meeting minutes indicated that the parent did not attend the annual review to "implement IHO order on IEP" (Dist. Ex. 3A at p. 1). The June 2018 CSE meeting minutes also indicated that the district physician spoke to the student's pediatrician who agreed with the recommendation of 40-minute duration for related services sessions (id.).

maintain the student's basic physical well-being throughout the day, the student would be provided close monitoring to prevent injury and aspiration, controllable lighting to prevent seizure activity, close monitoring of the student's food and fluid intake, assistance with feeding, use of ankle foot braces during weight bearing activities, wedge/pillow or therapy ball to aid in positional changes when not seated in an adaptive stroller, repositioning several times during the day, minimal environmental noise to support focus, and alternative methods of access and communication available during the school day (id. at p. 6). To address the student's needs the June 14, 2018 IEP recommended multiple goals with accompanying short-term objectives to guide the student's interventions including goals for reading, mathematics, attending and vision education, motor skills, feeding/oral motor skills, communication including technology assisted support, activities of daily living (ADL), and social skills (id. at pp. 7-13). Regarding transportation accommodations and services, the June 14, 2018 IEP provided for a paraprofessional for the bus, and accommodations including a lift bus, air conditioning, limited travel time not to exceed 60 minutes, and a regular size wheelchair (id. at p. 16).

On June 21, 2018, the parent provided the district with a 10-day notice letter indicating his intent to unilaterally place the student at iBrain for the 2018-19 school year and to seek public funding for the placement (Parent Ex. P at p. 1). The parent stated that the district did not provide an appropriate program or placement to address the student's educational needs and that the district had not convened a proper annual review with the parentally requested members (id.).[4]

On June 22, 2018 iHope prepared a quarterly progress report that reflected the student's performance with regard to goals/benchmarks in literacy, mathematics, vision, conductive education, speech-language, assistive technology, physical and occupational therapy (Parent Ex. U at pp. 1-14). Additionally, the June 2018 progress report detailed the student's individualized health care plan and an update of numerous aspects related to the student's medical conditions (id. at p. 15).

The hearing record includes another IEP for the student's 2018-19 school year, which is identical to the June 14, 2018 IEP, with the exception of the special transportation recommendations (compare Dist. Ex. 4A at p. 16, with Dist. Ex. 1A at p. 16). The subsequent IEP noted that it was a reconvene meeting of the CSE but neither reflects the date of the reconvene nor includes a signature page documenting who participated in the reconvene (Dist. Ex. 4A at pp. 17, 19). The district's SESIS log indicated that the student's IEP was changed from a draft to a final document on June 23, 2018 (Dist. Ex. 5 at p. 3). Further, the district school psychologist testified that the reconvene meeting took place on June 23, 2018 at the CSE office with herself and a special education teacher in attendance (Tr. pp. 1295-1303).[5] At the time of the CSE reconvene meeting,

[4] In the parent's 10-day notice letter, the parent noted his previous requests that the CSE consist of the full committee, including a district school physician, to develop an appropriate and timely IEP for the 2018-19 school year (Parent Ex. P at p. 1). The parent asserted that, as of that date, the district had not properly responded to the request and that the request continued (id.). Additionally, the parent expressed his willingness to entertain an appropriate district program and placement (id.).

[5] The district school psychologist, when alerted to the fact that the date of the subsequent IEP remained June 14, 2018, seemed to backtrack from her characterization that the CSE reconvened and indicated that, "[w]e finalized something on the 23rd" (Tr. p. 1300); in any event, given the evidence of the nature of the amendment to the IEP and the fact that two district employees were in "attendance" when the amendment took place, the June 23, 2018

those who participated modified the student's transportation accommodations/services by removing the mandates for an air-conditioned bus and for limited travel time of under 60 minutes (compare Dist. Ex. 1A at p. 16, with Dist. Ex. 4A at p. 16).

The district sent the parent a prior written notice, dated June 23, 2018, summarizing the program recommendation, related services/supplementary aids, and services/assistive technology the CSE recommended, as well as other options considered but deemed not appropriate (Dist. Ex. 11 at pp. 1-3). On the same date the district sent the parent a school location letter identifying the specific public school site to which the district assigned the student to attend for the 2018-19 school year (Dist. Ex. 12 at p. 1).

The student began attending iBrain on July 9, 2018 (Tr. p. 117).

A. Due Process Complaint Notice

In a due process complaint notice dated July 9, 2018, the parent alleged that the district failed to offer the student a FAPE for the 2018-19 school year (Parent Ex. A at pp. 1-3). According to the parent, the district failed to conduct the June 14, 2018 CSE meeting with a "Full Committee" in accordance with the parent's May 8, 2018 meeting request and failed to conduct the CSE meeting at a mutually agreeable time with the required members including the parent (id. at p. 2). The parent further contended that the June 14, 2018 IEP "was not the product of any individualized assessment of all [of the student's] needs and [would] not confer any meaningful educational benefit for [the] 2018-2019 [school year]" (id.). The parent asserted that the June 14, 2018 IEP inadequately described the student's present levels of performance and management needs and contained immeasurable goals (id.). The parent asserted that the recommendations set forth in the June 14, 2018 IEP would cause substantial regression because the proposed 12:1+(3:1) special class was too large given the student's need for "constant" 1:1 support and monitoring to remain safe and also because the student required 1:1 direct instruction to make progress (id. at pp. 2-3). The parent further objected to the June 14, 2018 CSE's recommended changes to the student's related services (id. at p. 2). The parent also alleged that the district failed to offer the student programming in the least restrictive environment (LRE), the district's programming was inappropriate because it did not address the student's highly intensive management needs, and that the IEP lacked "extended school day" services (id. at pp. 2-3). As relief, the parent sought the costs of the student's tuition at iBrain for the 2018-19 school year, transportation costs including a 1:1 "travel aide," and that the district be required to reconvene the CSE to conduct an annual review meeting for the student (id.).[6]

amendment of the student's IEP shall be treated as a reconvene meeting of the CSE.

[6] The parent also sought an interim decision directing the district to pay for iBrain as the student's pendency placement (Parent Ex. A at pp. 1-2).

B. Impartial Hearing, Impartial Hearing Officer Interim Decisions, and State-Level Administrative Review Decisions

The parties proceeded to an impartial hearing on September 6, 2018 and addressed the student's pendency placement that day (Tr. pp. 1-152). At the hearing, the parent asserted that pendency lay in the unappealed April 2018 IHO decision, which found that the parent's unilateral placement of the student at iHope for the 2017-18 school year was appropriate and awarded direct funding and/or reimbursement for the costs of the student's attendance (Tr. pp. 48-49; Parent Ex. B at pp. 5-7, 11-13).[7] Further, the parent asserted that the student was attending iBrain pursuant to a unilateral placement by the parent, which constituted a valid placement for purposes of pendency because it was substantially similar to iHope (Tr. pp. 49, 52-54; IHO Ex. II at pp. 7-8).

By interim decision dated October 4, 2018, IHO 1 found that the basis for pendency lay in the unappealed April 2018 IHO decision (Interim IHO 1 Decision at p. 3). IHO 1 further found that, although a change in location does not necessarily constitute a change of placement, parents are not free to unilaterally transfer their child from one school to another, and that there had been no showing that iHope was unable to implement the student's pendency placement; therefore, IHO 1 concluded that iHope was the student's pendency placement (id. at p. 5).

Following the pendency hearing and issuance of the interim decision, the parties participated in a prehearing conference with IHO 1 on October 9, 2018, as well as an additional hearing date on October 16, 2018, during which several preliminary issues were discussed and some exhibits were received into evidence (Tr. pp. 153-394).

While the proceeding was pending before IHO 1, the parent filed an interlocutory appeal seeking State-level review of IHO 1's October 4, 2018 interim decision regarding the student's pendency placement. On November 21, 2018, an SRO issued a decision with respect to the parent's appeal of IHO 1's October 4, 2018 interim decision (Application of a Student with a Disability, Appeal No. 18-119). The SRO in that review found that the student did not receive vision education services from the time she entered iBrain on July 9, 2018 until at least the date of the September 6, 2018 pendency hearing (id.). The SRO further determined that the hearing record established that vision education services were an important component of the student's pendency program and, accordingly, a program without that service was not substantially similar to one that provides vision education services (id.). Noting the parent's representations in his memorandum of law that the student may have begun receiving vision services at some point since the pendency hearing, the SRO stated that, as the impartial hearing proceeded, the IHO should permit the parent to present evidence regarding the date on which vision services became available and, if the evidence supported it, find that the programs were substantially similar and enter an order directing the district to fund the student's stay-put placement at iBrain from the date that the programs became substantially similar (id.).

The parties convened for an additional hearing date on November 30, 2018, during which no testimony or documentary evidence was presented (Tr. pp. 395-509). By email dated December 4, 2018, IHO 1 recused himself, and IHO 2 was appointed on December 7, 2018 (Interim IHO 2

[7] The district conceded that the April 2018 IHO decision established the student's placement for purposes of pendency (IHO Ex. I at p. 12).

Decision at p. 3). The parties attended a prehearing conference with IHO 2 on December 18, 2018 and further hearing dates relating to pendency took place over three non-consecutive hearing dates between January 2, 2019 and March 12, 2019 (Tr. pp. 510-799). On March 19, 2019 and March 20, 2019, the first two hearing dates on the merits took place (Tr. pp. 800-1226).

In an interim decision dated March 25, 2019, IHO 2 addressed the issues of the parent's requests to record the hearing audio/visually and "post online, and live stream the proceedings," as well as the district's proposed subpoena, and went on to make findings on some substantive issues in the case "to provide the parties with guidance with respect to forthcoming testimony in the hearing dates . . . scheduled" (Mar. 25, 2019 IHO 2 Interim Decision at pp. 3-6). As relevant to the present matter, IHO 2 found that the evidence adduced at the impartial hearing thus far supported "limited findings that have bearing on potential future testimony and witnesses" (id. at p. 4). Specifically, IHO 2 found that the June 14 and June 23, 2018 IEPs were "not supportable on the record" and "must be deemed void" and that the district failed to meet its burden to show that the student was offered a FAPE for the 2018-19 school year (id.). Nevertheless, IHO 2 indicated his decision "d[id] not mean that the district no[] longer has any argument to put forward with respect to those IEPs," and acknowledged that "a substantial portion" of the district's case concerned the parent's alleged lack of cooperation with the district's efforts to develop an IEP (id.). Additionally, IHO 2 acknowledged that his interim findings were rendered before the testimony of a witness had concluded and indicated that the parties would be permitted to conclude examination of the witness when the hearing reconvened (id.).

In summarizing his findings relative to the June 2018 IEPs, IHO 2 first stated that the district's own witnesses confirmed that the June 23, 2018 CSE meeting was convened without notice to the parent and without the parent's participation (Mar. 25, 2019 IHO 2 Interim Decision at p. 5). IHO 2 determined that this was "a procedural defect that r[ose] to the level of invalidating that IEP by virtue of denying the family its right to participate" (id.). Next IHO 2 found that the district failed to provide prior written notice of the "diminution of services contained in that IEP," an additional procedural violation according to IHO 2 (id.). IHO 2 then determined that the CSE's removal of limited travel time and the provision of an air-conditioned vehicle from the student's special transportation mandate on the June 23, 2018 IEP was "without clinical support" and "based exclusively on a bureaucratic practice of the district" was "a substantive violation" that invalidated the IEP (id.). Concerning the June 14, 2018 CSE meeting, IHO 2 found that the testimony of district's witnesses "to date" demonstrated that this meeting was also held without the parent in attendance and resulted in a procedural violation that denied the parent participation "in the review and thereby" invalidated the IEP (id. at pp. 5-6).[8]

[8] In the context of discussing his refusal to sign the district's proposed subpoena, which was directed to the particular transportation company with which the parent contracted for the purpose of transporting the student to and from iBrain, IHO 2 also limited the direct testimony of the district's proposed two witnesses on the issue of transportation unless the district could demonstrate relevance (Mar. 25, 2019 IHO 2 Interim Decision at p. 4). IHO 2 further indicated that he would permit testimony from a physician with direct knowledge of the student and her medical records on the issue of the student's safety if transported back and forth from home and school without special transportation services (id. at p. 5).

By motion dated March 25, 2019, the district requested that IHO 2 recuse himself (see Dist. Motion for Recusal at p. 1). IHO 2 denied the district's request on the record (Tr. pp. 1247-49).

Two additional hearing dates on the merits took place on March 29 and April 12, 2019 (Tr. pp. 1227-1625).

In an interim decision regarding the student's pendency placement, dated April 15, 2019, IHO 2 determined that iBrain became substantially similar to the student's program at iHope on December 6, 2018, when the student began receiving vision education services on a face-to-face basis (Interim IHO 2 Decision at pp. 9, 15). IHO 2 then determined that the district had failed to provide pendency services prior to December 6, 2018 (id. at p. 14). IHO 2 further found that the student was entitled to compensatory educational services for the district's failure to provide pendency services as of the date of the filing of the parent's due process complaint notice (id. at pp. 14, 15).

The final three hearing dates on the merits (out of the seven total) took place between May 13, 2019 and June 7, 2019 (Tr. pp. 1626-2279).[9]

While the proceeding was pending before IHO 2, the district filed another interlocutory appeal seeking State-level review of IHO 2's April 15, 2019 interim decision regarding the student's pendency placement, and, on June 20, 2019, the undersigned issued a decision with respect to the district's interlocutory appeal (Application of the Dep't of Educ., Appeal No. 19-039). In Application of the Dep't of Educ., Appeal No. 19-039, I first took notice that IHO 2's determination of the date that iBrain became substantially similar to iHope on December 6, 2018 and was not challenged and, consequently, that on that date iBrain was the student's placement for the pendency of this proceeding. However, I found that IHO 2 erred in directing the district to provide compensatory educational services for a lapse in the delivery of pendency services during a period of time when the student's program at iBrain was not substantially similar to the program provided at iHope (id.). Nevertheless, acknowledging the parent's assertion that the student was receiving make-up vision education pendency services, I directed the district to pay for the student's placement at iBrain during the period preceding December 6, 2018 under pendency, but conditioned upon the submission of documentation such as, dated session logs/notes, showing that iBrain made up at least 37 of the approximately 40 missed sessions prior to December 1, 2019.[10]

[9] Including all of the hearing dates devoted to preliminary matters, pendency matters, and the merits, the impartial hearing took place over a total of 15 dates between September 6, 2018 and June 7, 2019 (Tr. pp. 1-2279).

[10] Since IHO 2's March 25, 2019 interim decision predated the April 15, 2019 interim decision, it was part of the hearing record in the district's interlocutory appeal from IHO 2's April 15, 2019 interim decision. In my decision in Application of the Department of Education, Appeal No. 19-039, I acknowledged the March 25, 2019 interim decision but noted that I "express[ed] no opinion on these interim directives at this juncture, as they d[id] not directly relate to IHO 2's pendency determination" (Application of the New York City Dep't of Educ., Appeal No. 19-039).

C. Impartial Hearing Officer Decision

In a final decision dated July 17, 2019, IHO 2 found that the district failed to offer the student a FAPE for the 2018-19 school year (IHO 2 Decision at pp. 6, 7, 9). As described above, in an interim decision, IHO 2 found the June 14 and June 23, 2018 CSE meetings were conducted without the parent's participation, thereby invalidating the resulting IEPs (Mar. 25, 2019 IHO 2 Interim Decision at pp. 5-6).[11] Further elaborating on those determinations, IHO 2 found numerous procedural deficiencies in the conduct of the June 14 and June 23, 2018 CSE meetings that resulted in a denial of a FAPE to the student (IHO 2 Decision at pp. 7, 8-9). Specifically, IHO 2 found that the district conducted both meetings without the parent in attendance, that the June 23, 2018 meeting was conducted without notice to the parent, and that, although changes were made to the student's transportation services at the June 23, 2018 CSE meeting, the district did not provide a prior written notice to the parent (id. at pp. 7-8). As to the parent's lack of attendance at the meetings, IHO 2 found that, even if the district "concluded in good faith . . . that family participation was simply not going to happen, it would have had to take many more steps than it did" (id. at p. 8).

With regard to the adequacy of the IEPs, IHO 2 found that the June 23, 2018 CSE's removal of limited travel time and the provision of an air-conditioned vehicle from the student's special transportation mandate—which represented the removal of "an existing, patently necessary, service from the IEP" in the absence of "clinical support," based solely on a "bureaucratic practice of the district"—was "a substantive violation" that denied the student a FAPE (IHO 2 Decision at p. 7 [emphasis in the original]). Further, IHO 2 noted that the recommendations set forth in the June 14, 2018 IEP—which largely carried over to the June 23, 2018 IEP with the exception of the special transportation—differed from the March 29, 2016 IEP, which IHO 2 characterized as the "last agreed upon IEP," in several respects, including: the change from a 6:1+1 to a 12:1+(3:1) special class; the change from a State-approved nonpublic school to a district specialized school; and the change in the frequency and duration of related services sessions (id. at p. 9). IHO 2 found that the changes represented "a vast diminution of service without a clinical foundation, without family participation, and without the participation of teachers and therapists from the student's then-current placement" (id.). Specific to the reduction in the duration of related service sessions from 60 minutes to 40 minutes, IHO 2 noted that, while district witnesses testified that they were skeptical about the 60-minute duration for the services, this did not address the reduction in the "total allocation of each therapy" (id.).

Turning to the unilateral placement, IHO 2 determined that iBrain was appropriate (IHO 2 Decision at pp. 9, 12-14). Specifically, IHO 2 found that the parent presented "detailed testimony and evidence" about iBrain (id. at p. 12). Further, while acknowledging that the legal standard differed, IHO 2 noted that the SRO decisions addressing the pendency determinations in this matter found that iBrain was substantially similar to iHope (id.). IHO 2 then went on to address each "specific objection" to iBrain that the district raised in its post-hearing brief (id. at pp. 12-14). First, IHO 2 rejected the district's argument that iBrain utilized a "'one size fits all' program," finding that this did not necessarily overcome a finding that the program was "individually-

[11] In another interim decision dated July 16, 2019, IHO 2 declined to consolidate this matter with another matter filed by the parent regarding the student's 2019-20 school year (July 16, 2019 IHO 2 Interim Decision)

tailored" (id.). Contrary to the district's argument that the iBrain IEP was "a non-thing," an inaccurate description of the student's program, and largely lifted from the iHope IEP, IHO 2 held that the iBrain IEP was "detailed and provide[d] considerable insight" and the fact that it relied on the iHope IEP was appropriate (id. at p. 13). IHO 2 also rejected the district's argument that the provision of related services in 60-minute sessions was "somehow such a serious form of maltreatment that it invalidate[d] the whole program" (id.). Next, IHO 2 found that there was testimony that the student made progress at iBrain and that unilateral placements were not held to LRE requirements (id.). IHO 2 also rejected the district's objection to the manner in which iBrain priced related services separate from the program (id. at pp. 13-14). Finally, IHO 2 found "no reason why" the licensure of the service provider—i.e., the provider was licensed as a medical transportation provider but not as a school bus provider—"would invalidate the placement" (id. at p. 14).

As for equitable considerations, IHO 2 characterized them as "a trainwreck" (IHO 2 Decision at pp. 5-6). IHO 2 found that the district's decision to proceed with the June 14, 2018 CSE meeting without the parent resulted in a denial of a FAPE but that the parent's "failure adequately to cooperate in the scheduling of the review render[ed] that defect, when viewed simply on its face, non-dispositive" and, therefore, the equitable considerations "counter-balance one other" (id. at p. 6). IHO 2 noted that where the "scale winds up at equipoise and does not affect the outcome of the case," the decision-maker could view the matter through a "third equitable lens"; namely, "what is fair to . . . the student" (id.). Ultimately, IHO 2 found that the district was responsible to fund "the reasonable costs" of the unilateral placement, "but not for any excesses the family may have lavished on beyond [an] appropriate IEP" (id. at pp. 6-7).

Based on the foregoing, IHO 2 ordered the district to place the student at iBrain for the 2018-19 school year, to reimburse the parent and/or directly pay iBrain for the cost of the student's attendance, and to reimburse the lowest cost of the student's related services and special transportation out of a series of options (IHO 2 Decision at pp. 14-16). Specifically, for related services, IHO 2 ordered the district to fund the lowest of the following: if the providers that delivered services to the student were independent contractors, the actual costs paid; if the providers that delivered services to the student were employees of iBrain, 1/25th of their annual salaries; or the lowest amount paid by the district to the same provider for comparable services during the 2018-19 school year (id. at p. 16). For transportation, IHO 2 ordered the district to fund the amount the provider would have received for the same services if funded by Medicaid or the rates delineated in the decision (id.).

IV. Appeal for State-Level Review

The district appeals IHO 2's interim decision dated March 25, 2019 and IHO 2's final dated July 17, 2019, which found that the district failed to demonstrate that it offered the student a FAPE for the 2018-19 school year. The district argues its due process rights were denied by IHO 2, who rendered an interim decision prior to the district completing its presentation of evidence or resting its case. In the alternative, the district argues that "even though it was limited by . . . IHO [2]," the district established that it offered the student a FAPE for the 2018-19 school year and, therefore, IHO 2's findings to the contrary must be annulled. Specifically, the district points to its multiple attempts to schedule a CSE meeting at a mutually agreeable time. As for the change to the student's transportation mandate at the June 23, 2018 CSE meeting, the district asserts that it should not

form the basis for a denial of a FAPE since the parent did not provide the CSE with the "requisite information in order to make this recommendation." Further, the district asserts that the June 14, 2018 CSE was "appropriately composed, considered appropriate and current evaluative material regarding [the student] that was made available to the CSE, and developed an IEP that was substantively and procedurally valid." The district characterizes that the June 14, 2018 IEP was "finalized" pursuant to a notice dated June 23, 2018.

Next, the district contends that the parent's unilateral placement of the student at iBrain was not appropriate. Specifically, the district argues that iBrain failed to provide the student with the appropriate vision education services she required, noting that the student received no vision services from July 9 through September 14, 2018, and she received most of her vision services remotely thereafter until December 5, 2018. With regard to equitable considerations, the district alleges that the parent prevented the CSE from obtaining evaluations and progress reports and refused to participate in the student's annual review.

As relief, the district requests that IHO 2's FAPE determination, as set forth in the interim and final decision, be annulled, and the matter be remanded to a different IHO to conduct a hearing on the provision of FAPE to the student for the 2018-19 school year. Alternatively, the district seeks a determination that the student was offered a FAPE for the 2018-19 school year and/or that the parent did not demonstrate that his unilateral placement of the student at iBrain was appropriate and/or that equitable considerations warrant a reduction or denial of the costs of the student's attendance at iBrain for the 2018-19 school year.

In an answer with cross-appeal, the parent alleges that the district was not prevented from presenting its case during the impartial hearing, the district failed to offer the student a FAPE for the 2018-19 school year, and that the parent's unilateral placement of the student at iBrain was appropriate. The parent cross-appeals from IHO 2's determination that equitable considerations warranted an award of less than the full costs of the student's related services and transportation for the 2018-19 school year.

In a reply and answer to the parent's cross-appeal, the district alleges that portions of the parent's cross-appeal were not properly asserted and were not responsive to the district's request for review and failed to comply with practice regulations. Further, the district argues that the parent's cross-appeal should be dismissed.

V. Applicable Standards

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

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

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

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

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[12]

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

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

VI. Discussion

A. Preliminary Matters

1. Conduct of Hearing

The district argues that, at the time of IHO 2's March 25, 2019 interim decision, it had not fully presented its case on its offer of a FAPE to the student for the 2018-19 school year, and further alleges that IHO 2 prevented it from doing so. The district requests that IHO 2's March 25, 2019 interim decision be annulled and the matter be remanded to a new IHO for a hearing on the issue of FAPE.

As a general matter, summary disposition procedures akin to those used in judicial proceedings are a permissible mechanism for resolving certain proceedings under the IDEA;

[12] 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).

however, they should be used with caution and they are only appropriate in instances in which "the parties have had a meaningful opportunity to present evidence and the non-moving party is unable to identify any genuine issue of material fact" (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]). State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the 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]).

Prior to IHO 2's March 25, 2019 interim decision, on March 19 and March 20, 2019, the district started presentation of its direct case by offering several exhibits into evidence (see Tr. pp. 859-85; Dist. Exs. 1-4; 1A-4A; 5-42),[13] making an opening statement (see Tr. pp. 973-92), and calling two witnesses: a district special education teacher from the particular public school site to which the district assigned the student to attend (see Tr. pp. 998-1112) and the district school psychologist who attended the June 14 and June 23, 2019 CSE meetings (see Tr. pp. 1113-1210; see also Tr. pp. 1301-02; Dist. Ex. 2A); the district completed direct examination of the district school psychologist but the intent was to continue with the parent's cross-examination of the witness at the next hearing date (see Tr. pp. 1208-10).

Before the next hearing date, on March 25, 2019, IHO 2 issued the interim decision (Mar. 25, 2019 Interim IHO 2 Decision). Initially, review of the timing and content of IHO 2's March 25, 2019 interim decision reveals that IHO 2 made what amounts to a summary determination on the merits without a request therefor, with no notice to the parties of his intent to reach a determination before the close of the district's case, and with no opportunity for the parties to be heard. To justify the timing of his determination, IHO 2 cited to State regulation, which provides that "[e]ach party shall have up to one day to present its case unless the [IHO] determines that additional time is necessary for a full, fair disclosure of the facts required to arrive at a decision" (8 NYCRR 200.5[j][3][xiii]; see IHO Decision at p. 4). While it is appropriate for IHO 2 to rely on this regulation in order to control the length of the hearing—particularly in a case such as the present, where significant delay had already occurred[14]—IHO 2 should have given the parties notice of his intention to limit the time allotted to each party to present a case, rather than catching the parties unaware in the middle of a party's presentation of evidence.

Despite the timing of the March 25, 2019 interim decision, review of the hearing record as a whole reveals that IHO 2 remediated his premature determinations during the subsequent hearing dates by providing the district with opportunities to present further evidence regarding its offer of

[13] Some of the district's exhibits were previously received into evidence during the pendency portion of the proceedings (see Tr. pp. 46, 649, 687, 794; Dist. Ex. 1-2; 4; 34; 41-42), but the IHO re-admitted them before commencing the merits phase of the hearing (see Tr. pp. 859-62).

[14] In Application of the Department of Education, Appeal No. 19-039, the undersigned noted the length of the proceedings to date, as well as IHO 2's efforts to conduct the hearing as expeditiously as possible.

a FAPE to the student, including evidence specific to the findings reached by IHO 2 in his March 25, 2019 interim decision. However, the district did not avail itself of these opportunities.

First, in the March 25, 2019 interim decision itself, IHO 2 indicated that, despite his findings, he would "continue to authorize further testimony and hearing dates as required for the parties to have a full and fair opportunity to make their respective cases and be heard" but indicated that he wished to limit the scope thereof (Mar. 25, Interim IHO Decision at p. 4). Further, during the hearing date on March 29, 2019, although IHO 2 acknowledged that he felt the testimony he had heard thus far was dispositive, he indicated that he did not "feel that [he was] at all inclined one way or the other with respect to the outcome, the final outcome of this hearing" (Tr. p. 1248). IHO 2 went on to tell the district that if it "had other evidence that [it] felt contradicted what [it] put into the record, . . . [he] would certainly be open to a proffer" (id.). In particular, IHO 2 indicated that, unless the district took "a different position about" the June 23, 2018 CSE, the testimony of the district witnesses thus far essentially amounted to a stipulation that the June 23, 2018 CSE had not been conducted pursuant "to the procedural requirements of parental participation" (id.). IHO 2 also noted that, if the district had witnesses to speak to the June 14, 2018 CSE and resultant IEP, it had "a plenary invitation to [call such witnesses] with respect to Prong III, and based upon a proffer with respect to Prong I" (Tr. p. 1249).

Subsequently, the parent's cross-examination of the district school psychologist was conducted and that witness's testimony concluded (see Tr. pp. 1293-1380). In addition, on March 29 and April 12, 2019, the district called two more witnesses: the CSE chairperson, who largely testified regarding the district's attempts to schedule a CSE meeting to develop the student's IEP for the 2018-19 school year (see Tr. pp. 1382-1477), and the district director of educational vision services, who testified in response to IHO 2's request for "objective" testimony about "the nature of vision education services" to inform IHO 2's understanding of issues relating to pendency (Tr. pp. 1485-86; see Tr. pp. 1490-1616).[15]

Later, on May 13, 2019, in discussing the course of the reminder of the impartial hearing, IHO 2 indicated his preference to hear the rest of the district's "Prong I case" first (Tr. pp. 1618-19). IHO 2 acknowledged that, given his interim decision, the district may wish to rest if it didn't "have anything new to change [IHO 2's] mind" (Tr. p. 1619). IHO 2 indicated that he then would like to hear the district's "Prong III case" (id.). On this point, IHO 2 stated his impression that his March 24, 2019 interim decision had not "done very much" in the way of "foreclosing [the district's] Prong I case," since, in his view, the district's "Prong I case was actually . . . being heard through a Prong III ear" (Tr. pp. 1619-20). IHO 2 also indicated that the district would have an opportunity to "come back again at the end of it all and present" rebuttal evidence (Tr. pp. 1620-21). IHO 2 also clarified that he did not intend "to hold either side strictly to the rules of evidence because they don't apply strictly in these hearings" and, therefore, it would not be "the case that

[15] IHO 2 specified that, although the witness was on the district's witness list, he did not want to hear from him regarding the district's case in chief; however, the IHO also indicated he would have some flexibility on the scope of the witness's testimony since another hearing had been cancelled and they had more time than originally anticipated (see Tr. p. 1486).

anything that's raised on rebuttal has to be narrowly defined as rebuttal testimony in the rules of evidence" (Tr. p. 1621).

At the next hearing date on May 13, 2019, IHO 2 inquired of the district's attorney what he would be presenting next, to which the attorney responded that he thought he made it clear in an email correspondence with IHO 2 that the district "would be presenting [its] rebuttal case after the Parent[] presented [his] case" (Tr. p. 1631).[16] IHO 2 responded that he did not "actually view it as a rebuttal case" but agreed that the email was clear (Tr. p. 1632). In response to the parent's characterization that the district "was resting [its] case," the parent would present his case, "[a]nd if there was a need for a rebuttal that would be determined after [the parent's] case," IHO 2 stated his recollection that, after the parent's presentation of evidence, the district wanted to put on a "Prong III case," which IHO 2 indicated was "not a rebuttal case" per se and could amount to "other things that hadn't come out" and that "the district could be free to bring those things to the forefront" without considering the evidence as "a new and additional burden on either side to make an affirmative showing of the equities" (Tr. pp. 1632, 1634). IHO 2 summarized as follows: "So the District has the case to make that their program and placement were appropriate. I've already given you my impression based on the record with reasons why I feel that that's not been the case. But that doesn't mean that the District can't make a showing of the underlying reasons why that happened that way" (Tr. pp. 1634-35). However, IHO 2 did state his understanding that, at that point, the district had "completed the testimony with respect to what would typically be called Prong I" (Tr. p. 1637).

Following this, the parent presented testimony by affidavit, and the two witnesses appeared on May 15, 2019 for cross-examination (see Tr. pp. 1694-1825, 1830-1990; Parent Ex. JJ; KK). On June 7, 2019, the district presented five witnesses: the special education compliance liaison for the district office of pupil transportation (Tr. pp. 2017-26), a program manager of the bus driver unit for the State Department of Motor Vehicles (DMV) (Tr. pp. 2027-73), the district regional director of speech services (Tr. pp. 2075-2144), and the district school health supervising physician (Tr. pp. 2145-2225), and recalled the district director of educational vision services (Tr. pp. 2225-74).

Based on the foregoing, the hearing record supports that, despite IHO 2's March 25, 2019 interim decision, the district was given many opportunities to present additional evidence regarding its offer of FAPE to the student, including an opportunity to make a proffer to IHO 2 and to present evidence for the purposes of rebuttal or regarding equitable considerations with broad leeway to go beyond such purposes. In no instance does the hearing record show that the district attempted to present witness testimony but was prevented from doing so.

Nevertheless, after an initial review, the undersigned determined that additional information might be relevant and necessary for a full review of the district's contention that, due to IHO 2's issuance of the March 25, 2019 interim decision, it was not allowed to fully develop the hearing record with regard to its offer of FAPE to the student (see 8 NYCRR 279.6[d]; 279.10[b]). In particular, in the March 2019 interim order, IHO 2 indicated that he reviewed the district's "proposed witness list" (Mar. 25, 2019 Interim IHO 2 Decision at p. 4) and, in the district's motion

[16] The referenced email is not a part of the hearing record on appeal.

for recusal, the district indicated that it had disclosed to IHO 2 and counsel for the parent "that there would be approximately 11 witnesses testifying" (Dist. Motion for Recusal at p. 1). However, the hearing record filed with the Office of State Review did not include a proposed witness list from the district. In order to determine whether the district was prevented from presenting any witness or whether any such testimony would likely have affected IHO 2's findings, the undersigned determined that a proffer from the district was appropriate. Accordingly, at the undersigned's direction, by letter dated September 5, 2019 from the Office of State Review, the district was directed to provide an offer of proof to include a list of witnesses and/or documentary evidence it was precluded from presenting during the impartial hearing. Additionally, the district was directed to provide a written summary of the thrust of the anticipated testimony of its proposed witnesses (see Letter to Bell, 211 IDELR 166 [OSEP 1979]). The district and the parent were given the opportunity to state their positions with regard to whether the requested proffer should be considered by the undersigned.

With a letter dated September 9, 2019, the district provided a witnesses list, dated March 13, 2019, as disclosed during the impartial hearing (Supp. Ex. 2), and, as requested by the undersigned, summaries of the thrust of the anticipated testimony of several of the witnesses included on the March 13, 2019 witness list (Supp. Ex. 3).[17, 18] With regard to the district's position regarding the undersigned's consideration of the proffer, the district opined that the actions of IHO 2 so exceeded the discretion afforded him by State regulation and deprived the district of its right to due process that the additional information was wholly irrelevant and "superfluous" but that, in any event, consideration thereof would "demonstrate[] the extent to which IHO 2 severely limited the [district's] presentation of its case-in-chief." The parent did not respond by letter to the Office of State Review; rather, the parent asserted in his answer with cross-appeal that the district's response to the Office of State Review was "misleading at best" (Answer with Cross-Appeal at p. 5). The parent argued that the majority of witnesses on the list provided by the district with its September 9, 2019 letter had already testified and that there was no evidence in the hearing record that IHO 2 had limited the scope of those witnesses' testimony.[19]

[17] Exhibits attached to the district's letter were labeled by the district as exhibit 2 (the March 13, 2019 exhibit list) and 3 (the summary of the anticipated witness testimony). It is assumed that the district continued its numbering, taking into account an exhibit attached to the district's request for review, which was labeled exhibit 1 (and was a copy of the district's motion for recusal). For purposes of this decision, the exhibits attached to the district's September 9, 2019 letter shall be referenced as supplementary exhibits with the respective number designations used by the district (see Supp. Exs. 2-3).

[18] The district does not argue that it was precluded from presenting documentary evidence during the impartial hearing.

[19] In the district's verified reply and answer to the cross-appeal, the district argues that, because the parent did not set forth his position in a letter, as directed by the September 5, 2019 letter from the Office of State Review, the parent waived his right to respond to the question of the undersigned's consideration of the proffer. While the parent's answer with cross-appeal sets forth arguments pertaining to the import of the information provided in the district's proffer, the parent does not argue for or against the undersigned's consideration of the information. Therefore, it was not impermissible for the parent to elaborate on its position in opposition to the district's appeal by reference to the district's proffer.

Of the 11 proposed witnesses included on the district's March 13, 2019 witness list all but three testified at the impartial hearing (compare Supp. Ex. 2, with Tr. pp. 957-2279).[20] The district's proffer describes the thrust of the anticipated testimony of 8 of the 11 listed witnesses but does not demonstrate that they would have offered testimonial evidence above and beyond that which was or could have been presented at the impartial hearing regarding the district's burden (compare Supp. Ex. 2, with Supp. Ex. 3). Among the witnesses who did testify at the impartial hearing, for example, the district indicates that the CSE chairperson would present testimony that "would have addressed [the] witness['s] role in drafting the June 2018 IEP recommendations for the Student for the 2018-2019 school year" (Supp. Ex. 3). Likewise, the district proposes that the district director of speech services and the district director of educational vision services would have offered testimony concerning the student's speech-language needs and vision needs, respectively, and how the recommendations in the June 2018 IEP would have addressed these needs (id.). However, neither the CSE chairperson, the district director of speech services, nor the district director of educational vision services attended the June 14, 2018 CSE meeting (Dist. Ex. 2A), so it is unclear what insight they could offer on the topic of the CSE's recommendations.[21] As other examples, the district indicated that the special education compliance liaison for the district office of pupil transportation would have presented testimony regarding the district's ability to provide transportation for the student pursuant to the recommendations in the June 2018 IEP and the district school health supervising physician would have testified about the student's medical needs and how the IEP addressed these needs (Supp. Ex. 3); however, even assuming that the parent's due process complaint notice raised issues such as the district's ability to implement the transportation recommended in the IEP or specifically the degree to which the IEP addressed the student's medical needs (see Parent Ex. A), it would seem unlikely that these witnesses could have offered the sort of testimony which would have resulted in a different result in this matter, considering the grounds upon which IHO 2 rested in finding that the district denied the student a FAPE. More importantly, with regard to these witnesses, the hearing record shows no instance where the district was precluded from pursuing a line of questioning directed at the topics outlined in its proffer when these witnesses testified at the impartial hearing (see Tr. pp. 1382-1477, 1490-1616, 2017-26, 2145-2225, 2225-74; Supp. Ex. 3).

The three individuals included in the district's proffer, who did not testify at the impartial hearing, are the special education teacher who participated in the June 2014 CSE meetings (compare Supp. Ex. 2, with Tr. pp. 1301-02; Dist. Ex. 2A), as well as the district supervisor of the office of occupational therapy and the district director of physical therapy (Supp. Ex. 2). With respect to the latter two witnesses, as with several of the witnesses described above, although the

[20] The individual named as the bus driver unit representative from DMV on the district's witness list did not testify (Supp. Ex. 2), however, as noted above, a different individual from the bus driver unit testified on June 7, 2019 (Tr. pp. 2027-2073). Further, as the district does not argue that it was prevented from presenting the testimony of the program manager of the bus driver unit for DMV, the special education teacher from the assigned public school site, or the district school psychologist, the testimony of these individuals is not summarized on the district's submission (see Supp. Ex. 3).

[21] This is not to say that these witnesses could not have provided testimony that set forth their expert opinions about the CSEs' recommendations but that sort of testimony, while at times persuasive, would be unlikely to have resulted in a different outcome in this instance, given the nature of the IHO's FAPE determinations.

district indicates that their testimony would have addressed the student's OT and PT needs, respectively, and how the IEP addressed those needs, since they did not attend the June 2018 CSE meetings, their testimony would have been unlikely to have added much to the district's case. The district may be on better footing in arguing that the lack of testimony from the district special education teacher could have been determinative, since she attended the relevant CSE meetings (see Dist. Ex. 2A). What remains lacking from the district's argument, however, is any indication that the district requested from IHO 2 an opportunity to call this witness or any other witness for that matter.[22]

In sum, the hearing record reflects that, although IHO 2's interim decision was inadvisable, the district was not subsequently precluded from presenting additional evidence to add to its direct case regarding its offer of a FAPE to the student for the 2018-19 school year. Moreover, although the district had an opportunity in its request for review, as well as in its proffer, to explicitly point to anticipated testimony that may have changed the result in this matter, it failed to do so. Accordingly, there is no basis in the hearing record to remand the matter to an IHO to receive additional evidence regarding the district's offer of FAPE to the student for the 2018-19 school year.

2. Scope of Review

Having found that the matter should not be remanded, next, a determination must be made regarding the scope of review.

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 that 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]). 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]).

Review of IHO 2's final decision reveals that he resolved a number of issues in the parent's favor, with support for those findings drawn from the evidence in the hearing record, which the district does not specifically challenge on appeal.

With regard to its offer of a FAPE to the student, the district does allege with some specificity that IHO 2's decision was based on an incomplete record (Req. for Rev. at ¶ 14);

[22] Moreover, if the district's opening statement was to be relied upon as an accurate representation of the evidence the district intended to present at the impartial hearing (see Tr. pp. 973-92), there is merit to IHO 2's characterization of the district's case as focused upon equitable considerations (see Tr. pp. 1619-20). In fact, the district's opening statement illustrates that the district was laser focused on the conduct of the parent and the inappropriateness of the parent's unilateral placement, rather than the procedural and substantive adequacy of the June 14 and June 23, 2018 IEPs (Tr. pp. 973-992). And the district does not argue on appeal that it was prevented from presenting evidence at the impartial hearing relevant to the appropriateness of the unilateral placement or equitable considerations.

however, as discussed above, despite the IHO's interim decision, the IHO gave the district several opportunities to present evidence regarding its offer of a FAPE to the student for the 2018-19 school year, and the district has failed to allege with any specificity what evidence it was prevented from presenting. Therefore, any deficiencies in the hearing record are the fault of the district, as the party bearing the burden of proof at the impartial hearing (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

The district also alleges that IHO 2's determinations "that the IEPs were procedurally and substantially [sic] invalid must be annulled" (Req. for Rev. ¶ 14). The district follows this statement of error by setting forth its position that the evidence in the hearing record supports a finding that the district attempted to schedule a CSE meeting for the student at a mutually agreeable time and held the meeting without the parent and staff from iHope only after attempts to secure the parent's participation proved futile (id.). Next, the district alleges that IHO 2's findings regarding the changes to the transportation mandate on the June 23, 2018 IEP were error (id.). Accordingly, as it is sufficiently clear that the district challenges these aspects of the IHO decision, they are discussed below.

However, other than these more specific examples, the district's appeal of IHO 2's finding of a denial of a FAPE consists of broad examples of how it purports have to offered the student a FAPE for the 2018-19 school year (i.e., the CSE "produced" the student's IEP on June 14, 2018 and "finalized" the IEP on June 23, 2018, was appropriately composed, considered appropriate and current evaluative material that was made available to the CSE, and developed an IEP that was substantively and procedurally valid and reasonably calculated to provide the student with a FAPE in LRE) (Req. for Rev. at pp. 7-8). These examples are set forth in terms of the CSE's actions, rather than IHO 2's errors (see id.).

In contrast, IHO 2 specifically determined that the recommendations of the June 14 and June 23 2018 IEPs represented a "vast diminution of service" relative to an earlier March 2016 IEP, which all parties had agreed was appropriate, without clinical support for the changes and without participation of the parent or the staff from the student's then-current nonpublic school (IHO Decision at p. 9).[23] IHO 2 noted the change from a 6:1+1to a 12:1+(3:1) special class, the change from a State-approved nonpublic school to a specialized school, and the change in the frequency and duration of related services sessions (id.). IHO 2 also found that the district failed to address at the impartial hearing the reduction of related services in terms of the total allocation of each service (as opposed to the durations alone) (id.). In its request for review, the district did not allege that the IHO erred in any of these findings. As such, IHO 2's determinations that the recommendations in the June 2018 IEP represented an unsupported diminution of services, including the reduction in related services, is final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[23] The district school psychologist testified that the June 14, 2018 CSE "drew on" the March 2016 IEP to develop the student's IEP for the 2018-19 school year (see Tr. p. 1360). Elsewhere in the hearing record, counsel for the parent characterized that the March 2016 IEP was "the last IEP that was agreed on between the parent and the [district]" (Tr. p. 274).

The district's failure to pursue IHO 2's specific findings in this regard is particularly detrimental to the district's appeal, since IHO 2's findings about the reduction in services are substantive in nature and, alone, support a finding that the district failed to offer the student a FAPE. Notwithstanding that the district's failure to appeal these findings is determinative of FAPE in this matter, the issues relating to the CSE process and transportation are addressed below.

B. CSE Process: Mutually Agreeable CSE Meeting Time and Parent Participation

As discussed above the district argues on appeal that the evidence in the hearing record supports a finding that the district attempted to schedule a CSE meeting for the student at a mutually agreeable time and held the meeting without the parent and staff from iHope only after attempts to secure the parent's participation proved futile. Notwithstanding that a discussion of these issues is not determinative, for the reasons set forth above, they will be addressed herein, particularly since they are also ultimately relevant to a discussion of equitable considerations, as discussed below.

First, as to the scheduling of the CSE meeting and the requirements regarding a parent's participation, federal and State regulations require school districts to take steps to ensure parent participation in CSE meetings, including: notifying the parent prior to the meeting, scheduling the meeting at a mutually agreed upon time and place, and "[i]f neither parent can attend an [CSE] meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls" (34 CFR 300.322[a], [c]; 8 NYCRR 200.5[d][1][iii]). A district may conduct a CSE meeting without a parent in attendance if it is unable to convince the parents that they should attend; however, in such instances, the district is required to maintain detailed records of its attempts to ensure the parents' involvement and its attempts to arrange a mutually agreed upon time and place for the meeting (34 CFR 300.322[d]; 8 NYCRR 200.5[d][3], [4]).

In this case, the district sent the parent a CSE meeting notice dated February 14, 2018 indicating that a CSE meeting was scheduled for April 16, 2018 at 9:30 a.m. to "[r]eview the results of the reevaluation, determine your child's continued eligibility for special education services and to develop an [IEP]" for the student (Dist. Ex. 10 at p. 1). The notification included a list of the names and titles of the district personnel who would be attending the meeting (id. at p. 2).[24] The district's SESIS log also indicated that, on February 27, 2018, the district emailed the parent and the iHope associate program director (associate director) to inform the parent and iHope of the scheduled CSE meeting and requested that the parent or iHope provide the district with any teacher and related service providers' progress reports, student work samples, assessments, a report card, and any relevant materials prior to the CSE meeting (Dist. Ex. 5 at p. 9; see Dist. Ex. 29 at p. 3).[25] Also on February 27, 2018, the district changed the time of the scheduled April 16, 2018 meeting from 9:30 a.m. to 12:30 p.m., with the SESIS log denominating it a 3rd Notice" (Dist. Exs. 5 at p. 9; 9 at p. 1).

[24] There is a notation in the district's SESIS log that there was a "2nd Notice 8/24/2017 @ 11:30 AM " and then a "2nd Notice 4/16/2018 @ 9:30 AM" (Dist. Ex. 5 at p. 9).

[25] A copy of the e-mail was included in the SESIS log.

According to the SESIS log, by email dated April 11, 2018, the parent notified the CSE chairperson that the April 16, 2018 meeting "d[id] not work" and that he would "follow up" the following week "to find a mutually agreeable date and time to reschedule the IEP meeting" (Dist. Ex. 5 at p. 8). On April 12, 2018, the district again requested reports from iHope, and the associate director of iHope responded and advised the CSE chairperson that, until she received approval from "legal counsel," she was not permitted to release the student's reports to the CSE (id.).

By prior written notice dated April 17, 2018 and meeting notice dated April 18, 2018, the district notified the parent that his request to reschedule the CSE meeting was granted and that the new date was June 1, 2018 at 1:00 p.m. (Dist. Exs. 8 at p. 1; 27 at p. 1).[26] The CSE meeting notification included a list of two names and titles of the district personnel who would be attending the meeting, as well as the parent (Dist. Ex. 8 at p. 2).

By an e-mail and letter attachment dated May 8, 2018, the parent informed the CSE chairperson that he was requesting the upcoming CSE meeting be a "Full Committee Meeting" and that a district physician participate in the meeting in person (Dist. Ex. 26 at pp. 1-2).[27] The letter contained a list naming the student's special education teacher and her related service providers at iHope and indicated that the parent wanted any meeting notices regarding his daughter sent to those individuals (id. at p. 2). The parent further requested that the meeting take place at iHope and indicated he was "available to schedule this meeting Monday through Friday after 3:00pm" (id.). The letter further indicated that, once a meeting was scheduled for a mutually agreeable date and time, he would provide the student's most recent progress reports and any other documentation for the CSE's consideration (id. at p. 3). The parent asked that the CSE send him "a few proposed dates and times in writing" and indicated that he "would prefer not to schedule any meetings though the telephone to eliminate confusion" (id.). The parent also requested that the CSE consider a nonpublic school placement, and that it conduct the necessary evaluations for such consideration, as well as any other evaluations prior to scheduling the meeting (id.). Additionally, the parent requested that "the IEP Meeting . . . be recorded" (id.).

In a prior written notice dated May 31, 2018, the district stated that:

> The CSE initially scheduled a Psycho-Educational Evaluation and a Social History Update on January 20, 2018 at 10:30 A.M.. [The student] was in the hospital and this appointment was rescheduled for March 11, 2018 @ 10:30 A.M. You did not show for this appointment. The CSE scheduled an IEP Meeting on 4/16/2018. However, since you are requesting cancellation of this meeting, the CSE has rescheduled the Psycho-Educational Evaluation and a

[26] In SESIS, the notation was logged as a "Second Appointment" (Dist. Ex. 5 at p. 7). While the events logged in SESIS appear to corroborate to events that actually occurred, the system does not appear to number events in a recognizable pattern, (e.g. 2nd, 2nd, 3rd, Second, 5th).

[27] In the text of the e-mail, the parent indicated that he was unavailable to participate in a social history update at the scheduled time because he would be out of the country (Dist. Ex. 26 at p.1). In addition to the parent's letter, the email indicates also attached was a copy of the April 2018 IHO decision pertaining to the student's 2017-18 school year (id.).

> Social History Update on May 9, 2014, at 4 P.M. This evaluation notice has been mailed out to you and the CSE has rescheduled [the student]'s IEP meeting for June 1, 2018 at 1PM. This meeting notice was mailed and emailed to you. [The student] did not attend the May 9th evaluation appointment and a new appointment date was sent to you for May 29th at 4PM. [The student] attended the May 29th evaluation appointment and evaluation reports were emailed to you for on May 31st 2018.
>
> You requested to reschedule the June 1st IEP meeting so that iHOPE team members can be included in the notice of IEP meeting. Your request to reschedule the IEP meeting is granted as well as your request to schedule the meeting Monday through Friday after 3PM.
>
> Your request to schedule the IEP meeting at iHOPE program is not granted. CSE 10 has scheduled to hold this IEP meeting at a location that is physically accessible and convenient for all participants. At this time, CSE 10 cannot agree to your request to hold this IEP meeting at iHope without further information regarding your request. Accordingly, the IEP meeting will be scheduled to take place at the CSE 10 office. As per your request, a DOE physician will also participate in this meeting. The District will facilitate a phone conference number to allow you and your team members to participate via teleconference
>
> **To ensure appropriate and timely services for the 2018-2019 School Year, we must proceed the IEP Meeting; which is scheduled on June 14th, 2018 at 4PM**

(Dist. Ex. 30 at pp. 3-4 [emphasis in original]).

By CSE meeting notice dated June 1, 2018, the district notified the parent that a CSE meeting was scheduled for June 14, 2018 at 4:00 p.m. (Dist. Ex. 7 at p. 1).[28] The notification included a list of the names and titles of the district personnel who would be attending the meeting, as well as those persons from iHope that the parent requested, and an unnamed district physician "TBD" (id. at p. 2).[29] The CSE chairperson emailed the parent on June 4, 2018 to provide "important documentation regarding [the student's] IEP meeting and recent assessments" (Dist. Ex. 5 at p. 4). The SESIS log reflects that the CSE chairperson emailed the same "important documentation" to the associate director of iHope on June 4, 2018 and requested that the student's updated progress reports be submitted as soon as possible (id. at pp. 4, 5).

[28] Although this notice is dated June 1, 2018, the SESIS log indicates that it was sent to the parent and iHope on June 4, 2018 (Dist. Ex. 5 at p. 5). The SESIS log characterized the notice as a "5th Notice" (Dist. Ex. 5 at p. 5).

[29] The name of the vision education teacher from iHope appeared to be partially cut off but was consistent with the parent's request (see Dist. Ex. 7).

On June 10, 2018, a district social worker called the parent and left a message reminding him of the CSE meeting scheduled for the student on June 14, 2018 and requesting that he remind iHope to provide any progress reports or relevant information that could be important for the meeting (Dist. Ex. 5 at p. 5). On June 13, 2018 the CSE chairperson emailed both the associate director of iHope and the parent reminding them of the CSE meeting scheduled for the student for the following day and again requested that progress reports from iHope be submitted for the IEP meeting (Dist. Ex. 5 at p. 4).

On the day of the meeting, June 14, 2018 at 1:46 p.m., the parent emailed a letter to the CSE chairperson indicating that the meeting "cannot take place" and requesting that the CSE meeting be rescheduled (Parent Ex. O; Dist. Ex. 5 at p. 4). In his letter, the parent stated that he had previously requested a "Full Committee and a DOE School Physician" participate in the CSE meeting (Parent Ex. O). The parent further stated that the meeting notice was missing a "School Physician, a Parent Member and a Social Worker" (id.). The CSE chairperson responded to the parent at 1:57 p.m. reiterating the contents of the May 31, 2018 prior written notice wherein the parent's request for the participation of a school physician had been granted and assuring him that "all members are ready to participate in today's meeting" (Dist. Ex. 5 at pp. 3-4). The CSE chairperson also requested that the parent "[p]lease consent to the release of the [student's] progress reports so that the IEP team can prepare for today's IEP meeting" (id. at p. 4).

The district members of the CSE convened the meeting on June 14, 2018 in the parent's absence, and developed the student's 2018-19 IEP, which was to be implemented on July 1, 2018 (Dist. Ex. 1A at pp. 1, 13-14).

On Saturday, June 23, 2018, two members of the CSE, the district representative and the special education teacher, reconvened and removed air conditioning and limited travel time from the student's recommended special transportation portion of the IEP (Tr. pp. 1200-01, 1203-04; 1295, 1301-04; see Dist. Exs. 4A at pp. 16, 17; 5 at p. 3). Another prior written notice was issued on June 23, 2014, but the contents were limited to the matters determined during the June 14, 2018 CSE meeting, and a prior written notice regarding the events on June 23, 2018 was not issued by the district (Tr. pp. 1204, 1207). The IEP as revised on June 23, 2018 was mailed to the parent (Tr. p. 1208, Dist. Ex. 4A).

With regard to the parent's claim that the CSE meeting had not been scheduled at a mutually convenient time, parent's argument is belied by the evidence in the hearing record, at least with respect to the June 14, 2018 meeting. The parent requested that the CSE meeting be rescheduled to a Monday through Friday with a start time after 3:00PM and the district rescheduled the meeting to accommodate that request, scheduling it on a Thursday at 4:00 PM (Dist. Exs. 7 at p. 1; 26 at p. 2). The district ensured that the CSE meeting was scheduled at a mutually agreed upon time. The district also explained in its May 31, 2018 prior written notice to the parent why it could not agree to the request to hold the CSE meeting at iHope, citing concerns with accessibility and convenience, and indicating that it required further information regarding the parent's location request before agreeing to make such a change. There is no evidence that the parent thereafter provided any further explanation regarding why it was necessary to meet at iHope verses the district's offices and I find no violation of the parent participation requirements in terms of location, especially when it appears that parent had, at least in part, already curtailed iHope's participation in the IEP development process by previously making last minute cancellations and precluding

iHope from sharing documents about the student (see, e.g., Dist. Ex 5 at p. 8). Thus, the district's location determination for the CSE meeting was not inappropriate under these circumstances.

The branch of the parent's argument with regard to the district's alleged failure to conduct a "Full CSE" meeting, with the exception of the parent himself, also did not rise to the level of a denial of a FAPE because, as described above, a district physician and an additional parent member were present at the June 14, 2018 meeting via telephone (Dist. Exs. 2A; 3A at p.1).[30] Additionally, contrary to any contention by the parent, there is no requirement that a "social worker" is a mandatory member of a CSE meeting, even under the additional procedural requirements for membership described in State law (see Educ. Law § 4402[b]; 8 NYCRR 200.3[a]).[31]

The only procedural requirement for CSE membership in this case that bears serious scrutiny is the parent himself. The forgoing evidence described shows that the district accommodated many of the parent's demands for CSE membership and rescheduling. The question becomes whether district followed through with its obligations to attempt to secure the parent's attendance at the CSE meeting. With regard to a CSE meeting, federal regulations require that:

> (c) Other methods to ensure parent participation. If neither parent can attend [a CSE] meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls, consistent with § 300.328 (related to alternative means of meeting participation).
>
> (d) Conducting [a CSE] meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as—
>
> > (1) Detailed records of telephone calls made or attempted and the results of those calls;
> >
> > (2) Copies of correspondence sent to the parents and any responses received; and

[30] The parent points to the requirement that "[w]hen conducting a meeting of the committee on special education, the school district and the parent may agree to use alternative means of participation, such as videoconferences or conference telephone calls" (8 NYCRR 200.5[d][7]), and his request that the school physician attend in person (Dist. Ex. 26 at p. 2), but the parent does no more than try to take advantage of a technical error, and that is insufficient basis upon which to find a denial of a FAPE.

[31] The parent was free to invite a social worker among "other persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the school district or the parent(s) shall designate" (8 NYCRR 200.3[a][1][ix]).

> (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(34 CFR 300.322[c]-[d]; 8 NYCRR 200.5[d][1], [3]).

In this case, the parent was clearly aware of the CSE meeting in view of his correspondence on the day of the meeting, but he requested to reschedule the meeting rather than refused to attend at all (Parent Ex. O). In Board of Education of the Toledo City School District v. Horen, the district court discussed the difference between an affirmative refusal to attend versus a request to reschedule a meeting (2010 WL 3522373, at *15-*18 [N.D. Ohio Sept. 8, 2010]; see Doug C. v. Hawaii Dep't of Educ., 720 F.3d 1038, 1044 [9th Cir. 2013] [noting that parental involvement requires the agency to include the parents in a CSE meeting unless they affirmatively refused to attend]). The e-mail documents on June 14, 2018 in this case show that the parent wanted to reschedule the meeting, and that the district explained 11 minutes later that rescheduling was no longer possible because the IEP services would likely be delayed if the meeting was rescheduled again (Parent Ex. O; Dist. Ex. 30 at p. 1, 3-4). This conundrum faced by the district was well described by the Ninth Circuit in Doug C., in which the parent vigorously objected to the school district holding an IEP meeting without him and asked the school district to reschedule the meeting for the following week:

> The more difficult question is what a public agency must do when confronted with the difficult situation of being unable to meet two distinct procedural requirements of the IDEA, in this case parental participation and timely annual review of the IEP. In considering this question, we must keep in mind the purposes of the IDEA: to provide disabled students a free appropriate public education and to protect the educational rights of those students. 20 U.S.C. § 1400(d). It is also useful to consider our standard for determining when a procedural error is actionable under the IDEA. We have repeatedly held that "procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE." When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE. In reviewing an agency's action in such a scenario, we will allow the agency reasonable latitude in making that determination.

(Doug C., 720 F.3d at 104 [internal citations omitted], quoting Shapiro v. Paradise Val. Unif. Sch. Dist. No. 69, 317 F.3d 1072, 1079 [9th Cir. 2003]). Under the facts of Doug C. and Horen, the courts ultimately rejected the school district's respective arguments that parental participation was the less important requirement in those circumstances (but see A.L. v. Jackson Cnty. Sch. Bd., 635 Fed. App'x 774, 780 [11th Cir. Dec. 30, 2015] [finding that repeated refusals to attend four separately scheduled meetings during a four month period in person or by telephone were tantamount to refusal to attend]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d

387, 392, 396 [S.D.N.Y. 2010] [finding that, when contacted by telephone, the parent affirmatively declined to participate in the CSE meeting]).

In this case, I accept the district's argument that it was unlikely that an IEP would be developed in time, especially in light of the number of various types of rescheduling requests that the parent had made of the district and its previous accommodations of his requests, but I see little if any effort of compliance with the federal regulation described above requiring detailed records of telephone calls made or attempted and the results of those calls in the district's attempt to encourage the parent's attendance at the June 14, 2018 CSE meeting. The SESIS log shows that the district successfully telephoned the parent once in January 2018, that he could not be reached by voicemail in February 2018 because his voicemail was full, and the district reached his voicemail on June 10, 2018 when reminding him of the CSE meeting several days later (Dist. Ex. 5 at pp. 5, 10). In its email to the parent, the district indicated that "we look forward to meeting you at 4PM," but there is no evidence that the CSE attempted to call the parent during the actual CSE meeting on June 14, 2018, despite evidence that the physician attended by telephone and the prior written notice to the parent indicating that "[t]he [d]istrict will facilitate a phone conference number to allow you and your team members to participate via teleconference" (Dist. Exs. 2A; 30 at pp. 1, 4). This case is unlike the circumstances in the J.G. case, in which "[t]he record . . . show[ed] that when the Parents did not show up to the August 9 meeting, Lavin called Mr. G to invite him to participate by phone. Mr. G, however, declined the opportunity to participate"; under those circumstances, the better course was clearly to proceed with the CSE meeting without the parent in attendance (682 F. Supp. 2d at 396). In this case, I find that the district did not take the steps necessary to sufficiently document its attempts encourage the parent's participation in the CSE meeting on June 14, 2018, even in light of the difficult position in which the parent was putting the district (see Doug C., 720 F.3d at 1045 [noting that the district's obligation is owed to the child and the parent's obstinance or the "fact that it may have been frustrating to schedule meetings with or difficult to work with [the parent] does not excuse the [school district's] failure to include him in [the student's] IEP meeting when he expressed a willingness to participate"]).

Accordingly, I decline to find that IHO 2 erred in determining that the June 14, 2018 CSE's decision to proceed without the parent in attendance was a procedural violation that resulted in a denial of a FAPE. The parent's requests to reschedule the meeting on June 14 will be further discussed below with respect to equitable considerations.[32]

Even assuming, for the sake of argument, that I had concluded that the district's conduct of the June 14, 2018 CSE meeting was not a denial of FAPE on procedural grounds, the June 23, 2018 alterations of the IEP clearly were done without any attempt to include the parent and would

[32] As an aside with respect to one of the parent's requests for scheduling, there is no authority holding that a CSE is required provide a list of "proposed dates" to parents for a CSE meeting, although such a practice is not impermissible either. In one case, the parents' refusal to attend an IEP team meeting which was selected by all participants in advance after checking schedules, without a justifiable excuse, proved fatal to their claim that the district denied the student a FAPE on procedural grounds (Michael J. v. Derry Twp. Sch. Dist., 2006 WL 148882, at *16 [M.D. Pa. Jan. 19, 2006]). Additionally, even assuming there was merit to the parent's other objections to the scheduling of the CSE meeting, namely, any alleged defect in the meeting notices or the lack of any evaluations or attendees that the parent believed necessary, they do not result in a violation of the requirement to schedule the CSE meeting at a mutually agreeable time.

be an independent basis for concluding that there was a denial of a FAPE. The district's attorney conceded on the record during the impartial hearing that no meeting notice was created (Tr. p. 1203) nor did it document any efforts to ensure the parent's involvement in the Saturday June 23, 2018 CSE meeting. The district's witness ultimately conceded that the events on June 23, 2018 constituted a reconvene of the CSE, that the parent was not present, and alluded that the alterations to the student's bussing on the IEP possibly came the direction of her supervisor (Tr. pp. 1301, 1304).[33] IHO 2 correctly determined that reconvening without the parent in attendance to remove components of a related service was a procedural violation that significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student.[34]

C. Special Transportation

On appeal, the district argues that IHO 2 erred in finding that it denied the student a FAPE based on the changes to the student's special transportation mandate made during the June 23, 2018 CSE reconvene. The district argues that IHO 2's determination must be annulled because the parent "did not supply the CSE with requisite information in order to make this recommendation" (Rev. for Rev. ¶ 14).[35]

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[33] The parent's attorney attempted to argue that it was not a reconvene of the CSE (Tr. pp. 1305-07), but it was a distinction without a difference—a school district is not permitted effect a substantive change in an IEP without a CSE meeting unless the parent agrees to amend an IEP in writing (see 20 U.S.C. § 1415[d][3][D]; 34 CFR 300.324[a][4][i]; 8 NYCRR 200.4[g][2]), which are facts that are not present in this case. In either event it would significantly impede the parent's participation in the development of the IEP.

[34] The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]).

[35] In his due process complaint, the parent did not challenge the reconvene of the CSE on June 23, 2018 or the removal of limited travel time and air conditioning from the special transportation accommodations on the resultant IEP, and, upon review of the hearing record, there is no indication that the district subsequently agreed to add such issues, nor did the parent attempt to amend the due process complaint notice to include them (see Parent Ex. A; see also 20 U.S.C. § 1415[c][2][E][i], [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i], [j][1][ii]; R.E., 694 F.3d at 187 n.4 ["The parents must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function."]). However, on appeal, the district does not allege that the IHO erred in reaching the issue sua sponte. In any event, testimony about the June 23, 2018 CSE reconvene and the removal of the air conditioning and limited travel time from the student's special transportation recommendations arose during the district's direct examination of the district school psychologist and appears to have been for the purpose of defending the June 23, 2018 IEP (see Tr. pp. 1145-478). Therefore, the hearing record indicates that the district opened the door to the issues relating to the June 23, 2018 IEP and the removal of the transportation services (M.H., 685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

As noted above, discussion of this issue is not determinative given the district's failure to appeal substantive findings of IHO 2, which were adverse to the district. Further, the district's appeal of IHO 2's findings about the June 23, 2018 reconvene CSE meeting and the removal of aspects of the student's special transportation mandate is narrow. The district focuses only on justifying the removal of the accommodations based on the parent's failure to submit required paperwork. Notably, the district does not argue that the transportation accommodations were unnecessary for the student to receive a FAPE.

The district school psychologist testified that the CSE "reconvened because we removed some busing accommodations" (Tr. pp. 1144). She specified that the June 23, 2018 CSE removed the air conditioning and limited travel time accommodations because the CSE had not obtained approval from the Office of School Health (Tr. p. 1146). She indicated that they had been included on the June 14, 2018 IEP because the CSE had carried them over from the prior IEP and that their inclusion was a "clerical error" (Tr. pp. 1152-53). The district school psychologist explained that the Office of School Health determined whether or not such accommodations were needed but that such determinations were not made in conjunction with the CSE and that the CSE was bound by "their recommendations" (Tr. pp. 1147-49). For the student, the district school psychologist further testified that approval from the Office of School Health could not be obtained because the parent had failed to complete and return required documentation (Tr. pp. 1146-47).

The district school psychologist's testimony about the need for approval by the Office of School Health is reminiscent of the recent case of J.L. v New York City Department of Education, which involves allegations against the district pertaining to its failure to provide nursing, transportation, and/or porter services to students with disabilities as a result of the approval process for such services, involving district agencies, such as Office of School Health and Office of Pupil Transportation, outside of the CSE process (324 F. Supp. 3d 455, 461-63, 465 [S.D.N.Y. 2018]). The District Court described the situation as such:

> The claims in this action arise from a systemic breakdown in DOE's practices, policies, and procedures governing the services it must provide to medically fragile children. While DOE is responsible for providing every child with a "free and appropriate public education," its policies and procedures have hobbled the efforts of the disabled students in this case from securing the services they need. Instead of alleviating the burdens borne by disabled students and their families, the current policies spawn a cumbersome and counterintuitive bureaucracy that undermines the goal of educating these children. There is a glaring disconnect among the agencies within DOE tasked with providing nursing, transportation, and porter services. Because of these issues, the students were left with no other choice but to sit out significant periods of the school year.

(J.L., 324 F. Supp. 3d at 460). While the District Court in J.L. did not reach the merits of the claims, the Court found that that parents sufficiently stated a cause of action under the IDEA to survive a motion to dismiss (id. at 466-67), and the matter as of the date of this decision is remains pending in District Court (see 17-cv-07150).

Notably, the school psychologist, who participated in altering the IEP on June 23, 2018, agreed with the IHO when he asked if a child, like the one in this case, who was "nonverbal and nonambulatory and are on a -- on some form of provided transportation by the District in mid-summer in Manhattan should have air conditioning," stating in her answer "[y]es, I think they should" (Tr. pp. 1156). The evidence supports the claim that the CSE should not have removed the student's transportation accommodations from the IEP, even if the district's reasons involving the procedures of Office of School Health were accepted as entirely accurate, because it is the CSE that is responsible to make the determination. In the present case, without further commenting on the systemic nature of the issue relating to the reconvene CSE's determination to remove the transportation accommodations from the student's IEP, it is sufficient to note that, as the district does not allege that the student did not need such accommodations to receive a FAPE, IHO 2 did not err in finding that the removal of air conditioning and limited travel time from the student's IEP constituted a denial of a FAPE (see Placements, 71 Fed. Reg. 46,588 [Aug. 14, 2006] ["placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as . . . availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience"]).

D. Unilateral Placement

Having determined that the district failed to offer the student a FAPE for 2018-19 school year, the next issue to address is whether the parent's unilateral placement at iBrain was appropriate to meet the student's needs. The district argues that IHO 2's finding that the parent met his burden in demonstrating that iBrain was an appropriate placement for the student must be annulled, specifically because the student's vision education services were not appropriate. However, contrary to the district's assertions, review of the hearing record supports IHO 2's findings that iBrain was an appropriate unilateral placement for the 2018-19 school year.

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

placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

I note that when addressing the issue of FAPE in this case, as discussed above, it was determined largely on procedural grounds without a detailed discussion of the substantive provisions of the district's IEP and parties' resulting dispute. As the student's needs have yet to be discussed in detail, a summary of the more recent evaluations of the student is warranted before reviewing the evidence of the appropriateness of the unilateral placement. A February 9, 2018 classroom observation reported that the student presented "with significant delays in all developmental domains" and indicated that at the time of the observation, demonstrated limited awareness of the surroundings, interest in the lesson, or people in close proximity (Dist. Ex. 13 at pp. 1-2). According to the report, although the student's ability to respond to questions was limited, she did respond when provided with repetition, additional response time, maximum adult support, and prompting to engage and attend (id. at p. 2). During the observation the student cried, whined, and vocalized when waiting, and smiled once—but not directly in response to a stimulus or questioning—and appeared fatigued (id.).

A May 29, 2018 psychoeducational evaluation report reflected information from a March 20, 2015 neuropsychological evaluation report that indicated the student had received a diagnosis of a traumatic brain injury resulting in '"[s]evere brain damage with diffuse injury to both hemispheres"' (Dist. Ex. 21 at p. 1). The psychoeducational evaluation report indicated that the student was nonverbal and non-ambulatory, "completely dependent for all her daily living needs," and had diagnoses of cortical vision impairment and seizure disorder that was controlled with

medication (id. at pp. 1, 6). The report noted that, due to the nature of the student's significant disabilities, she was unable to participate in "standardized cognitive and academic testing" and therefore the assessment relied "primarily on observation and adaptive behavior assessment" (id. at p. 1). Administration of the Vineland-3 Comprehensive Parent/Caregiver Form—a measure of the student's adaptive functions with respect to communication, daily living skills and socialization—to the parent yielded scores that fell "well below the normative mean of 100," with an overall score below the first percentile (id. at p. 6).

Turning to the unilateral placement, the director of special education at iBrain (director) testified that iBrain opened on July 9, 2018 and described iBrain as an interdisciplinary program for students ranging from age 6 to 19 "with brain-based disabilities or traumatic brain injury," who were "primarily nonverbal and non-ambulatory" (Tr. pp. 86-88). She further explained that students attending iBrain "require extensive assistance in all areas including feeding, toileting, dressing, interacting at all with their educational environment" (Tr. p. 88). The director noted that iBrain offered "four 6:1:1 classes and two 8:1:1 classes at present," along with "a wide range of therapy services," including OT, PT, speech-language therapy, services for the deaf and hard of hearing, and parent counseling and training, which were delivered in a "push-in and pullout interdisciplinary model" (Tr. pp. 87, 100-01). Vision education services began at iBrain on September 14, 2018 (Parent Ex. CC). Further, according to the director, "[s]ome of [the iBrain] students [we]re very medically fragile and ha[d] one-to-one nurses to attend to their needs" and "all of [the iBrain] students ha[d] one-to-one paraprofessionals in order to . . . ensure that they remain[ed] engaged and progressing throughout their therapies and educational environment" (Tr. p. 88). The director also testified that all the teachers at iBrain were certified, most of them by the State (Tr. p. 89).

The director testified that the student was a "12-month student" who began attending iBrain on July 9, 2018 (Tr. p. 117). The director's December 3, 2018 affidavit indicated that, for the 2018-19 school year, the student was in a 6:1:1 class with a full-time 1:1 paraprofessional, a 1:1 full-time nurse during the school day, and related services (Parent Ex. CC). The director specified that, at iBrain, the student received individual PT five days per week for 60 minutes, individual OT three days per week for 60 minutes, individual speech-language therapy five days per week for 60 minutes, individual vision education services three days per week for 60 minutes, individual assistive technology services two days per week for sixty minutes, and parent counseling and training one time per month for sixty minutes (Parent Ex. CC; see Tr. pp. 92-95). The student also received academic instruction on a one-on-one basis with a teacher for a half an hour each day (Tr. p. 622).

Before turning to the district's specific argument on appeal, it is noted that, in its request for review, the district did not challenge any of IHO 2's specific findings regarding the appropriateness of iBrain, including IHO 2's specific findings in response to the arguments raised by the district in its post-hearing brief (compare Req. for Rev. at pp. 8-9, with IHO Decision at pp. 9, 12-14, and Dist. Ex. 44 at pp. 6-21). Instead, on appeal, the district choses to argue for the first time that iBrain was an inappropriate unilateral placement for the student because the vision education services delivered at iBrain were not appropriate.

With respect to the district's specific challenge on appeal—the sufficiency of the vision education services provided at iBrain—review of the information in the hearing record about the

student's vision needs is warranted. A February 2, 2017 vision evaluation report indicated that the student's cortical visual impairment was due to damage to the rear cortex of her brain, which impacted her ability to "attend, remember, and perceive what she is seeing" and resulted in relative strength in her left eye as compared to her right eye (Dist. Ex. 25 at p. 1). At the time of the report, the student was "working on integrating vision with functional tasks such as reaching for an object after visually locating it" (id.). The evaluator opined that developing specialized strategies with regard to vision would enhance the student's skills relative to communication, motor development, and academic performance (id.). Based on results of the vision assessment, the February 2017 evaluation report reflected that the student's vision was "within the 6-7 range on the CVI Range," and "at the end of Phase II," which indicated that the student was "beginning to utilize her vision as a means for learning" (id. at p. 4). Specifically, the evaluator indicated that these skills "allow[ed the student] to use her vision to provide answers, such as yes or no, answer questions with regard[] to literacy and mathematical goals as well as continue to make choices throughout her day" (id.).

At the conclusion of the February 2017 vision evaluation the evaluator provided specific visual recommendations to be included in the student's daily routines, therapies and educational activities (Dist. Ex. 25 at p. 5). The recommendations included presentation of novel objects: in pink or purple, in the left visual field, in an environment with minimal distractions, and in an array of two; with black or high contrast backgrounds, movement to initiate visual attention, and slowly with sufficient processing time (id.). Additionally, the evaluator provided specific recommendations regarding the distance and latency with which items should be presented to the student, and that she should not be expected to look and reach at the same time (id.). The evaluator proposed annual goals to improve the student's ability to choose a photograph of a familiar person in an array of two, visually locate objects and photographs used in daily routines presented against increasingly complex backgrounds, and match objects to their two-dimensional representations in an array of two (id. at pp. 5-6). According to the vision evaluation report, the evaluator recommended that the student receive two 60-minute sessions per week of individual vision education using a combination of both push in and pull out interventions "on a consistent basis in order to acquire increased visual skills" (id. at p. 7). The evaluator elaborated on the rationale for the recommendations, including that: the "self-contained" sessions would allow the student to work on specific visual techniques and strategies, the push-in sessions would enable her to have access to modified academic materials that met her needs, two sessions per week would enable her to retain what she had learned, and the 60-minute session length would accommodate for transitioning, positioning, and processing time (id.). Additionally, the evaluator stressed the importance of having "staff members [] collaborate and integrate [the student's] visual needs throughout the day" (id.).

Regarding the vision education services the student received at iBrain, the director of special education testified with personal knowledge as to the student's need for vision therapy and its importance to her program. As stated previously, the student has received a diagnosis of a cortical visual impairment, which the director described as a vision problem that is not caused by a deficit in physical eye structure or functioning, but rather stems from the way the brain receives and processes information from the optical nerve (Tr. p. 97). The director stated that vision therapy is designed to help adjust and repair the failure to properly process information from the optical nerve through a "very systematic use of appropriate materials" and that each student had a unique therapy profile based on their specific impairment (id.). Further, she testified that knowing the details of the student's specific impairment and how to help the student "process so she can

accurately see things as best as she can throughout the school day is really important" and helps with academics (Tr. pp. 98-99). She testified that the student's academic material, and how it was presented, was designed according to her visual preferences (Tr. p. 99).

On appeal, the district asserts that iBrain was not an appropriate unilateral placement for the student in part because she did not receive vision education services—which the parties agreed was a needed component of her educational program—from the time she began attending iBrain on July 9, 2018 until September 14, 2018. To this point, the iBrain director of special education testified that prior to the hiring of two certified teachers of the visually impaired in September and October 2018, staff who were not certified in vision education incorporated vision services into the student's overall program and implemented the student's "vision education recommendations and strategies throughout the school day" (Tr. pp. 96, 117, 592-93, 623; see Tr. p. 722). According to the director, however, there was a difference in the "focus" of instruction and the implementation of the vision recommendations between non-certified staff and a "vision teacher" (Tr. pp. 137-38).[36] For example, she indicated that, although during an academic activity non-certified staff may use the student's color preference, the primary focus of the activity was still academic, whereas the vision teacher's "primary concern" was not the academic skill, but rather the student's ability to process a new color (id.). The director testified that the two staff hired by iBrain in fall 2018 were providing vision education services "to make up any sessions that were missed during the time that [iBrain] . . . didn't have the vision therapist" (Tr. pp. 623-25, 633-35, 637-38, 702, 767; see Parent Exs. CC; DD).

Although the lack of vision education services for three months was not ideal, under a Burlington/Carter analysis,[37] parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). Moreover, the hearing record shows that iBrain attempted to implement the student's existing vision education recommendations and correct the lack of services from July to September 2018 by providing make-up sessions to the student. Therefore, the hearing record does not support the district's position that iBrain as a unilateral placement was wholly inappropriate for the student during the 2018-19 school year due to the lack of twice weekly sessions of vision education services for approximately two months.

[36] Over the course of the director's testimony, the parties appear to use the titles "vision teacher," "vision education teacher," and "vision therapist" interchangeably (see, e.g., Tr. pp. 137-38, 623-24, 631, 633-34; Parent Exs. DD at p. 1; EE at p. 1). Also during her testimony, the terms "vision therapy," "vision services," and "vision education services" appeared to be used interchangeably (see, e.g., Tr. pp. 97, 100, 623-24, 628; Parent Ex. EE at p. 1). Similarly, a self-described teacher of the visually impaired—who is a certified teacher of the blind and partially sighted—explained that her role at iBrain was as a "vision therapist" and characterized the services she provided as "vision therapy" (Tr. pp. 722, 724, 729; Parent Ex. DD at p. 4).

[37] The quality, the amount, and the extent of the student's need for vision education services under Endrew F. and Burlington/Carter is a distinct, plenary review of the parent's unilateral selection of iBrain. The review in this phase of the proceeding is separate and very unlike the pendency analysis discussed in Application of the Dep't of Educ., Appeal No. 19-039 which is an "automatic injunction" that does not involve any analysis of whether the services mandated by the IDEA's stay put rule are "appropriate."

The district further asserts on appeal that the vision education services the student did receive at iBrain from September 14, 2018 to December 6, 2018 were not appropriate because they were conducted remotely and not in-person. At the outset of this discussion, I note that the 2018-19 iBrain vision therapy and educational services program description indicated that students' individualized programs were based "on their interests, functional tasks that they engage in daily, and personal visual preferences" (Parent Ex. G at p. 12). Students received direct instruction through both push-in (in the classroom) and pullout models, with pullout sessions focusing on a student's specific visual skills as well as visual attention when indicated (id.). Additionally, the program description indicated that the vision education team trained the entire iBrain staff on how to work with students with cortical visual impairment and collaborated with ophthalmologists and parents on a consistent basis (id. at p. 11). Review of the student's 2018-19 vision education services log and session notes indicated that the director of vision education worked with the student in both individual pullout sessions, in the classroom during class activities, and with the student's family/caregivers outside of the school program, and that he also provided staff training and co-treating sessions with other providers (see Tr. pp. 754-57; Parent Ex. FF at pp. 2-3, 5-17).[38] The director of vision education testified that the student had three vision goals: to participate in classroom meeting via switch activation, to access tactile graphics and manipulatives; and to train caregivers in how to adapt so the student could use vision skills throughout the day (Tr. pp. 774-75).

Specific to the issue on appeal, the director of vision education testified that he initially provided the student's vision education services via "[t]elehealth sessions," which entailed working with the student and her healthcare providers remotely via internet access (Tr. pp. 738-39, 749-50).[39] Prior to December 6, 2018, the director of vision education worked with the student "face-to-face," on two to three occasions between September and November 2018 (see Tr. pp. 739, 747-49, 759, 769, 779). On December 6, 2018, the director of vision education began providing the student with 60-minute sessions in person as a full-time employee of iBrain (Tr. pp. 738, 746, 769).

Regarding the implementation of the remotely provided vision education sessions, the iBrain director of vision education testified that when he first met with the student on September 14, 2018, he began assessing her "to determine that she would benefit from this type of platform of delivery of educational instructional methods," which included a "simultaneously conducted [] functional vision assessment and a learning media assessment" (Tr. pp. 750, 762-63). The director of vision education also testified that he "experimented" with three different video conferencing or "learning platform delivery" systems with the student (Tr. pp. 778-80, 785). According to the

[38] The director of vision education at iBrain testified that he began providing the student's vision education services on September 14, 2018 "in a part time capacity" (Tr. pp. 734, 738). The iBrain special education director testified that when the director of vision education was hired, the student initially received partial frequency, but full duration of her vision education mandate, and when a second vision "therapist" was hired, she began receiving three sessions per week of vision services (Tr. p. 631).

[39] Session notes also refer to the telehealth sessions as "Skype" sessions (Tr. pp. 763-64; see e.g. Parent Ex. FF at pp. 5-7). The director of vision education also testified that telehealth sessions included experimentation with "Blackboard Collaborate" and "Zoom" video conferencing or "learning platform delivery" systems (Tr. pp. 778-80, 785).

director of vision education, use of the "Zoom" video conferencing system resulted in the student being able to recognize him on the computer screen within three seconds, which, when compared to her performance using Skype, demonstrated "considerable progress in terms of the quality of the delivery and speed" of the technology on the student's recognition ability (Tr. p. 785). The director of vision education testified that it was appropriate to conduct vision education services remotely because of the improvement in the technology capabilities, specifically videoconferencing technology such that it was "completely appropriate to observe [the student] in detail with the technology at a distance, any distance, via the internet" (Tr. p. 750). He further stated that providing vision education services remotely was a "currently-used model" in many locations (id.).

Contrary to this position, the district's director of educational vision services testified that he would not conduct "distance sessions" with "any student, regardless of their condition" (Tr. pp. 1489, 1554). He opined that vision services provided remotely did not constitute a "session" because when students are "right in front of them" teachers of the visually impaired "pick[] up on a lot of tiny nuances" that students exhibit visually, physically, and positionally, which, from a distance on a screen, would be "almost impossible to pick up on" (Tr. p. 1554). Further, the district's director of educational vision services stated that because the student was "flip flopping back between left and right periphery" it would be "almost impossible for her to visually focus in the center of a screen and then to have to deal with the complexity in a screen" (Tr. pp. 1554-55). He further testified that as far as the district was concerned "no distance session" was valid (Tr. p. 1555).

Review of the testimony from both the iBrain and district vision education specialists, as discussed above, reflects professional disagreement regarding the appropriateness of implementing vision education services remotely. While not to diminish the concerns raised by the district's director of educational vision services about conducting vision education services remotely, the hearing record shows that iBrain's director of vision services personally assessed the student at the time vision services commenced and in his opinion, concluded that remote vision services were appropriate (compare Tr. pp. 750, 762-63, 778-80, 785 and Parent Ex. E at pp. 1, 8, with Tr. pp. 1554-55). As noted in Application of the Dep't of Educ., Appeal No. 19-039, iBrain eventually shifted to providing the student with face-to-face session, and conducting at least some makeup sessions as of the date of the undersigned's determination in that decision. That change in circumstances brought the two expert's respective positions into closer proximity, even if it did not occur at the beginning of the 2018-19 school year. Therefore, although recognizing the misgivings of the expert called on the district's behalf about how the student's vision education services were initially delivered at iBrain, the provision of remote services to the student from September to early December 2018, on its own, does not support a finding that the parent failed to meet his burden under Burlington, Carter and Endrew F. to show that iBrain was reasonably calculated to enable the student to make progress appropriate in light of her circumstances for the 2018-19 school year.

E. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ.,

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

Initially, as noted above, IHO 2 found that the conduct of both parties "counter-balance[d] one other" and that, where the "scale winds up at equipoise and does not affect the outcome of the case," the decision-maker could view the matter through a "third equitable lens"; namely, "what is fair to . . . the student" (IHO 2 Decision at p. 6). While IHO 2's focus on fairness to the student is understandable, under the IDEA, reduction or denial of tuition reimbursement, as well as reduction or denial of attorney's fees in certain instances, represent "authorized sanctions [that] penalize[] the parents or their attorney—not their children" and "provide a sufficient deterrent to unreasonably demanding or litigious parents" (Anchorage Sch. Dist. v. M.P., 689 F.3d 1047, 1057 [9th Cir. 2012]; see 20 U.S.C. § 1412[a][10][C][iii]; 1415[i][3][B][i]; 34 CFR 300.148[d]).

While the parent's conduct discussed above in the context of the CSE process, including the parent's eleventh hour request to reschedule first of the June 2018 CSE meetings (June 14th), may not have been sufficient to completely absolve the district of its obligation follow all of the federal procedures "to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate (34 CFR 300.322[a], [c]), it is also clear that the parent was less than sufficiently cooperative in the process scheduling CSE meetings and developing the IEP and that a reduction of tuition reimbursement would be warranted under equitable grounds. First, while I concluded district did not make sufficient effort to contact the parent during the CSE meeting on June 14, 2018 CSE meeting (and was patently insufficient in its procedures on the date of the June 23, 2018 CSE reconvene meeting) to secure the parent's attendance, the district had already rescheduled the CSE meeting several times and modify the meeting notices in order to accommodate the parent's requests (see Dist. Exs. 7-10; 26 at p. 2; 30 at p. 3). The reasons cited in the parent's June 14, 2018 letter for his nonattendance at the CSE meeting scheduled for 4:00 that same day was that the CSE meeting notice did not list a district physician, an additional parent member, or a social worker as invited attendees (see Parent Ex. O); however, the meeting notice was sent out on June 4, 2018, over a week prior to the date on which the CSE was scheduled to convene (see Dist. Exs. 5 at p. 5; 7), during which time the parent could have raised his objection to the list of attendees included on the notice so the district could correct or reissue the notice to the parent's demanding standards, but the parent chose not to

do so.[40] Waiting until the eleventh hour to voice objection about the meeting notice, if strategic in nature, only served to frustrate the process. Moreover, even assuming the meeting notice was incomplete or inaccurate, the parent's demand to reschedule the meeting again for that reason was a poor excuse and rather than demanding perfection in the meeting notices, he should have attended the scheduled CSE meeting rather than refusing to attend over his perception of the meeting notice's technical noncompliance. The parent's unyielding stance in this regard was unreasonable (see 20 U.S.C. § 1412[a][10][C][iii][II]; 34 CFR 300.148[d][2] [a request for tuition reimbursement may be reduced or denied upon a finding of unreasonableness with respect to the actions taken by the parents]). Most troubling to me was the parent's refusal to provide consent for iHope to release the student's progress reports to the district for consideration at the CSE meeting, particularly when it became clear that the parent did so not out of genuine misgivings of whether the CSE should consider the information from iHope at all (i.e. that the information about the student might be faulty or misleading), but merely as a tactic of noncooperation—an attempt to hold the CSE process hostage by conditioning his release of the student's progress reports to the CSE on the district's acceding to his demands with regard to scheduling and rescheduling the CSE meeting, all while adding additional procedural hoops for district personnel to jump though (see Tr. p. 1474; see also Dist. Exs. 5 pp. 7-8; 26 at p. 3). In short, the evidence convincingly shows that at times the parent was unreasonably difficult and frustrating for district personnel to work with.

Having determined that the parent's conduct was unreasonable, it remains to be examined whether a reduction or denial of tuition reimbursement is warranted as a result. IHO 2 took into account equitable considerations when he determined that, while the district would be responsible for the full costs of the student's program at iBrain, the costs of related services and transportation would be the lesser of specified options (IHO 2 Decision at pp. 14-16). However, given the focus on the related services and transportation (rather than the total cost of the student's attendance at iBrain), as well as language in IHO 2's decision that district would not be responsible for "any excesses the family may have lavished on beyond [an] appropriate IEP" (IHO 2 Decision at pp. 6-7), it appears that IHO 2 may have rested his reduction on a ground related to the reasonableness of the costs of the related services and transportation (see E.M., 758 F.3d at 461) or related to segregable costs charged for services that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016]).

[40] Further, the parent's objections to the meeting notice lack merit. While the June 1, 2018 CSE meeting notice did not list a district physician by name, it did list as an invited attendee a district physician "TBD," and the parent had previously been advised by the CSE that his request for attendance of a district physician had been granted (Dist. Exs. 7 at p. 2; 30 at p. 3). And, while the parent previously requested that the district invite a district physician to attend the CSE meeting, there is no evidence that he likewise requested a social worker or an additional parent member (see Dist. Ex. 26 at pp. 2-3). In order to be considered fully composed, there is no requirement that a CSE include an additional parent member (unless one is requested in writing 72 hours before the meeting) and, as described previously, no requirement at all for a social worker in federal or State regulations (see 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). Moreover, the June 1, 2018 CSE meeting notice included language required by State regulation informing the parent that he could "invite other individuals who [the parent] determine[d] to have knowledge or special expertise about [the student]," as well as the parent's "right to right to request" in writing at least 72 hours before the meeting "that the additional parent member of the CSE . . . attend" (Dist. Ex. 7 at p. 2; see 8 NYCRR 200.5[c][iii]-[iv]; see also 34 CFR 300.322[b][1][ii]).

While the district raised the question of the costs of the program and services at iBrain in its post-hearing brief, the district's arguments in this regard were focused on the appropriateness of the separate billing practices employed by iBrain and how such practices called into question the appropriateness of iBrain as a unilateral placement for the student (Dist. Ex. 44 at pp. 19-21). The district failed to argue or present any rebuttal evidence that—regardless of precisely how the amounts were billed—the actual costs of the services provided by iBrain were excessive, i.e., by reference to actual evidence of lower-cost programs and/or services that were comparable to and available in the same geographic area. The district also did not attempt to show if similar services to those being provided to the student at iBrain could be provided at significantly lower cost by the district somewhere in its public schools. Further, the evidence does not support a finding that the student received services at iBrain that far exceeded the level that the student required in order to receive a FAPE such that a reduction of the amounts charged for each of the segregable costs would be warranted. Accordingly, while IHO 2's approach to achieving an equitable reduction in the costs of the student's tuition is an understandable attempt to align the reduction with a tangible explanation, some of which he attempted to describe during the impartial hearing by reference to a "Medicare model," use of cost buckets and cost centers, average costs, and cost approaches used by nonpublic schools approved by the State Education Department (see Tr. pp. 1958-66)

Instead, taking into account the parent's conduct in the present matter including his uncooperative tactic of refusing to allow the CSE to have information about the student from iHope without justification and his repeated (and at times unreasonable) rescheduling requests, and balancing those considerations against the district's conduct of holding two CSE meetings without parental attendance (including one meeting without any parental notification), I find that a twenty five percent reduction in the total cost of the student's tuition at iBrain, related services, and transportation for the 2018-19 school is warranted.[41]

VII. Conclusion

In summary, the evidence in the hearing record does not support the district's assertion that IHO 2 precluded the district from presenting evidence at the impartial hearing. Further, the district did not assert an appeal of substantive grounds for IHO 2's determination that the district failed to offer the student a FAPE and, therefore, that determination has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Nevertheless, there is also no merit to the district's appeal of IHO 2's determinations relating to the CSE process or special transportation. As for the unilateral placement, the district has identified no basis for concluding that IHO 2 erred in finding iBrain appropriate. Finally, equitable considerations warrant a 25 percent reduction of

[41] I will clarify that nothing in this decision is designed to vacate the requirements in my previous decision regarding the student's stay-put placement. Notwithstanding this equitable reduction, the district remains subject to the requirement to fund the full costs of the student's attendance at iBrain, related services, and transportation for the 2018-19 school year pursuant to pendency. Thus, assuming that the parent has produced evidence that iBrain made-up at least 37 60-minute vision education sessions for the student in accordance with my previous decision (see Application of the New York City Dep't of Educ., Appeal No. 19-039; Application of a Student with a Disability, Appeal No. 18-119), which, in the answer with cross-appeal, the parent represents iBrain did (Answer with Cross-Appeal at pp. 8-9), the district remains obligated for the full cost of iBrain under pendency, unless and until that determination is overturned.

the costs of the student's attendance at iBrain for the 2018-19 school year, including the costs of related services and transportation.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that IHO 2's decision dated July 17, 2019, is modified, by reversing those portions which required the district to fund the costs of the student's program at iBrain consistent with the lower of certain identified measures of the costs of related services and transportation; and

IT IS FURTHER ORDERED that with respect to the merits of the parent's claims in this proceeding, the district shall be required to reimburse the parent for 75 percent of the costs of the student's attendance at iBrain for the 2018-19 school year, including the costs of related services and transportation.

Dated: **Albany, New York**
November 4, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER