The University of the State of New York

The State Education Department
State Review Officer
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**No. 19-096**

**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 Brian Davenport, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondent, by John Henry Olthoff, 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 the costs of the student's tuition and related services at the International Institute for the Brain (iBrain) for the 2018-19 school year. The appeal must be dismissed.

### II. Overview—Administrative Procedures

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

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

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

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

## III. Facts and Procedural History

The student in this case attended kindergarten during the 2015-16 school year at a district public school (see Tr. p. 483; Dist. Ex. 33 at p. 1).[1] As described in the hearing record, the student's

[1] As will be discussed herein, this student has been the subject of a prior State-level administrative appeal of an IHO's (IHO 2's) second interim decision, dated December 25, 2018, 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. 19-015). This State-

kindergarten classroom consisted of 12 students and the student received approximately three sessions per week of each of the following related services: physical therapy (PT), occupational therapy (OT), and speech-language therapy (see Tr. pp. 483-84; Dist. Ex. 33 at p. 1).[2]

The student began attending iHope, a nonpublic school, in July 2016 for the 2016-17 school year (see Tr. p. 484). At iHope, the student attended a classroom with a total of six students, each of whom—including this student—had the assistance of an individual paraprofessional within the classroom (see Tr. p. 484). The student's classroom at iHope was staffed with one teacher, and the student received five sessions per week of each of the following related services: OT, PT, speech-language therapy, and vision services (see Tr. pp. 484-85).

On or about March 17, 2017, iHope developed an IEP for the student for the 2017-18 school year, which consisted of the following program: 12-month services in a 6:1+1 special class with a full-time, 1:1 paraprofessional; special transportation; nursing services; assistive technology devices; and related services consisting of five 60-minute sessions per week of individual PT, four 60-minute sessions per week of individual OT, three 60-minute sessions per week of individual vision education services, five 60-minute sessions per week of individual speech-language therapy, and one 60-minute session per month of parent counseling and training in a group (see Parent Ex. C at pp. 1, 33-35).

On or about June 14, 2017, a CSE convened for the student's annual review and developed an IEP for the 2017-18 school year (see Parent Ex. B at pp. 5-6). The parent rejected the district's recommended program and unilaterally placed the student at iHope for the 2017-18 school year (see Tr. p. 484; see generally Parent Exs. B-C; H; Dist. Exs. 19-20). By due process complaint notice dated November 15, 2017 (November 2017 due process complaint notice), the parent alleged that the district failed to offer the student a FAPE for the 2017-18 school year based upon various challenges to both the June 2017 CSE process and the resultant June 2017 IEP, and as relief, sought reimbursement for the costs of the student's attendance at iHope for the 2017-18 school year (see Parent Ex. B at pp. 3, 6-7).

As the impartial hearing related to the 2017-18 school year proceeded, the district, in preparation for the student's educational planning for the 2018-19 school year, sought and received the parent's consent to reevaluate the student (see Dist. Exs. 12; 32 at p. 1). In a letter dated February 9, 2018, the district scheduled the reevaluations—an updated social history and an administration of the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3)—to be completed on March 28, 2018 (see Dist. Exs. 13; 43 at p. 11; see also Dist. Ex. 5 at p. 1). Shortly thereafter, in a letter dated February 14, 2018, the district began the process of scheduling a CSE meeting and initially selected March 27, 2018 at 1:00 p.m. as the date and time for the meeting (see Dist. Ex. 24 at p. 1); however, the evidence in the hearing record reflects that the district then

level appeal, however, relates to IHO 2's final decision on the merits regarding whether the district offered the student a free appropriate public education (FAPE) for the 2018-19 school year.

[2] At the impartial hearing, the parent testified that the student may have also received vision services while attending the district public school for kindergarten (see Tr. pp. 483-84).

rescheduled the CSE meeting for March 13, 2018 (see Dist. Ex. 25 at p. 1 [reflecting CSE meeting notice dated February 27, 2018]).[3]

In preparation for the student's March 13, 2018 CSE meeting, a SESIS log entry dated March 8, 2018 recorded the receipt of a "Rec. Ind. Ed. Plan 2018-2019," which, while not explained, most likely referred to the student's iHope IEP for the 2018-19 school year, dated March 6, 2018 and entitled "Recommended Individualized Education Plan (IEP) 2018-2019," sent by iHope in response to a request for documents for the meeting (compare Dist. Ex. 43 at pp. 9-10, with Dist. Ex. 20 at p. 1). In another SESIS log entry dated March 8, 2018, the district also recorded its receipt of a copy of the student's "Quarterly Progress Report," dated January 12, 2018, from iHope (compare Dist. Ex. 43 at pp. 9-10, with Dist. Ex. 19 at p. 1). A SESIS log entry dated March 12, 2018 documented that the district called the parent—and iHope—to confirm that the CSE meeting scheduled for March 13, 2018 was "being postponed" because the student's updated evaluations had not yet been completed (Dist. Ex. 43 at p. 9).

As the district proceeded with its educational planning for the 2018-19 school year and the scheduling of a CSE meeting, the IHO assigned to preside over the proceeding adjudicating the parent's November 2017 due process complaint notice regarding the 2017-18 school year (IHO 1) issued a decision dated March 13, 2018, which 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 tuition reimbursement relief (see Parent Ex. B at pp. 7-12, 14-15). Notwithstanding the fact that the district conceded at the impartial hearing that it failed to offer the student a FAPE for the 2017-18 school year at the impartial hearing, IHO 1 went on to conclude that the district did not offer the student a FAPE for the 2017-18 school year because it failed to "offer any evidence at the hearing in support of its classification of the student [as a student] with multiple disabilities," and similarly failed to present "any record of its attempts to arrange a mutually agreed upon time and place for its CSE meetings before proceeding in the absence of the parent or staff from iHope" (id. at pp. 10-13). IHO 1 then found that iHope was "an appropriate program for the student because it provide[d] her with specifically designed, individualized instruction to meet her unique educational needs" (id. at pp. 13-15). In particular, IHO 1 described the student's program at iHope for the 2017-18 school year as including "direct instruction in a 6:1+1 special class setting . . . supported by a full-time, one-to-one paraprofessional daily," as well as related services consisting of PT, OT, speech-language therapy, vision education services, and parent counseling and training

[3] The hearing record contains no evidence to explain the reason(s) for rescheduling the CSE meeting initially scheduled for March 27, 2018 (see generally Tr. pp. 1-565; Parent Exs. A-K; N-Y; Dist. Exs. 1-14; 16-33; 40; 42-44; IHO Exs. I-II). However, according to an entry dated February 27, 2018 in the district's computerized Special Education Student Information System (SESIS) log, a "Notice of IEP Meeting (2nd Notice 4/18/18 @ 1:00 PM)" was sent to the parent and iHope (via email) on that same date (Dist. Ex. 43 at p. 10). The hearing record does not include a separate CSE meeting notice corresponding to a CSE meeting scheduled for April 18, 2018 (see generally Tr. pp. 1-565; Parent Exs. A-K; N-Y; Dist. Exs. 1-14; 16-33; 40; 42-44; IHO Exs. I-II). Within minutes of this entry, the district's SESIS log reflected another entry dated February 27, 2018, indicating that a "Notice of IEP Meeting (2nd Notice 3/13/18 @ 10:00 AM)" was sent to the parent and iHope (via email) on February 27, 2018 (Dist. Ex. 43 at pp. 9-10). In this instance, the hearing record does include a separate letter, dated February 27, 2018, corresponding to the CSE meeting rescheduled for March 13, 2018 (compare Dist. Ex. 43 at pp. 9-10, with Dist. Ex. 25 at p. 1).

services, all delivered to the student individually in 60-minute sessions (id. at pp. 14-15). With respect to equitable considerations, IHO 1 found no basis upon which to reduce or deny reimbursement or funding for the costs of the student's unilateral placement at iHope for the 2017-18 school year (id. at pp. 15-16). Therefore, as relief, IHO 1 directed the district to reimburse the parent for the student's tuition costs at iHope for the 2017-18 school year and to directly pay iHope for "any and all outstanding costs" related to the student's attendance during the 2017-18 school year (id. at pp. 16-17). In addition, IHO 1 also ordered a CSE—within 30 days of its receipt of the decision—to "convene, at a time mutually agreeable to the parent, iHope staff, and [district] personnel, to set the student's educational classification as traumatic brain injury (TBI) and [to] develop an IEP for the student consistent with her then-current educational needs and abilities" (id. at p. 17).[4]

On March 23, 2018, the district completed both the updated social history and the Vineland-3 assessment of the student (compare Dist. Ex. 13, with Dist. Ex. 5 at p. 1, and Dist. Ex. 6 at p. 1, and Dist. Ex. 22 at p. 1; see also Dist. Ex. 43 at p. 8 [noting a telephone call on March 14, 2018 to the parent to confirm that she could complete the updated social history on March 23, 2018 and reflecting that the administration of the Vineland-3 had also been rescheduled for March 23, 2018]).[5] In a meeting notice of the same date, the district rescheduled the CSE meeting for May 10, 2018 at 10:00 a.m. (see Dist. Ex. 26 at p. 1).[6]

On April 6, 2018, iHope's "Chairman of the Board" (chairman) composed a memo addressed to "iHOPE Parents/Guardians" (iHope memo) (Dist. Ex. 21 at p. 1). In the iHope memo, the chairman alerted parents about information he recently received, which indicated that "certain parents ha[d] been advised by their attorney to cancel IEP Meetings scheduled for the remainder of April and May" (id.). The chairman noted that he intended to provide parents with information in order for them to "make a decision" with regard to the "Current IEP Season" (id.). Specifically, the iHope chairman noted that "IEP Sessions" for the upcoming 2018-19 school year had been scheduled beginning in the "first week of March" and through the "remainder of April, with some meetings pushed into May" (id.). The chairman further noted that "personnel responsible for

[4] With respect to IHO 1's decision and order that a CSE convene a meeting to change the student's classification to TBI and develop an IEP, an entry in the district's SESIS log—dated May 24, 2018—captured an email sent on April 9, 2018 from a district implementation manager to the CSE chairperson, which advised that "[t]o be in compliance, we should schedule the meeting to occur before 4/12/2018 (unless we get documentation from [the] parent [indicating] she wishe[d] to postpone), inviting all the necessary participants from the school" (Dist. Ex. 43 at pp. 5-6). The implementation manager's email also instructed that a CSE meeting notice should be sent to the parent's attorney via email "by today if possible" (id. at p. 6).

[5] Even though both the updated social history and the Vineland-3 had been completed on March 23, 2018, the district's SESIS log noted, in an entry dated March 29, 2018, that the parent was a "No Show" for the March 28, 2018 appointments to complete these evaluations (Dist. Ex. 43 at pp. 7-8; see Dist. Exs. 5 at p. 1; 6 at p. 1; 22 at p. 1).

[6] The district's SESIS log entry dated March 23, 2018 reflected that the May 10, 2018 CSE meeting would be held at 9:30 a.m., rather than 10:00 a.m., as represented in the CSE meeting notice (compare Dist. Ex. 43 at p. 8, with Dist. Ex. 26 at p. 1). Following this entry, the district SESIS log reflected an April 6, 2018 entry noting that "several attempts" had been made to reach the parent by telephone, and while having left a "voicemail message," the parent had not responded; however, this log entry does not include any additional information explaining why the district was attempting to reach the parent (Dist. Ex. 43 at p. 7).

developing [the students'] IEP report[s] (iHope teachers, therapists, etc.) ha[d] committed their time, energy and resources to completing the documentation in a timely manner ahead of each meeting" (id.). Next, the iHope chairman reiterated—as the school's "OFFICIAL POSITION"—that iHope had an "agreement with CSE10 to conduct all of these IEPs on the schedule we created and agreed to with them back in January" (id.). In addition, the chairman noted that iHope had "instructed our school personnel to be ready to prepare for and participate in these meetings" and, as discussed in February—iHope "expect[ed]" the parents "to cooperate with this process and get these meetings finished on the schedule we agreed to with CSE10" (id.). As for "Legal Representation," the iHope chairman repeated information previously provided to the parents, namely, that "[a]s of January 1, 2018, whether [the parents were] being represented by [a particular attorney], his staff or any other attorney for that matter, they [were] your lawyer(s) and **they do not represent iHope Academy**" (id. at pp. 1-2 [emphasis in original]). The chairman reminded the parents that "[t]heir strategy towards the IEP meetings may differ from the school's," and the parents would "ultimately [have to] make the choice of how to proceed" (id. at p. 2). As a final point, the chairman noted that he had "instructed the staff of iHope Academy to stay on the schedule we agreed to with CSE10" and if the parents "decide[d] to change the schedule with CSE10 without prior approval from [the associate program director at iHope], [he] c[ould not] guarantee that [those students'] staff w[ould] be available for the new IEP meeting" (id. at pp. 2, 4). In an email dated April 10, 2018, the associate program director at iHope forwarded the iHope memo to the CSE chairperson at CSE 10 (id. at p. 1).

The next direct correspondence between the district and the parent occurred via letter from the parent's attorney, dated May 4, 2018, sent on the parent's behalf to the CSE chairperson (see Parent Ex. N at p. 1; Dist. Ex. 23).[7] According to the letter, the parent wrote to "follow up on rescheduling" the student's "IEP meeting" (Parent Ex. N at p. 1).[8] Specifically, the parent requested a "Full Committee Meeting" and for a "[district] School Physician [to] participate in person" (id.). The parent also requested that the student's then-current special education teacher

[7] The district's SESIS log did not reflect the receipt of the parent's May 4, 2018 letter (see generally Dist. Ex. 43). Upon review, it appears that the SESIS log failed to document actions taken, if any, between entries dated April 6, 2018 and May 4, 2018, and then also between entries dated May 4, 2018 and May 24, 2018 (id. at p. 7). Moreover, several SESIS log entries dated May 24, 2018 reflected emails or other exchanges that occurred in March and April 2018 (id. at pp. 5-7). For example, a SESIS log entry dated May 24, 2018, reflected an email exchange—dating from March 18, 2018 through March 20, 2018—between the CSE chairperson and iHope that, while not explained in the hearing record, appears to document attempts to reschedule the March 13, 2018 CSE meeting that had been postponed due to incomplete reevaluations of the student (id. at pp. 7, 9). The iHope email suggested rescheduling the meeting for April 30, 2018 at 12:30 p.m. because the parent was available on that day and time, but according to the emails, the district could not accommodate that date and counteroffered either "May 10th at 9 or 12:30 or Mary [sic] 17th at the same times" (id. at p. 7). On March 23, 2018, the CSE chairperson sent an email to iHope, which indicated that the student's CSE meeting notice would be sent to the parent and reflected that the district had been able to "schedule it on the date and time requested by the parent" (id. at p. 6). A May 24, 2018 SESIS log entry thereafter reflected another email from the CSE chairperson to iHope, dated March 23, 2018, which reflected that the rescheduled CSE meeting would take place on May 10, 2018 at 9:30 a.m. (id.; cf. Dist. Ex. 26 at p. 1 [scheduling the CSE meeting for 10:00 a.m.]).

[8] At the time of the parent's May 4, 2018 letter, the district had most recently rescheduled the student's CSE meeting to occur on May 10, 2018 at 10:00 a.m. as reflected in the CSE meeting notice, dated March 23, 2018 (see Dist. Exs. 26 at p. 1; 43 at pp. 5-7).

and related services providers at iHope (identified by name and title in the letter) be included on "any IEP Meeting Notice" and for the meeting notices to be sent to the so-identified iHope staff at iHope (id.). The parent noted her own availability for a meeting as "Tuesdays or Thursdays between 9:30 am-1:00 pm" and further requested that the meeting be held at iHope (id.).

In addition, the parent indicated in the letter that she "look[ed] forward to addressing the issues outlined in the recent decision [issued by IHO 1] to make the appropriate changes to [the student's] IEP as well as to develop an appropriate and timely IEP for the 2018-2019 school year" (Parent Ex. N at p. 1). The parent also asked that the "CSE consider a placement in a non-public school and conduct the necessary evaluations for such consideration and any other evaluations prior to scheduling the meeting" (id.). Finally, the parent asked the CSE chairperson to "send [her] a few proposed dates and times in writing, either via email" or by mail to avoid any potential confusion when attempting to schedule a meeting "through the telephone," and further advised that she would "provide the most recent progress reports and any other documentation for your consideration" once a meeting had been scheduled on a "mutually agreeable date and time" (id. at p. 2).

After receiving the parent's letter, the district rescheduled the CSE meeting for May 24, 2018 at 12:00 p.m. via a CSE meeting notice dated May 8, 2018 and a prior written notice dated May 8, 2018 (see Dist. Exs. 8 at p. 1; 27 at p. 1).[9] Initially, the district identified the subject of the prior written notice as the "CSE's response to [the] parent's request to reschedule the IEP Meeting for the 2018-2019 School Year" (Dist. Ex. 8 at p. 1). As the "Description of [the] action proposed or refused," the prior written notice indicated that the parent's request for a CSE meeting to be scheduled on "Tuesdays or Thursdays between 9:30 A.M.-1:00 P.M." had been "granted," and furthermore, that "[the parent] ha[d] confirmed the new meeting date on Thursday, May 24, 2018 @ 12:00 P.M." (id.). The prior written notice also advised the parent that although the district had "granted" her request for a district school physician to participate in the meeting, the district had "not granted" her request for the district school physician to participate "in person" at the meeting (id.). In addition, the district indicated that it had "granted" the parent's request to "include IHOPE Staff in the Meeting Notice," but did "not grant" her request to "hold the meeting at IHOPE" (id.).

Next, the district's prior written notice provided an "Explanation of why the action [was] proposed or refused," indicating that the CSE meeting had been rescheduled from March 27, 2018 to March 13, 2018—with appropriate meeting notices to the parent and iHope—and that "this appointment was provided after [the parent] and the school mutually agreed to the schedule" (Dist. Ex. 8 at p. 1). The district also noted within the same section of the prior written notice that the CSE meeting had, again, been rescheduled to May 10, 2018 with meeting notices sent to the parent and the school (id.). The district then explained that it could not grant the parent's request to hold the CSE meeting at iHope "without further information regarding [her] request," but would "facilitate a phone conference number to allow all members to participate" (id. at p. 2). The district

[9] There is no SESIS log entry corresponding to the district actually sending the parent either the May 8, 2018 CSE meeting notice or the May 8, 2018 prior written notice; instead, the SESIS document includes an entry dated May 24, 2018, which reflects the following: "Notice of IEP Meeting (4th Notice 5/24/18 @ 12:00 PM)" (Dist. Ex. 43 at pp. 5-7). In contrast, the CSE meeting notices dated February 14, 2018, February 27, 2018, and March 23, 2018, all appear as entries within the SESIS log with the following notation: "'Notice of IEP Meeting: Reevaluation/Annual Review' sent for [the student]" to both the parent and "the school" (id. at pp. 8-11).

reiterated that it "**must proceed with the rescheduled IEP Meeting for the 4th time for Thursday, May 24, 2018 @ 12:00 P.M.**" in order to "**ensure appropriate and timely services for the 2018-2019 School Year"** (id. [emphasis in original]).

On May 24, 2018 at approximately 8:49 a.m.—prior to the CSE meeting scheduled for 12:00 p.m.—the CSE chairperson called the parent (see Dist. Ex. 31; see also Tr. pp. 495-96; Dist. Exs. 8 at p. 1; 27 at p. 1). In an email to the CSE chairperson, dated May 24, 2018, the parent reported the conversation she had that same morning with the CSE chairperson (see Dist. Ex. 31). Specifically, the parent indicated in the email that she had not been "aware of an IEP meeting scheduled [for that day] at 12pm" and she had "not consent[ed] for the meeting to be done without [her]" (id.). The parent also indicated that she had "not receive[d] any prior notification for this meeting via mail, email, or phone call" and had only been "made aware of this meeting [on that] morning when [the CSE chairperson] called" her, and she was "not available to attend" (id.). The parent then requested that the district reschedule the CSE meeting and noted that her "attorney w[ould] follow up" with the CSE chairperson (id.).

As a follow-up to the parent's May 24, 2018 email to the CSE chairperson, the parent's attorney wrote a letter—also dated May 24, 2018—to the CSE chairperson (see Parent Ex. O at p. 1).[10] In the letter, captioned as "**REQUEST FOR RECONVENE IEP MEETING (School Years 2017-2018 / 2018-2019 IEP)**," the parent's attorney reiterated the parent's contentions that she had no notice of a CSE meeting scheduled for May 24, 2018 and admonished that the meeting "should not have proceeded due to lack of sufficient notice and the parent's inability to attend" (id. at pp. 1-2). Thereafter, the parent's attorney indicated the parent's desire to proceed with a meeting that she could attend "along with a Full Committee" (id. at p. 1). To "expedite scheduling this meeting," the parent's attorney requested that the CSE chairperson send the parent an email with a "few additional proposed dates and times so the parent c[ould] identify a mutually agreeable date and time" (id.). Additionally, the parent's attorney requested that the "Full Committee" include the "**in person**" participation of a district school physician, as well as the following "mandated [m]embers": the student's special education teacher, the parent, a district representative, the student's related services providers, a school psychologist, and a parent member (id. [emphasis in original]).[11] The parent's attorney also noted that the parent did not "waive" her right for the district school physician and for the parent member to participate at the meeting (id. at p. 2). Relatedly, the parent's attorney noted that the parent was required to "indicate in writing if she agree[d] to a mandated Member of the IEP Team to NOT participate in person," and therefore, because the parent "expected" the district school physician to participate in person, the "CSE should ONLY propose dates" that the district school physician could attend in person (id.).

[10] While the letter from the parent's attorney is dated May 24, 2018, the district's SESIS log does not reflect any entry corresponding to the district's receipt of this letter on that date; however, the SESIS log may mistakenly note its receipt in an entry dated June 12, 2018, which indicated the following: "(Letter from Lawyer dated June 24, 2016)" as the hearing record does not include any other letter from the parent's attorney dated June 24, 2016 (see Dist. Ex. 43 at p. 2 [emphasis added]).

[11] In contrast to the May 4, 2018 letter from the parent's attorney, the May 24, 2018 letter did not include the names of the specific providers—i.e., the student's special education teacher and related services' providers—requested by the parent to attend the CSE meeting (compare Parent Ex. N at p. 1, with Parent Ex. O at p. 1).

Next, the parent's attorney requested that the district send a "Meeting Notice attached to all future Prior Written Notices" and that "any new Meeting Notice confirm[] in writing the names of the Parent Member and the [district] School Physician and that they w[ould] be participating in person" (Parent Ex. O at p. 2).

The parent's attorney then noted in the May 24, 2018 letter that the "recent annual IEP Meeting held by [the] CSE . . . for this student on March 13, 2018, was not appropriate, since the CSE relied upon her 2017-2018 IEP developed by the [district], which [IHO 1] invalidated" (Parent Ex. O at p. 2). According to the parent's attorney, "[t]here [was] no reason the reconvene IEP Meeting to address the 2017-2018 IEP c[ould not] be held at the same time as the reconvene IEP Meeting to address the 2018-2019 IEP" (id.). "In an effort to accommodate the busy schedule of the [student's] family, as well as the [district]," the parent's attorney indicated that the parent would be "available for IEP meetings scheduled on Tuesdays or Thursdays" (id.).[12] The parent's attorney also indicated that the parent "look[ed] forward to developing an appropriate and timely IEP for the 2018-2019 School Year, as well as addressing the changes to the 2017-2018 IEP ordered by [IHO 1]" (id.).

As final points, the parent's attorney asked that the "CSE conduct any evaluations necessary when considering a non-public school placement" for the student, consistent with the district's "Standard Operations Procedure Manual (SOPM)" (Parent Ex. O at p. 2). The parent's attorney also asked the district "to send a Draft Agenda of the IEP Meeting in writing at least seven (7) days prior to the IEP Meeting to ensure an efficient and effective meeting for this student" (id.).

In an email dated May 25, 2018, the CSE chairperson responded to the parent's May 24, 2018 email (see Dist. Ex. 31). Along with forwarding copies of a May 25, 2018 prior written notice and a notice of CSE meeting (identified as "Attachments" in the email) to the parent and the parent's attorney, the CSE chairperson asked the parent to "submit updated progress reports and any other necessary documentation to the CSE prior to the IEP meeting to allow proper review and preparation" (id.; see generally Dist. Exs. 9; 28).

The May 25, 2018 CSE meeting notice sent to the parent, the parent's attorney, and iHope rescheduled the student's meeting for June 12, 2018 at 11:30 a.m. (see Dist. Ex. 28 at p. 1; see also Dist. Exs. 31; 43 at pp. 4-5 [appearing to document the transmission of the June 12, 2018 CSE meeting date to these individuals within the district's SESIS log]). The May 25, 2018 CSE meeting notice identified by name and title the following individuals expected to attend the meeting: a district special education teacher or related service provider, a district representative, a district school psychologist, the parent, a parent member (listed as "TBD"), a district school physician (listed as "TBD"), the student's special education teacher at iHope, the student's occupational therapist at iHope, the student's speech-language therapist at iHope, and the student's vision education therapist at iHope (compare Dist. Ex. 28 at p. 1, with Parent Ex. N at p. 1). The May 25, 2018 prior written notice provided to the parent with regard to the newly rescheduled CSE meting for June 12, 2018 at 11:30 a.m. contained the same information, nearly verbatim, as

[12] In contrast to the May 4, 2018 letter from the parent's attorney, the May 24, 2018 letter did not set forth any specific times during the day that the CSE meeting must be held, other than noting that the meeting should be rescheduled for a Tuesday or a Thursday (compare Parent Ex. N at p. 1, with Parent Ex. O at pp. 1-2).

reflected in the prior written notice dated May 8, 2018 (compare Dist. Ex. 9, with Dist. Ex. 8). In addition, the district sent another prior written notice dated June 1, 2018, to the parent, which reflected the information in both the May 8, 2018 and May 25, 2018 prior written notices (compare Dist. Ex. 10, with Dist. Ex. 9, and Dist. Ex. 8).[13]

On June 4, 2018, the CSE chairperson sent emails to the parent and iHope forwarding copies of a May 31, 2018 prior written notice and a notice of CSE meeting (see Dist. Exs. 11; 43 at pp. 3-4).[14] In the email directed to iHope, the CSE chairperson requested copies of the student's progress reports for the upcoming meeting (see Dist. Ex. 43 at pp. 3-4).

On June 4, 2018, the parent executed an enrollment agreement with iBrain for the student's attendance from July 9, 2018 through June 26, 2019 for the 2018-19 school year (see Parent Ex. J at pp. 1, 6).[15]

On June 9, 2018, the district's SESIS log noted an entry reflecting that a district bilingual social worker called the parent on that date and left a "voice mail regarding the upcoming appointment . . . scheduled for 6/12/18 @ 11:30 a.m." (Dist. Ex. 43 at p. 3). The SESIS log entry noted that the parent was also asked to "have the school provide any teacher's report or other reports that might be relevant to this evaluation" and left the parent a "contact phone" number (id.).

On June 11, 2018 at approximately 5:58 p.m., the parent's attorney sent an email to the CSE chairperson (see Dist. Exs. 17; 43 at p. 3). In the email, the parent's attorney "attached [his] letter in response to the recent P[rior] W[ritten] N[otice] and Meeting Notice . . . sent to [the parent] and the recent decision by [IHO 1]" (Dist. Ex. 17).[16] The CSE chairperson responded to the parent's attorney in an email dated June 12, 2018 at approximately 10:03 a.m. (id.). In the email, the CSE chairperson thanked the parent's attorney "for reaching out to the CSE" and reminded him that, as noted in the "P[rior] W[ritten] N[otice] issued by the CSE and dated June 1st, 2018; we must proceed with this IEP meeting on June 12 at 11:30 to ensure timely and appropriate services

[13] Both the May 8, 2018 and the June 1, 2018 prior written notices informed the parent that the district had not granted her request for the district school physician to participate at the meeting in person; the May 25, 2018 prior written notice did not include this information (compare Dist. Ex. 10 at p. 1, with Dist. Ex. 9 at p. 1, and Dist. Ex. 8 at p. 1).

[14] The hearing record does not include a prior written notice dated May 31, 2018 or a CSE meeting notice dated May 31, 2018 and the district's SESIS log does not reflect any entries corresponding to either a prior written notice or CSE meeting notice dated May 31, 2018 (see generally Tr. pp. 1-565; Parent Exs. A-K; N-Y; Dist. Exs. 1-14; 16-33; 40; 42-44; IHO Exs. I-II).

[15] 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]).

[16] The hearing record does not include a copy of a letter from the parent's attorney responding to any prior written notice issued by the district with respect to scheduling the June 12, 2018 CSE meeting (see generally Tr. pp. 1-565; Parent Exs. A-K; N-Y; Dist. Exs. 1-14; 16-33; 40; 42-44; IHO Exs. I-II); however, according to the district, attached to the June 11, 2018 email from the parent's attorney was the same letter dated May 4, 2018 previously sent to the district (Req. for Rev. ¶ 6; see Parent Ex. N; Dist. Ex. 23). Ultimately, the hearing record is unclear with respect to what the parent's attorney included as attachment(s) to the June 11, 2018 email.

for [the student] for the next school year" (id.). The CSE chairperson asked the parent's attorney to "let [them] know if [the] parent w[ould] be available via phone or if any accommodations [were] required" (id.).

According to the evidence in the hearing record, two CSE meetings occurred on June 12, 2018: the first CSE meeting convened, "pursuant to [IHO 1's] order," on June 12, 2018 at approximately 11:15 a.m. with the following individuals in attendance: a district special education teacher, a district representative (who was a district school psychologist), and a district regular education teacher (see Tr. pp. 296-304; Dist. Exs. 14 at pp. 17, 20; 42 at pp. 1-2).[17, 18] According to the district representative's understanding, IHO 1's order "directed the CSE to convene and [for the] IEP to set the Student's classification as Traumatic Brain Injury ('TBI') and develop an IEP that was 'consistent with her then-current educational needs and abilities'" (Dist. Ex. 42 at pp. 1-2; see Tr. pp. 296-304; Parent Ex. B at pp. 16-17). The district representative attested that the parent did not attend the first CSE meeting held on June 12, 2018 (see Dist. Ex. 42 at p. 2; see also Dist. Ex. 14 at p. 20). She further attested that the CSE complied with IHO 1's order and changed the student's classification from multiple disabilities to TBI and "developed an IEP that was appropriate" for her educational needs, noting that the "projected implementation date of the program developed at the Order meeting was July 1, 2017" (Dist. Ex. 42 at p. 2; see Dist. Ex. 14 at pp. 1, 14-15).

[17] At the impartial hearing, the district representative's direct testimony was presented via affidavit (see generally Dist. Ex. 42). The parties established 11:15 a.m. as the approximate start time of the first CSE meeting held on June 12, 2018 based upon a time-stamp on the attendance page of the corresponding IEP and 1:15 p.m. as the approximately start time of the second CSE meeting held the same day based upon a similar time-stamp on the corresponding IEP (see Tr. pp. 313-15; Dist. Exs. 14 at p. 20; 18 at p. 22). The district representative testified on cross-examination at the impartial hearing that "two hours" had elapsed between the first CSE meeting and the second CSE meeting (Tr. pp. 304, 313-15).

[18] The hearing record submitted to the Office of State Review in connection with this appeal was in disarray because several of the district's exhibits, as physically numbered, did not correspond to the district exhibits as numbered on the exhibit list attached to IHO 2's decision. The Office of State Review sought clarification from the district concerning the irregularities discovered within the administrative hearing record; while the district resubmitted certain exhibits and attempted to clarify discrepancies, the administrative hearing record—as resubmitted and recertified—continues to suffer from discrepancies. For example, although the district recertified the hearing record to reflect that district exhibit 14 included only 1 page, the transcript of the hearing record clearly indicates that district exhibit 14 included 20 pages and was correctly entered into the hearing record as a 20-page exhibit—but was thereafter mistakenly noted as a 1-page exhibit on IHO 2's exhibit list (see Tr. pp. 222, 314; Dist. Ex. 14 at pp. 1-20). The same is true for district exhibit 18, which the district recertified as consisting of a 21-page exhibit, but instead, is reflected in the transcript of the impartial hearing as being entered into evidence as a 22-page document (see Tr. pp. 185, 221; Dist. Ex. 18 at pp. 1-22). The district is cautioned that merely seeking confirmation from the IHO assigned to the matter as a method of certifying that the hearing record sent to the Office of State Review is a complete and accurate copy of the hearing record does not meet its obligations under State regulations. Rather, the district must independently undertake a careful review of the documents comprising the hearing record to ensure it represents a complete and accurate copy of the hearing record before sending it to the Office of State Review. In this instance, while some of the responsibility may rest with the parties and IHO 2—who, for reasons unexplained at the impartial hearing, decided to reassign some of the district's exhibits with different numbers—it is the district's obligation to provide the Office of State Review with a certified copy of the hearing record that attempts to identify and explain any discrepancies.

According to the district representative, the second CSE meeting convened at approximately 1:15 p.m. on June 12, 2018 to address the student's program for the 2018-19 school year with the following individuals in attendance: a district special education teacher, a district representative (district school psychologist), and a district regular education teacher—all of whom had attended the CSE meeting held at 11:15 a.m. (see Tr. pp. 313-15; Dist. Ex. 42 at p. 2; compare Dist. Ex. 14 at p. 20, with Dist. Ex. 18 at p. 22). However, the district representative attested that a district school physician also attended the second CSE meeting held on June 12, 2018, and participated via telephone (see Dist. Ex. 42 at p. 2; see also Dist. Ex. 18 at p. 22). Similar to the first CSE meeting held at 11:15 a.m., the parent did not attend the second CSE meeting held at 1:15 p.m. (see Dist. Exs. 18 at p. 22; 42 at p. 2).[19]

At the second meeting held on June 12, 2018 the CSE conducted the student's annual review and developed an IEP for the 2018-19 school year (see Dist. Exs. 18 at pp. 1, 19; 42 at pp. 2-5).[20] Finding the student eligible for special education as a student with multiple disabilities, the June 2018 CSE recommended a 12-month school year program in a 12:1+(3:1) special class placement (also referred to as a 12:1+4 special class placement) with the following related services: three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual vision education services, and one 60-minute session per month of parent counseling and training services (see Dist. Exs. 18 at pp. 1, 16-17; 42 at pp. 2-5).[21] The June 2018 CSE also recommended the services of a full-time, 1:1 paraprofessional for transportation and the services of a full-time, 1:1 paraprofessional to address the student's health and feeding needs (see Dist. Ex. 18 at p. 17). Finally, the June 2018 CSE recommended a variety

[19] At the impartial hearing, the district representative testified during cross-examination that it was not her decision to conduct two CSE meetings on the same date, but instead, she had received a "sheet" with the student's name on it and with "two different meetings, one of which said implementation order and the other . . . of which said IEP" (Tr. pp. 315-16). Therefore, the district representative—who believed that either one of two CSE chairpersons had generated the "sheet" she received for scheduling two CSE meetings—testified that "[w]e were scheduled for [the two meetings and] we did them" (Tr. pp. 315-17).

[20] The district representative attested that "in preparation for the Student's 2018-2019 IEP, the IEP team relied on the following sources of clinical information to gain the fullest possible view of the Student's functioning:" a 2016 classroom observation, a 2018 parent interview /social history update, a 2018 Vineland-3 assessment, a 2017 swallow study, a 2015 eye report, a 2017 school vision report, a 2018 physical exam, a 2016 OT evaluation, an undated Pediatric Evaluation of Disability Inventory report, an undated Brigance Inventory of Early Development III, an undated Preschool Language Scale-5 assessment, a 2017 letter from a physician, a 2016 speech-language evaluation, a 2016 PT evaluation, and a 2016 vision education assessment (Dist. Ex. 42 at pp. 2-3). In addition, the district representative's affidavit indicated that the June 2018 CSE also reviewed the student's "progress reports from iHOPE from the 2017-2018 school year and the Student's iHOPE IEP from 2017-2018 to supplement the Student's evaluative material to assess her strengths and needs to develop an appropriate IEP for the 2018-2019 school year" (id. at p. 3).

[21] While the student's eligibility for special education programs and related services is not in dispute, the parent contends that the student should be eligible for such services as a student with a TBI (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]; see also Parent Ex. A at p. 3), and not as a student with multiple disabilities (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

of strategies to address the student's management needs and created annual goals with corresponding short-term objectives (id. at pp. 6-16).

In a school location letter dated June 12, 2018, the district identified the particular public school site at which to implement the student's 2018-19 IEP (see Dist. Ex. 3 at p. 4). In a prior written notice dated June 17, 2018, the district summarized the student's recommended program for the 2018-19 school year (see Dist. Exs. 3 at pp. 1-2; 29 at pp. 1-2).[22]

In a letter to the district dated June 21, 2018, the parent—through her attorney—notified the district of her intentions to unilaterally place the student at iBrain for the 2018-19 school year and to seek public funding for this placement (see Parent Ex. P). According to the letter, the parent asserted that the district had not offered the student a "program or placement" that would appropriately meet her needs (id.). In addition, the parent indicated that the district had "not conducted an annual IEP for this student," and she had "repeatedly requested the CSE to conduct a Full Committee Meeting along with a [district] school physician to develop an appropriate and timely IEP for the 2018-2019 school year" (id.). The parent noted that, as of the date of the letter, the district had "not properly responded to this request," and the parent, through the letter, continued to request that a "CSE schedule an appropriate IEP meeting at a mutually agreeable date and time to allow for all mandated members of the IEP team to participate" (id.). Finally, the parent noted her willingness to "entertain an appropriate [district] program and an appropriate public or approved non-public school placement once an IEP ha[d] been conducted" (id.).

On or about July 9, 2018, the student began attending iBrain in a 12-month school year program and in a "6:1:1 special class" with the following related services: five 60-minute sessions per week of individual PT; four 60-minute sessions per week of individual OT; five 60-minute sessions per week of individual speech-language therapy; and three 60-minute sessions per week of individual vision education services (Parent Ex. W at p. 2; see Parent Ex. D at p. 38). In addition, the student received the services of a full-time, 1:1 paraprofessional to "support her needs" (Parent Ex. W at p. 2; see Parent Ex. D at p. 38). Also as a part of the student's program at iBrain, she was provided with the use of assistive technology devices on a daily basis and one 60-minute session per week of training in assistive technology; special transportation (including limited time travel, a 1:1 transportation paraprofessional, air conditioning, and a lift bus with wheelchair accessibility); and one 60-minute session per month of parent counseling and training services (Parent Ex. W at p. 2; see Parent Ex. D at p. 38).

**A. Due Process Complaint Notice**

By due process complaint notice dated July 9, 2018, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (see Parent Ex. A at pp. 1-2). As a basis upon which to conclude that the district failed to offer the

[22] While it is unclear why the hearing record includes two copies of the same prior written notice dated June 17, 2018, both documents reflect that the CSE relied upon the following documents to develop the student's June 2018 IEP: a February 2017 teacher report, a March 2018 social history update, and a March 2018 Vineland-3 assessment (see Dist. Exs. 3 at p. 1; 29 at p. 2). Additionally, both documents identify the student's eligibility category as TBI (Dist. Exs. 3 at p. 1; 29 at p. 1), notwithstanding that the CSE changed the student's eligibility classification to multiple disabilities at the second meeting (see Dist. Ex. 18 at p. 1).

student a FAPE, the parent asserted that the district committed "several substantive and procedural errors" in the development of the June 2018 IEP and with regard to the "subsequent placement recommendation" at a district public school (assigned public school site) (id. at p. 2). The parent noted that she rejected both the June 2018 IEP and the assigned public school site "in their entirety" (id.).

More specifically, the parent alleged that the June 2018 CSE failed to hold the "annual review meeting at a time that was mutually agreeable" with the parent and that complied with the parent's request for a "Full Committee meeting" to discuss the student's needs for the "extended school year" (Parent Ex. A at p. 2). Relatedly, the parent contended that the June 2018 IEP was not appropriate because neither the parent nor "any of the mandated members" attended the June 2018 CSE meeting held to develop the IEP (id.). The parent further asserted that the district failed to follow the "procedures pursuant to state and federal law" when developing the June 2018 IEP, noting specifically that the CSE "feigned interest in the independent evaluations and reports" provided by the "State licensed Special Education teacher and related service therapists" submitted on the parent's behalf and which had been "discussed extensively during the meeting on 3/13/18" (id.).

Next, the parent asserted that the student would be "expose[d] . . . to substantial regression" as a result of the student-to-teacher ratio of the "12:1+(3:1)" special class placement recommended in the June 2018 IEP and due to the "significant and unsubstantiated reduction in the related services mandates" in the IEP (Parent Ex. A at p. 2). The parent also alleged that the CSE failed to recommended a program and placement to meet the student's "highly intensive management needs [that] require[ed] a high degree of individualized attention and intervention," the "recommended program and placement" did not constitute the student's least restrictive environment (LRE), and the student-to-teacher ratio of the special class placement—here, "12:1(3:1)"—was "too large a ratio to ensure the constant 1:1 support and monitoring" the student required to "remain safe" (id. at p. 3). The parent also alleged that the student-to-teacher ratio did not "offer the 1:1 direct instruction and support" the student required to make progress (id.). The parent further asserted that the June 2018 IEP was not based upon "any individualized assessment" of all of the student's needs, and thus, would fail to "confer any meaningful educational benefit" to the student during the 2018-19 school year (id. at p. 2).

In addition, the parent alleged that the June 2018 IEP was not appropriate because it failed to identify the student's eligibility category as TBI (see Parent Ex. A at p. 3). The parent also alleged that the June 2018 IEP failed to adequately describe the student's present levels of performance and management needs and also failed to include measurable annual goals (id.). As a result, the parent contended that the June 2018 IEP did not reflect the student's "individual needs" (id.).

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

**B. Impartial Hearing Officer Decision**

On October 9, 2018, the parties proceeded to an impartial hearing, which concluded on June 25, 2019, after five days of proceedings (see Tr. pp. 1-565).[23] In a decision dated August 26, 2019, IHO 2 concluded that the district failed to offer the student a FAPE for the 2018-19 school year, that iBrain was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's requested relief (see IHO Decision at pp. 7-8, 29-37).

In reaching the conclusion that the district failed to offer the student a FAPE for the 2018-19 school year, IHO 2 initially opined that, "notwithstanding the fact that [the district] simply flipped my colleague the bird and thumbed its virtual nose at [IHO 1's] unappealed Final Order," the district claimed that "it nevertheless offered the student a FAPE in the 2018-19 IEP it adopted in contravention to the substance of [IHO 1's] Order" (IHO Decision at p. 29). According to IHO 2, the district "implemented [IHO 1's] Order for less than two hours before reinstating the very classification and program [IHO 1] had ruled inappropriate, and it did so in the second of a pair of whipsaw CSE meetings that neither the family nor the student's school attended (in direct contravention of [IHO 1's] Order that the meeting must be scheduled 'at a time mutually agreeable to the parent, iHOPE staff, and [district] personnel'" (id. at pp. 29-30 [internal citations omitted]). IHO 2 also noted that "for the second and more important meeting—where the district reinstated the overturned program and classification and limned the student's 2018-19 program, they met at a time and in a meeting that had never been noticed to the family" (id. at p. 30).

Next, IHO 2 explained that IHO 1 had "held explicitly that the district's 2017-18 IEP was a nullity because the district neither had provided any clinical support for their programmatic conclusions nor afforded the family an opportunity to participate meaningfully in the review for that year" (IHO Decision at p. 30). In addition, IHO 2 noted that IHO 1 found that these "procedural defects reflected in the 2017-18 IEP review rose to the level of a denial of FAPE" and, as relief, ordered the CSE to "convene within 30 days of March 13, 2018, and do two things: change the student's classification to [TBI] and [in] partnership with the family, develop a new 2017-18 IEP in keeping with the student's then-current needs" (id.). According to IHO 2, the district "actually had scheduled a CSE review" for the same day that IHO 1 issued his decision—to wit, March 13, 2018—but then "unilaterally canceled that review" and failed to reschedule a meeting to implement IHO 1's order within the 30-day timeframe as ordered (i.e., on or before April 12, 2018) (id.). Additionally, IHO 2 indicated that instead of scheduling a CSE meeting for April 30, 2018, "as requested by the family," the district "unilaterally offered May 10, 2018, which the family said was not a good date for them" (id.).

[23] The first two impartial hearing dates—October 9, 2018 and November 27, 2018—concerned the student's pendency (stay-put) placement and services, which resulted in IHO 2 issuing a second interim decision on pendency dated December 25, 2018 (see Tr. pp. 1-159; Second Interim IHO Decision at pp. 6-9). The district appealed IHO 2's second interim decision on pendency to the Office of State Review, and an SRO issued a decision on March 21, 2019 (see Application of the Dep't of Educ., Appeal No. 19-015). After the hearing date in November 2018, the parties and IHO 2 did not meet for another hearing date until June 6, 2019 (compare Tr. p. 14, with Tr. p. 160).

Continuing to review the chronology of the CSE process, IHO 2 indicated that the district "then, on May 8, 2018, unilaterally scheduled May 24, 2018" as the next meeting date (IHO Decision at p. 30). IHO 2 also indicated that the district convened on this date, but "did not actually meet" because, although "district staff called and reached the parent from the meeting," the parent had no knowledge or notice of the meeting and "referred them to her attorney" (id.). IHO 2 also noted that the district convened on May 24, 2018 "notwithstanding silence about that proposed date from the family" and that this date for the CSE meeting was "some 72 days after [IHO 1's] Order and some 42 days late" (id.). In addition, IHO 2 indicated that on May 24, 2018, the district adjourned the meeting and did not "undertake the ministerial but required action of changing the student's classification as ordered [by IHO 1]" (id.).

According to IHO 2, the district—on the very next day, May 25, 2018—"unilaterally scheduled a new meeting for June 12, 2018 at 11:30," without consulting the parent or the parent's attorney, and "then subsequently repeatedly reminded the family that the meeting would take place at that time" (IHO Decision at p. 30). IHO 2 discerned that, while the prior written notices "announce[d] that the purpose of the 11:30 meeting was to develop the 2018-19 IEP," the development of the 2018-19 IEP did not occur at the 11:30 meeting, but instead, was created at the "second, later, non-noticed 1:00 meeting" when a district school physician was in attendance (id. at pp. 30-31). In addition, IHO 2 indicated that the hearing record did not include any prior written notices or notices of a CSE meeting to address IHO 1's decision and order concerning the 2017-18 IEP (id. at p. 31). Regardless, IHO 2 found that the parent did not attend either the 11:30 a.m. meeting or the 1:00 p.m. meeting held on June 12, 2018 (id.).

Turning to the events of the first meeting held on June 12, 2018, IHO 2 found that while it had been "calendared" for 11:30 a.m., the CSE "clocked in at 11:15, some fifteen minutes prior to when the notice to the family had stated it would commence" (IHO Decision at p. 31). IHO 2 also found that this CSE "modified the 2017-18 IEP" by changing the student's classification from multiple disabilities to TBI, consistent with IHO 1's order, "albeit after 91 days rather than within 30" days of that order (id.). The CSE meeting was then adjourned "only to convene a new meet two hours later to undo what they had been ordered to do" (id.).

With regard to the second meeting held on June 12, 2018, IHO 2 noted that, after adjourning the first meeting, the "team then allegedly reviewed in camera the scant information it had about the student's 2017-18 performance and then developed the new IEP, which was clocked in at 1:15 p.m." (IHO Decision at p. 31 [emphasis in original]). According to IHO 2, the only distinction between the program recommended for the student at the first meeting (2017-18 school year) when compared to the program recommended for the student at the second meeting (2018-19 school year) was changing the student's classification from TBI back to multiple disabilities (id.).

In IHO 2's opinion, the second CSE meeting held on June 12, 2018 to develop the 2018-19 IEP "replicat[ed] the very reasons why the 2017-18 IEP had been declared a nullity [by IHO 1]," namely, because the "district convened a pro forma review to pay lip service to [IHO 1's] order and then in an act that might charitably be characterized as blind to [IHO 1's] Order or perhaps more accurately be characterized as hubris, two hours later changed it back to the very classification about which [IHO 1] had written at length" (id. at pp. 31-32). Consequently, IHO 2 found that the student's 2018-19 IEP was "nullity" because the district "failed to change the

student's program from the one ordered by [IHO 1] (and so it remains TBI)" and that "no actual proffered placement—not even one that assured a seat in special education Heaven—could rehabilitate or resuscitate that defective IEP" (id. at p. 32).

Notwithstanding this finding, IHO 2 forged ahead and noted that the "district's actions may be characterized as procedural defects," which did "not necessarily amount to a denial of FAPE" (IHO Decision at p. 32). After reciting the legal standard for procedural violations under the IDEA, IHO 2 found—as similarly determined by his "colleague" (IHO 1)—that the district's "choice to go forward in the absence of the family and the student's teachers surely, 'significantly impeded the parents' opportunity to participate in the decision[-]making process regarding the provision of a [FAPE] to the parents' child'" (id. at pp. 32-33). However, in this case, the district "detailed the several efforts it had made to schedule the meeting and notify, and to some extent accommodate the wishes of, the family," which IHO 2 found differed from the district's case in the matter concerning the 2017-18 school year assigned to IHO 1 (id. at p. 33). Upon reviewing the evidence, IHO 2 found that the district "was under the obligation detailed above to schedule the meeting 'at a time mutually agreeable to the parent, iHOPE staff, and [district] personnel'" and instead, the district: "unilaterally set the date and time of each scheduled review"; "unilaterally rejected the one time/date proposed by the family"; "unilaterally cancelled one scheduled date for reasons of its own . . . and that it . . . also cancelled a second date at the family's request"; it "failed to notify the family that it was scheduling not one but two meetings on June 12 (one for 2017-18 and one for 2018-19)"; the district "never notified the family (but apparently did notify its physician) of the afternoon meeting," which the district conducted; and "in direct contravention to the substantive holdings of [IHO 1]—proposed a program identical to the one that had been invalidated for 2018-19" (id.).

Based upon these findings, IHO 2 concluded that "not only did the procedural errors rise to a denial of FAPE, but substantively the choices to reinstate the [multiple disabilities] classification that [IHO 1] had characterized as undefended and indefensible and to reinstate a program already deemed inappropriate without any clinical basis for doing so together constitute a substantive deprivation of FAPE" (IHO Decision at pp. 33-34).

Next, IHO 2 addressed whether the parent sustained her burden to establish that the student's unilateral placement at iBrain was appropriate (see IHO Decision at pp. 34-35). While initially reciting IHO 1's finding with regard to the program the student received at iHope for the 2017-18 school year—which IHO 1 found to be an appropriate unilateral placement for the student—IHO 2 noted that the "similarities between [the iHope] program and the one offered at iBrain ha[d] been pored over repeatedly already this year in the context of pendency" (id. at p. 34). IHO 2 continued therein, noting that an SRO "concluded that the iBrain program was 'substantially similar' to that of iHope but for one element: at the start of the school year iBrain had not as yet fully staffed its Vision Services program" (id.). Next, however, IHO 2 clarified that the "standard for 'substantial similarity' between the two programs applied to pendency determinations [was] significantly more demanding than Endrew's meaningful educational benefit standard discussed in detail above," and "even if one were to apply that more stringent standard the evidence reflect[ed] the fact that even if there were some brief period when the student's receipt of [vision education services] was deferred at iBrain they ultimately were delivered" (id.).

IHO 2 then recited the program the student received at iBrain as including a 6:1+1 special class placement, five 60-miute sessions per week of individual PT, four 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual speech-language therapy, three 60-minute sessions per week of individual vision education services, and one 60-minute session per month of parent counseling and training services (see IHO Decision at pp. 34-35). In addition, IHO 2 noted that the student's program at iBrain also included the services of an "individual nurse throughout the school day, the use of assistive technology communications device and services all day, and a 1:1 paraprofessional all day" (id. at p. 35). IHO 2 also found that the student received round-trip special transportation services while attending iBrain (id. at p. 35). Based upon the foregoing, IHO 2 concluded that the parent had sustained her burden to establish the appropriateness of the student's unilateral placement at iBrain for the 2018-19 school year (id.).

Finally, IHO 2 addressed the question of equitable considerations (see IHO Decision at pp. 35-36). Initially, IHO 2 found it "important to note that the district's actions described above appear to have been undertaken by well-intentioned, highly experienced, and caring staff who were struggling to overcome frustration created by a series of actions by the family and their representative(s) that appear[ed] to have been consciously designed to make the district's work as difficult as possible, and to thwart a participatory or collegial process" (id. at p. 35). However, IHO 2 also found that the parent's actions—which IHO 2 described as "no less important" to the analysis—were also "taken in[] seeming good faith, largely in frustrated response to the district's failure to act in compliance with what they deemed to be the requirements of the law and of the unappealed prior due process hearing order" (id.). Finding that "each side ha[d] outdone the other in undermining the legitimacy of the process laid with such care and in such detail by the IDEA," IHO 2 admonished both the parent and the district and reminded both parties that each must continue to collaborate (id.). IHO 2 concluded that "[n]either side in the history of this matter ha[d] entirely unclean hands, but neither side emerge[d] at the end of a full review of the record as being more responsible than the other for the tensions that arose" (id. at p. 36).

Given these findings, IHO 2 ordered the district to reimburse the parent, or to directly pay, the costs of the student's tuition and related services at iBrain for the 2018-19 school year (see IHO Decision at p. 36). In addition, IHO 2 ordered the district to "develop a new IEP for this student" based upon either the "clinical recommendations made by the family's providers and clinicians" or based upon an "objective and independent assessment of the student's many educationally relevant needs" fulfilling the parameters of such assessment outlined by IHO 2 in the decision (id. at pp. 36-37). Finally, IHO 2 ordered the district to convene a CSE "staffed by members of a Regional CSE that has not as yet reviewed an iBrain student, to meet at a time and date that will permit participation by the evaluators whose reports will be considered, as well as by the family and any clinicians or advocates they wish to have participate, as well as by any district clinicians that the district wishes to include" (id. at p. 37).

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

The district appeals, arguing initially that IHO 2's decision must be overturned because IHO 2 exceeded the scope of the impartial hearing by improperly relying upon an issue not raised in the parent's due process complaint notice as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2018-19 school year. Next, the district contends that,

contrary to IHO 2's decision, the district offered the student a FAPE for the 2018-19 school year. The district also contends that IHO 2 erred in finding that iBrain was an appropriate unilateral placement for the student, and similarly erred in finding that equitable considerations weighed in favor of the parent's requested relief. Finally, the district asserts that IHO 2 demonstrated bias against the district in his written decision. Based upon the foregoing, the district requests that IHO 2's order be reversed in its entirety and that the district be found to have offered the student a FAPE.

In an answer, the parent responds to the district's allegations and generally argues to uphold IHO 2's decision in its entirety.

**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 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]).[24]

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

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

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

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

## VI. Discussion

### A. Preliminary Matters

#### 1. Scope of the Impartial Hearing

On this point, the district argues that IHO 2 improperly relied upon IHO 1's determination that the district failed to offer the student a FAPE for the 2017-18 school year as the sole basis upon which to conclude that the district failed to offer the student a FAPE for the 2018-19 school year, rather than relying upon the documentary and testimonial evidence presented at the impartial hearing. As an issue not raised in the due process complaint notice, the district argues that IHO 2 exceeded the permissible scope of the impartial hearing and, therefore, IHO 2's decision must be overturned. The parent disagrees, arguing that IHO 2 properly relied upon the evidence in the hearing record to reach his conclusions that the district failed to, procedurally and substantively, offer the student a FAPE for the 2018-19 school year. A review of the evidence in the hearing record does not support the district's contentions.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b], 300.508[a]; 8 NYCRR 200.5[j][1]; Application of a Student with a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *8-*9 [S.D.N.Y. Aug. 5, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *4 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 Fed. App'x 65 [2d Cir. Jan. 30, 2014]; DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *23 [S.D.N.Y. Jan. 2, 2013]).

In this instance, the parent—as the party requesting the impartial hearing—had the first opportunity to identify the range of issues to be addressed at the impartial hearing. Upon review, although I find that the parent's due process complaint notice cannot reasonably be read to include the district's alleged failure to implement IHO 1's decision and order pertaining to the 2017-18 school year—or the district's alleged failure to develop the student's 2018-19 IEP consistent with the directives in IHO 1's decision and order—as a basis upon which to conclude that the district failed to offer the student a FAPE for the 2018-19 school year, I find that the district conflates the IHO's comments on the IHO 1's decision vis à vis the bases his FAPE determination, and do not construe IHO 2's ultimate conclusions that the district failed to offer the student a FAPE for the 2018-19 school year to be based upon such allegations (compare Parent Ex. A, with IHO Decision). Indeed, IHO 2 focused a considerable amount of time and ink airing his opinions—whether justified or not—with respect to whether the district took sufficient actions to implement IHO 1's decision and order but, more importantly, IHO 2 also examined and weighed the evidence with respect to the procedural and substantive bases he ultimately relied upon for finding that the district failed to offer the student a FAPE for the 2018-19 school year (see IHO Decision at pp. 29-35).

Nevertheless, IHO 2 is reminded that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a], [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent enforcement power and granting an injunction requiring the district to implement a final SRO decision]). In the event that a parent experiences difficulty with the district in implementing a final decision of an IHO or SRO reached through the impartial due process hearing process, such parent may file a State complaint against the district through the State complaint process for failure to implement an IHO or SRO's due process decision or may attempt to seek enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R., 407 F.3d at 76, 78 n.13).

Therefore, contrary to the district's argument, IHO 2 did not exceed his jurisdiction by improperly ruling upon an issue not raised by the parent in the due process complaint notice, and the district's contentions to the contrary must be dismissed as without merit.[25]

**2. IHO Bias**

The district argues that IHO 2's decision was "laced with abusive and unprofessional allegations against the [district] which demonstrate[d] his inability to be . . . fair or impartial." More specifically, the district contends that IHO 2 "crafted his [d]ecision not based in law or fact, or even on the merits of the IEP, but upon his personal agenda to chastise the [district] and assert his personal views of how IDEA cases should be handled." The parent disagrees and characterizes

[25] Even assuming for the sake of argument that IHO 2 had reached a FAPE determination on an improper basis, I have conducted an independent review and, as further described below, find that the district would not have prevailed in any event upon the FAPE claims squarely within the parent's due process complaint notice.

the district's arguments as based upon its dissatisfaction with the outcome of the case, rather than bias. In addition, the parent notes that, "[r]egardless of IHO [2's] artistic and literary license, the record clearly shows that [the district] impeded the [p]arent's participation in the IEP process, disregarded an unappealed IHO order in creating an inappropriate IEP, and recommended a program and placement that was a nullity based on a nullity."

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Upon review, the IHO's decision is clearly lacking in the dispassionate, composed tone that an administrative hearing officer should demonstrate through his or her writing; however, the district's criticisms of IHO 2's decision do not, in this particular case, afford a sufficient basis for overturning his ultimate decision.[26] In the decision, IHO 2 unflinchingly aired his frustrations with the district's actions in the development of the student's June 2018 IEP for the 2018-19 school year, which IHO 2, without question, measured against what he considered to be IHO 1's directives to the district and which IHO 2, also without question, criticized the district with an unnecessary harshness for failing to sufficiently adhere, to his particular satisfaction, with the appropriate amount of deference to the decision of a professional colleague (see, e.g., IHO Decision at pp. 7, 29-36). However, the district does not point to any actions taken by IHO 2—either through the written decision or at the impartial hearing—that infringed upon the district's due process rights or otherwise interfered with the district's ability to obtain a full and fair opportunity to present its case (see generally Req. for Rev.). Therefore, in instance, the district's arguments of personal bias do not, by themselves provide a basis to depart from the conclusions reached by IHO 2 in his decision.[27]

[26] Although expressing indignation at perceived problems with the district's conduct is within the discretion of an administrative hearing officer, evoking imagery of vulgarity cannot be excused in order make the point about his displeasure to the parties and, instead only undermines his decision by pushes the matter much closer toward reversal due to impropriety.

[27] Again, I have conducted an impartial and independent review of the entire hearing record and, as discussed below, reach an independent determination in this matter (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). Overall, an independent review of the hearing record demonstrates that the district had the fair and reasonable opportunity to present its case at the impartial hearing which, notwithstanding the harsh tone that IHO 2 used in his decision, was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]).

**B. CSE Process**

As part of its overall argument that, contrary to IHO 2's determination, the district offered the student a FAPE for the 2018-19 school year, the district argues that IHO 2 erred in finding that it failed to provide any notice to the parent with respect to the two CSE meetings held on June 12, 2018 and improperly held the meetings without the parent. The district asserts that the parent refused to attend the CSE meeting scheduled within the parameters requested by the parent—that is, on a Tuesday or Thursday and between 9:30 a.m. and 1:00 p.m.—notwithstanding "several follow-up reminders" for the CSE meeting on June 12, 2018. In response, the parent asserts that the district failed to schedule the student's CSE meeting as ordered by IHO 1 at a "time that was 'agreeable to the Parent, iHOPE staff, and [district] personnel.'" Upon review, the evidence in the hearing record does not support the district's contentions.

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 May 25, 2018 indicating that a CSE meeting was scheduled for June 12, 2018 at 11:30 a.m. to "[r]eview the results of the reevaluation, determine your child's continued eligibility for special education services and develop an [IEP]" for the student (Dist. Ex. 28 at p. 1). The notification included a list of the names and titles of the district personnel who would be attending the meeting, as well as the names and titles of the student's special education teacher at iHope, the student's occupational therapist at iHope, the student's speech-language therapist at iHope, and the student's vision education therapist at iHope (id. at pp. 1-2). The district's SESIS log also indicated that, on May 25, 2018, the district sent the May 25, 2018 CSE meeting notice to the parent, and emailed the same notice to the "school, attorney and parent" (see Dist. Ex. 43 at pp. 4-5). In addition, the SESIS log reflected that the district—in separate emails to the parent and to iHope—requested that the parent or iHope provide the district with any updated progress reports, any other "necessary documentation," and any other "educational/medical records" prior to the CSE meeting (id.). The evidence in the hearing record demonstrates that the district re-sent the parent and iHope a "Notice of IEP Meeting" scheduled for June 12, 2018 on or about June 4, 2019, and also re-sent separate emails to the parent and iHope on June 4, 2018 to remind them of the June 12, 2018 CSE meeting and to re-request documentation for that meeting (id. at pp. 3-5).

The evidence in the hearing record also reveals that on June 9, 2018 a district bilingual social worker called the parent and left a message reminding her of the CSE meeting scheduled for the student on June 12, 2018 and requesting that she remind iHope to provide any "teacher's report" or other relevant information that could be important for the meeting (Dist. Ex. 43 at p. 3).

As noted previously, the parent's attorney emailed the CSE chairperson at 5:58 p.m. on June 11, 2018—the evening immediately prior to the June 12, 2018 CSE meeting—and the CSE chairperson responded to the parent's attorney in an email dated June 12, 2018 at approximately 10:03 a.m. (see Dist. Ex. 17). Although the text of the email from the parent's attorney did not expressly indicate that the parent declined to attend the June 12, 2018 CSE meeting, it appears from the CSE chairperson's response that the district got that impression from either the email or the attached letter, as the chairperson noted in her response that "we must proceed with this IEP meeting on June 12 at 11:30 to ensure timely and appropriate services for [the student] for the next school year" (id.).[28] In addition, the CSE chairperson asked the parent's attorney to "let [them] know if [the] parent w[ould] be available via phone or if any accommodations [were] required" (id.).

Although the hearing record does not include any evidence that the parent's attorney responded to the CSE chairperson's inquiry about the parent's availability (see generally Tr. pp. 1-565; Parent Exs. A-K; N-Y; Dist. Exs. 1-14; 16-33; 40; 42-44; IHO Exs. I-II), the hearing record does reflect that the district—as found by IHO 2—convened not one, but two CSE meetings on June 12, 2018, and moreover, that neither of the two CSEs convened at 11:30 a.m., as set forth in the May 25, 2018 CSE meeting notice or as noted in any follow-up with the parent regarding the May 25, 2018 CSE meeting notice (i.e. the May 25, 2018 and June 4, 2018 emails to the parent and iHope staff and the bilingual social worker's telephone call to the parent on June 9, 2018) (see Dist. Exs. 28 at p. 1; 43 at pp. 3-5; see generally Dist. Exs. 14; 18). Instead, as found by IHO 2, the first CSE meeting convened early at approximately 11:15 a.m. and the second CSE meeting—held specifically to develop the student's IEP for the 2018-19 school year—met at approximately 1:15 p.m. (see Tr. pp. 296-304, 313-15; Dist. Exs. 14 at p. 20; 18 at p. 22; IHO Decision at pp. 30-31; see generally Dist. Ex. 42). The parent did not attend either of the two CSE meetings held on June 12, 2018, and in this case, the hearing record contains no evidence that the district provided the parent with any notice that two CSE meetings would occur on June 12, 2018 at 11:15 a.m. or 1:15 p.m. (see generally Tr. pp. 1-565; Parent Exs. A-K; N-Y; Dist. Exs. 1-14; 16-33; 40; 42-44; IHO Exs. I-II).

Even more problematic for the district's case, the hearing record fails to contain any evidence that the district attempted to contact the parent on June 12, 2018, to encourage her attendance during either the 11:15 a.m. meeting or the 1:15 p.m. meeting (see generally Tr. pp. 1-565; Parent Exs. A-K; N-Y; Dist. Exs. 1-14; 16-33; 40; 42-44; IHO Exs. I-II). The district's response to the email from the parent's attorney on the morning of the June 12, 2018 CSE meeting highlights the district's concern about the need for the CSE to develop an IEP for the student prior

[28] As noted above, it is unclear what letter was attached to the June 11, 2018 email from the parent's attorney (see Dist. Ex. 17). Assuming that the attachment was the parent's May 4, 2018 letter, as the district alleges (see Req. for Rev. ¶ 6), that letter presents the parent's requests relevant to rescheduling the CSE meeting, not a refusal to participate in a meeting with the CSE (see Parent Ex. N). While the district personnel may have received the impression that the parent was not going to attend a CSE meeting on June 12, 2018 CSE meeting, there is insufficient evidence in the hearing record to support that the parent affirmatively refused to attend a CSE meeting at all (see Bd. of Educ. of the Toledo City Sch. Dist. v. Horen, 2010 WL 3522373, at *15-*18 [N.D. Ohio Sept. 8, 2010]; [discussing the difference between an affirmative refusal to attend versus a request to reschedule a meeting]; see also 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]).

to the beginning of the school year (Dist. Ex. 17), and the district may have justifiably believed that the parent would be unlikely to attend any meeting scheduled and so, therefore, prioritized the need to conduct a timely CSE meeting. 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. v. Hawaii Dep't of Educ., 720 F.3d 1038, 1046 [9th Cir. 2013] [internal citations omitted], quoting Shapiro v. Paradise Val. Unif. Sch. Dist. No. 69, 317 F.3d 1072, 1079 [9th Cir. 2003]). Courts that have examined such conundrums have ultimately rejected the school districts' respective arguments that parental participation was the less important requirement in those circumstances (Doug C., 720 F.3d at 1045-47; Bd. of Educ. of the Toledo City Sch. Dist. v. Horen, 2010 WL 3522373, at *15-*18 [N.D. Ohio Sept. 8, 2010]; 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 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 12, 2018, on that day, 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"]).[29]

Consequently, the district's decisions to hold two CSE meetings without accurate notices to the parent and without attempting to encourage the parent's participation during either CSE meeting on the day of the meetings—as procedural violations—prove fatal to its case because the procedural violations had the effect of developing the student's 2018-19 IEP without parental input, which was sufficient to significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student and thus constituted a procedural denial of a FAPE (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).[30] As such, the evidence in the hearing record supports IHO 2's finding that the district failed to offer the student a FAPE for the 2018-19 school year.[31]

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[29] If a school district decides to proceed with a CSE meeting, when making its efforts to encourage a parent to participate, among the most compelling last ditch approaches of which I am aware is a telephone call indicating something to the effect of "we are having a CSE meeting about your child right now, we would very much like your input," or at least leaving a message to that effect at the beginning of the CSE meeting with a method for the parent to call the CSE back. The district has, in previous cases, shown the ability to call parents during a meeting, and a parent may end up participating, or the CSE may receive a response that gives further insight into the parent's rationale for not participating (see, e.g., Application of a Student with a Disability, Appeal No. 18-087 [noting that the district's CSE telephoned the parent during the meeting to ensure her participation (as well as iHope staff) and the parent stated she was unable to participate and requested "time to call her lawyer" but while the CSE team waited on the phone for the parent to speak to her lawyer and return to their call, the parent hung up, later testifying that she did not remember the incident]).

[30] This case is distinguishable from another, decided recently, in which the student's IEP had already been completed with the parents' participation in the annual review process, but the parents later requested that the CSE reconvene for a second meeting. In that case, the district had no reason to reconvene the CSE other than to honor the parents' request to convene a second time, and when the parents' did not attend the rescheduled meeting, for which there were only minor defects in the meeting notice, the undersigned determined that the district not required to continue encouraging parents to attend a second meeting that they requested in order to revisit an IEP that had already been completed (Application of the Dep't of Educ., Appeal No. 19-107).

[31] Even assuming, for the sake of argument, that I had concluded that the district's decision to conduct the June 2018 CSE meetings at 11:15 a.m. and 1:15 p.m.—without accurate notices to the parent or communication attempts to the parent once the CSEs convened—to develop the student's IEP for the 2018-19 school year was not a denial of FAPE on procedural grounds, the district could not sustain its burden to establish that the June 2018 IEP offered the student a FAPE. This is especially true where, as here, the hearing record failed to include sufficient evidence to establish that the present levels of performance were adequate/accurate descriptions of the student's needs. For example, although the district representative attested to a list of documents relied upon by the CSE in preparing the student's IEP for the 2018-19 school year (Dist. Ex. 42 at pp. 2-3 [listing 15 "sources of clinical information"]; but see Tr. pp. 304-05 [reflecting the testimony of the district representative that the CSE only had the Vineland-3 and the social history update]; Dist. Ex. 3 at p. 1 [prior written notice listing as documents considered at the June 2018 CSE meeting a February 2017 "[t]eacher report" and the May 2018 Vineland-3 and social history update]), many of the documents cited were not included in the hearing record (but see Dist. Exs. 5-6; 22; 33; Parent Exs. X; U). In addition, although the district representative's affidavit indicated that the June 2018 CSE also reviewed the student's "progress reports from iHOPE from the 2017-2018 school year and the Student's iHOPE IEP from 2017-2018" (Dist. Ex. 42 at p. 3; see Dist. Exs. 19; 20), on cross-examination, she testified that the CSE did not have any reports from iHope (Tr. pp. 304-05, 356-57, 359, 367-68). Ultimately, the hearing record is conflicting as to what the CSE relied upon, making a review of the IEP speculative in terms of determining how the CSE formulated the present levels of performance and resultant program and placement

### C. Unilateral Placement—Applicable Standards

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 of the student at iBrain was appropriate to meet the student's needs. Here, the district argues that IHO 2 erred in finding that iBrain was an appropriate unilateral placement for the student because IHO 2 relied upon the wrong legal standard to reach this conclusion. In particular, the district contends that rather than using a Burlington/Carter analysis, IHO 2 found iBrain was appropriate based solely upon the fact that an SRO found—"in the context of pendency"—that iBrain was substantially similar to the student's program at iHope, which the district contends is plain error. However, an independent review of IHO 2's decision and the evidence in this case does not support the district's contention that iBrain was inappropriate for the student.

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.

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recommendations (see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 110-11 [2d Cir. 2016] [noting that when a CSE fails to accurately document the evaluative data it relied on in developing an IEP, reviewing authorities or courts, often times months or years later, are left to speculate as to how the CSE formulated the student's IEP and it causes other errors or omissions in the IEP to be called into question]).

> 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).

In finding that iBrain was an appropriate unilateral placement for the student, IHO 2 summarized, in a lengthy recitation, the relief available to litigants when districts fail to offer a FAPE (see IHO Decision at pp. 21-29). As part of this general discussion, IHO 2 included legal authority to explain reimbursement relief under the "Burlington and Carter cases" and the application of what IHO 2 referred to as the "Burlington/Carter/Endrew" test (id. at pp. 26-29). After concluding that the district failed to offer the student a FAPE for the 2018-19 school year, IHO 2 then turned to the appropriateness of iBrain (id. at p. 34).

On one hand, IHO 2's factual analysis of the student's unilateral placement at iBrain does not appear to follow any particular legal standard, or even the legal standards included within the decision itself, as IHO 2 does not cite to the "Burlington and Carter cases" or to cases involving the application of the "Burlington/Carter/Endrew" test (see IHO Decision at pp. 34-35). In addition, when concluding that the "iBrain program (Exhibit E), and updated iBrain IEP (Exhibit D), amply meet the Rowley/Endrew standard," IHO 2 did not enunciate with specificity how iBrain met this standard (id. at p. 35). On the other hand, IHO 2's analysis does not, as the district argues, reflect that he relied upon the "substantially similar" analysis used in the pendency context as the basis upon which to conclude that iBrain was an appropriate unilateral placement (id. at pp. 34-35). Instead, IHO 2 simply noted that the student's program at iBrain for the 2018-19 school year mirrored the student's program at iHope during the 2017-18 school year—which IHO 1 had recently found was an appropriate unilateral placement for the 2017-18 school year—and that the student's iBrain program for the 2018-19 school year had been the subject of prior scrutiny under a "significantly more demanding" standard than required in order to find iBrain was appropriate as a unilateral placement (id.). I note that the parent submitted documentary evidence of quarterly progress reports from both iHope during the 2017-18 school year and iBrain during the 2018-19 school year, both of which showed that the student was making some progress under similarly designed programming (Parent Exs. G-I). "Although past progress is not dispositive, it does 'strongly suggest that' an IEP modeled on a prior one that generated some progress was 'reasonably calculated to continue that trend'" (S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011], citing Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153 [10th Cir. 2008]; see also F.L. v. Bd. of Educ. of Great Neck U.F.S.D., 274 F Supp 3d 94,

[E.D.N.Y. 2017] [finding a substantially similar program appropriate in light of the student's progress in the preceding school year]).[32] Thus there is some support in the evidence that iBrain was appropriate for the student because it provided similar to the programming at iHope in the preceding school year, and there is some evidence that the student had been making some progress at iHope.

While IHO 2 did not otherwise spend an inordinate amount of time analyzing the appropriateness of iBrain as a unilateral placement, a review of the district's closing memorandum submitted to IHO 2 also reveals that the district made little, if any effort, in arguing that iBrain was not appropriate (see Dist. Ex. 44 at pp. 7-9). For example, other than generally criticizing the testimony by the director of special education at iBrain (iBrain director) for failing to provide "any information unique to this student" and how iBrain met the student's needs, and for including "conclusory statements about the student's overall progress," the district's only other challenges to the appropriateness of iBrain were attacks on the iBrain director's credibility about information wholly irrelevant to that inquiry (id.). The district did not question the documentary evidence showing that the student was making progress in both schools when they employed similar specially designed programming for the student.

Now on appeal, the district abandons the few arguments it made to IHO 2, and other than asserting that IHO 2 erred in finding that iBrain was appropriate under the wrong legal standard, the district does not point to any evidence that the IHO overlooked or should have placed greater weight upon in order to conclude that iBrain was not an appropriate unilateral placement for the student for the 2018-19 school year under any other legal standard whatsoever (see Req. for Rev.). It is not this SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. American Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; L.I. v. Hawaii, 2011 WL 6002623, at *9 [D. Hawaii Nov. 30, 2011]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D. Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, 2007 WL 2409819, at *4 n.3 [S.D. Ala. Aug. 23, 2007]). Accordingly, the district has not raised an argument that is sufficient to overturn the IHO's ultimate conclusion that iBrain was an appropriate unilateral placement for the student for the 2018-19 school year.

**D. Equitable Considerations**

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary

[32] These cases were discussing similar IEPs in a public school context, but nothing in the authorities that a similar analysis cannot be employed in the when assessing a unilateral placement provided there is evidence that the programming is similar and there is evidence of past progress during the immediately preceding school year.

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"]).

Here, the district contends that IHO 2 erred in finding that equitable considerations weighed in favor of the parent's requested relief. The district specifically argues that IHO 2 improperly balanced "his perceptions of the [district's] conduct as an equal value" in assessing equitable considerations. In support of its argument, the district contends that it provided the parent with "multiple notices" about IEP meetings and "worked to accommodate her schedule." However, the district asserts that the email sent by the parent's attorney on June 11, 2018, could only be interpreted as the parent's refusal to participate in the IEP process. In addition, the district asserts that when the parent's attorney reattached a letter previously sent to the district to the same email and declined to confirm in the email whether the parent would be attending the CSE meeting, such actions demonstrated the parent's "obstructionist and uncooperative actions."

Upon review, however, the district's view of the facts in this case are not supported by the evidence in the hearing record. First, the evidence reveals that although the district may have sent the parent "multiple notices" for IEP meetings—dated February 14, 2018 (for a March 27, 2018 meeting); February 27, 2018 (for a March 13, 2018 meeting); and March 23, 2018 (for a May 10, 2018 meeting)—the district only rescheduled one CSE meeting to accommodate the parent's schedule (see Dist. Exs. 16; 24 at p. 1; 25 at p. 1; 26 at p. 1). Specifically, the hearing record includes no evidence to explain why the first CSE meeting scheduled for March 27, 2018 was cancelled; the second CSE meeting set for March 13, 2018 had to be rescheduled because the district had not yet completed the student's updated evaluations; and the district thereafter rescheduled the third CSE meeting set for May 10, 2018 because it had been selected as a date prior to its receipt of the parent's May 4, 2018 letter outlining her availability (see Dist. Exs. at p. 1; 24 at p. 1; 25 at p. 1; 26 at p. 1; 43 at pp. 5-11; see also Parent Ex. N). With respect to the CSE meeting scheduled for May 24, 2018—which a CSE convened for, but did not hold—the weight of the evidence in the hearing record supports a finding that the parent was not provided with notice of the CSE meeting scheduled on that date, as the district's SESIS log failed to document that any meeting notice had been sent to her, and thus, was rescheduled for June 12, 2018 (see Dist. Exs. 27 at p. 1; 43 at pp. 4-11). Given these facts, the district's implicit assertion that several meeting notices had been sent due to the difficulty in accommodating the parent's schedule and that, therefore, this should equitably weigh against her request for relief is without merit.

Similarly, the evidence in the hearing record does not support the district's contention that the June 11, 2018 email demonstrated that the parent engaged in "obstructionist and uncooperative actions." At best, the June 11, 2018 email, which the parent's attorney sent on the eve of the CSE meeting, was vague, unclear, and made no reference one way or the other regarding the parent's attendance at the June 12, 2018 CSE scheduled for 11:30 a.m. (see Dist. Ex. 17). Given, perhaps, its lack of clarity, the CSE chairperson responded in an email the next morning—approximately 1.5 hours prior to the scheduled CSE meeting at 11:30 a.m.—inquiring about the parent's attendance via telephone or through some other accommodation (id.; see Dist. Ex. 28 at p. 1). Based upon the evidence in the hearing record, the June 12, 2018 CSE meeting was the next event to occur at 11:15 a.m.; however, the evidence does show that the district members of the CSE decided to proceed with the meeting earlier than the time listed in the notice, and the hearing record fails to include any evidence of any district's attempts to contact the parent, or even the parent's attorney, via telephone or any other means either prior to or during this CSE meeting in a manner similar to those taken by the district in calling the parent on May 24, 2018 approximately 3 hours prior to the start of that scheduled CSE meeting at 12:00 p.m. (see Dist. Exs. 31; 43 at pp. 1-3; see also Tr. pp. 495-96). And notwithstanding the fact that the parent did not attend the first CSE meeting held on June 12, 2018, the hearing record also fails to include any evidence that the district took any actions to contact the parent either prior to or during the second CSE meeting held at 1:15 p.m. on June 12, 2018 (see generally Tr. pp. 1-565; Parent Exs. A-K; N-Y; Dist. Exs. 1-14; 16-33; 40; 42-44; IHO Exs. I-II).

In light of these facts, IHO 2 did not err in finding that equitable considerations did not act to bar or reduce the tuition reimbursement relief sought by the parent in this matter. As such, the district's arguments are rejected as lacking in merit.

**VII. Conclusion**

In summary, the evidence in the hearing record establishes that the district's decision to proceed with the development of the student's IEP for the 2018-19 school year in the absence of the parent after failing to provide the parent with accurate notices of the two CSE meetings held on June 12, 2018 or otherwise taking sufficient steps to encourage her participation in such meetings were procedural violations that significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student and resulted in the failure to offer the student a FAPE for the 2018-19 school year. In addition, the district has raised insufficient grounds to disturb the IHO's conclusion that the parent sustained her burden to establish that iBrain was an appropriate unilateral placement for the student, and moreover, that equitable considerations supported the parent's requested relief.

**THE APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**December 9, 2019**

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