The University of the State of New York

The State Education Department
State Review Officer
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No. 20-169

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Peter G. Albert, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO 3) which denied in part her request to be reimbursed for her son's tuition costs at the International Institute for the Brain (iBrain) for the 2018-19 school year. Respondent (the district) cross-appeals from IHO 3's determination that iBrain was an appropriate unilateral placement for the student during that school year. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has been the subject of several prior State-level administrative appeals (Application of the Dep't of Educ., Appeal No. 20-157; Application of the Dep't of Educ., Appeal No. 20-044; Application of the Dep't of Educ., Appeal No. 20-033) and, as a result, the parties' familiarity with his educational history and the prior due process proceedings is presumed, however, some discussion of procedural history is required.

The student in this matter has been diagnosed with multiple medical conditions which include cerebral palsy, epileptic seizures and a cortical vision impairment and is non-ambulatory and non-verbal (Parent Ex. F at p. 1). The student attended the International Academy of Hope (iHope) during the 2017-18 school year (Parent Ex. Z at p. 3).

On April 10, 2018, a nonpublic school IEP was drafted by iBrain for the student for the 2018-19 school year (Parent Ex. G at pp. 1, 34). The iBrain IEP recommended that the student receive instruction in a 6:1+1 special class with five 60-minute sessions of individual physical therapy (PT) per week, four 60-minute sessions of individual occupational therapy (OT) per week, three 60-minute sessions of individual vision education services per week, and five 60-minute sessions of individual speech-language therapy per week (id. at p. 34). Additionally, the IEP provided for a 12-month program, assistive technology services, one 60-minute session of parent counseling and training per month, a school nurse daily as needed and 1:1 paraprofessional services (id.).

In a letter dated April 19, 2018, the parent requested that the CSE convene at iHope with the district's physician in attendance and to send the meeting notice to the student's then-current school, iHope (Parent Ex. P).[1] The parent indicated that she wanted the district to send several dates and times for a meeting in writing, but not to schedule the meeting over the telephone (Parent Ex. P). In a notice dated April 27, 2018, the district scheduled a CSE meeting for May 15, 2018 at 3:15 p.m. (Dist. Ex. 18; see District Ex. 19). In a letter dated May 10, 2018, the parent's attorney indicated that he was following up with the CSE after prior correspondence between the parent and the CSE (Parent Ex. Q at p. 1). The parent's attorney reiterated the request that a full committee convene, including the in-person participation of a district physician, and that the meeting occur on a Monday through Thursday after 3:00 p.m. (id.).

The CSE convened on May 15, 2018 to develop a public school IEP for the student (see Dist. Exs. 21 at p. 10; 22; Tr. pp. 322-25; 588).[2] In the resultant June 2018 IEP, the CSE recommended that the student receive 12-month services in a 12:1+(3:1) special class at a specialized school (id. at pp. 7-8, 10). Additionally, the CSE recommended three 30-minute sessions of individual OT per week, three 30-minute sessions of individual PT per week, two 30-minute sessions of speech-language therapy per week, and one 60-minute session of group parent counseling and training per month (id. at p. 7). Although a school physician was present at the meeting, the parent did not attend the CSE meeting (Dist. Ex. 22).

In a letter dated June 21, 2018, the parent, through her attorneys, indicated that the district "has not conducted an annual IEP for this student. The parent has repeatedly requested the CSE to conduct a Full Committee Meeting along with a DOE school physician to develop an appropriate and timely IEP for the 2018-2019 school year" and notified the district of her intent to enroll the student at iBrain for the 2018-19 school year as well as seek public funding for the placement (Parent Ex. R; Dist. Ex. 24).

As the undersigned noted in a prior State-level Review:

> In a due process complaint notice dated July 9, 2018, the parent asserted that the district failed to offer the student a free appropriate

[1] The parent's letter was written in Spanish.

[2] Some of the relevant documents contain the date June 15, 2018, which a district witness indicated was the date the IEP was finalized, however, the exact date of the CSE meeting is not crucial, given that the district concedes that it did not offer the student a FAPE during the 2018-19 school year (Tr. pp. 277-78, 450; Dist. Exs. 18-19; 21-22).

> public education (FAPE) for the 2018-19 school year as "several substantive and procedural errors" occurred while developing the June 15, 2018 IEP (Parent Ex. A at pp. 1-2). As relevant here, the parent requested that an interim decision regarding the student's pendency (stay-put) placement be issued immediately (id. at p. 1). The parent asserted the student's right to a pendency placement pursuant to an unappealed decision of an IHO dated August 29, 2016 (id. at p. 2). The parent asserted that the specific pendency request was for the district to prospectively pay for the student's full tuition at iBrain for the 2018-19 school year (including academics, therapies and a 1:1 paraprofessional during the school day), as well as special transportation (including a limited travel time of 60 minutes, a wheelchair accessible vehicle, air conditioning, a flexible pick-up and drop-off schedule, and a paraprofessional) (id.).
>
> The parent contended that her right to meaningfully participate in the decision-making process was significantly impeded (Parent Ex. A at p. 2). The parent asserted that the CSE was not properly composed and the recommended IEP would have caused substantial regression (id.). Moreover, the parent claimed that the IEP did not reflect the student's individual needs and did not offer an appropriate program and placement to address the student's highly intensive management needs (id. at pp. 2-3). Further, the parent argued that the 12:1+(3:1) class size was not appropriate for the student nor did the program offer an extended school day necessary to implement the student's mandated related services (id. at p. 3). The parent requested tuition reimbursement for the costs of iBrain for the 2018-19 extended school year (id.)

(Application of the Dep't of Educ., Appeal No. 20-044).

An impartial hearing convened and the first IHO to preside over this matter (IHO 1) issued an interim decision denying the parent's request for pendency funding for iBrain and finding that the student's pendency was at iHope (Nov. 29, 2018 Corrected Interim IHO Decision at pp. 5-6). In April 2019, the parent filed an action appealing IHO 1's pendency determination in the United States District Court for the Southern District of New York (New York City Dep't of Educ., 2019 WL 5212233, at *4 [S.D.N.Y. Oct . 15, 2019]).

As noted in Application of the Dep't of Educ., Appeal No. 20-044, after the interim decision on pendency, the parties proceeded to an impartial hearing regarding the claims raised in the due process complaint notice and additional hearing dates were presided over by IHO 1 (see Tr. pp. 163-242). Shortly after the district called its first witness (Tr. p. 224); it became apparent that IHO 1 had a conflict of interest and she decided to recuse herself (Tr. pp. 224, 228-29; 235-37). A second IHO (IHO 2) was assigned to the case and the parties proceeded with additional hearing dates during which further evidence was entered (see Tr. pp. 243-346). During this portion of the impartial hearing, the district conceded that it did not offer the student a FAPE for the 2018-19 school year; however, the district argued that the evidence in the hearing record would show that

iBrain was not an appropriate placement and that the equities did not favor reimbursement (Tr. pp. 277-78).

On October 15, 2019, the district court issued a decision vacating IHO 1's determination on pendency for the 2018-19 school year and remanded the case back for an impartial hearing to determine whether the program provided by iBrain was substantially similar to the program provided by iHope (New York City Dep't of Educ., 2019 WL 5212233 at *9-10).

Following remand from the district court, the parties continued the impartial hearing with one additional hearing date (see Tr. pp. 347-93). In a decision dated January 26, 2020, IHO 2 held that the programs of iHope and iBrain were substantially similar, that iBrain was therefore the student's pendency placement, and that the merits of the case should be dismissed as moot (Jan. 26, 2020 IHO 2 Decision at pp. 1-14).

The district appealed from IHO 2's January 2020 decision and the parent cross-appealed (see Application of the New York City Department of Education, Appeal No. 20-044). In resolving that matter, the undersigned determined that there was no error by IHO 2 in relying upon the substantial similarity standard to determine pendency, however, the evidence in the hearing record was inadequate to determine whether the iHope and iBrain programs were substantially similar because IHO 2 had terminated a relevant line of questioning (id.). The undersigned further found that IHO 2 erred in dismissing the parent's claims raised in the due process complaint notice as moot due to pendency (id.). With regard to the student's pendency placement, the matter was remanded for development of the record on the issue of whether the 2017-18 iHope and 2018-19 iBrain programs were substantially similar and, with respect to the merits of the proceeding, IHO 2 was directed to determine whether the unilateral placement at iBrain for the 2018-19 school year was appropriate and whether equitable considerations favor reimbursement (id.).

Following remand from the undersigned, IHO 2 recused himself, and a third IHO (IHO 3) was assigned whereupon the parties continued the impartial hearing after three additional hearing dates (see Tr. pp. 394-627). In a decision dated September 21, 2020, IHO 3 determined that recent Second Circuit precedent prevented her from finding that iBrain was the student's pendency placement under a substantial similarity theory, and that the parent's pendency claim was therefore outside her jurisdiction and moot (IHO 3 Decision at pp. 11-12).

Turning to the merits, IHO 3 further found that the district failed to offer the student a FAPE for the 2018-19 school year, and that iBrain was an appropriate unilateral placement, but that equitable considerations did not weigh in favor of the parents' request for an award of tuition reimbursement due to convincing evidence of the parent's failure to fully cooperate with the CSE in developing an IEP for the student (id. at pp. 17-20). Accordingly, the IHO determined to reduce reimbursement for tuition by "about 33% or $48,000 because of parental noncooperation" but did not reduce reimbursement for the cost of related services or transportation (id.).[3] As relief, the IHO ordered the district to reimburse the parents for the full cost of the student's transportation

[3] IHO 3 noted the cost of the student's transportation for the 2018-19 school year to be $134,860.00, however she could not identify the cost of the related services the student received at iBrain within the impartial hearing record (IHO 3 Decision at p. 19).

and related services at iBrain, as well as a portion of the tuition at iBrain for the 2018-19 school year (id.).

IV. Appeal for State-Level Review

The parent appeals and the district cross appeals from IHO 3's determination. The parents also answer the district's cross appeal. With regard to the continuing contested matters therein, the following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether IHO 3 erred in failing to determine that the student's pendency placement should be at iBrain.

2. Whether IHO 3 erred in finding that the student's unilateral placement at iBrain was appropriate for the 2018-19 school year.

3. Whether IHO 3 erred in finding that equitable considerations warranted a reduction in tuition reimbursement funding.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are

alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

[4] 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).

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

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

VI. Discussion

A. Pendency

Turning first to the parent's appeal regarding the student's pendency placement, the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement

is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

In her decision, IHO 3 noted that the case had been remanded by the undersigned in part to amplify the record as to the similarities between the programs at iHope during the 2017-18 school year and iBrain during the 2018-19 school year (IHO 3 Decision at p. 11-12). However, in Ventura de Paulino, a decision issued after this matter was remanded to IHO 3, the Second Circuit Court of Appeals was confronted with a set of facts similar the present matter in that the IHOs had concluded that iHope was an appropriate unilateral placement for the students for prior school years and the district did not appeal those rulings, meaning that the district, by operation of law, consented to the students' placements at iHope (959 F.3d at 532). The issue presented in Ventura de Paulino was whether the parents could unilaterally move the student to iBrain and still receive pendency funding (id.). The Court concluded the parents could not effectuate this unilateral move since it is the district that is authorized to decide how (and where) the students' pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (id. at 533-35). The Court observed that:

> If a parent disagrees with a school district's decision on how to provide a child's educational program, the parent has at least three options under the IDEA: (1) The parent can argue that the school district's decision unilaterally modifies the student's pendency

> placement and the parent could invoke the stay-put provision to prevent the school district from doing so; (2) The parent can determine that the agreed-upon educational program would be better provided somewhere else and thus seek to persuade the school district to pay for the program's new services on a pendency basis; or (3) The parent can determine that the program would be better provided somewhere else, enroll the child in a new school, and then seek retroactive reimbursement from the school district after the IEP dispute is resolved

(id. at 534). Therefore, the Court concluded that "[r]egardless of whether the educational program that the Students are receiving at iBRAIN is substantially similar to the one offered at iHOPE, when the Parents unilaterally enrolled the Students at iBRAIN for the 2018-2019 school year, they did so at their own financial risk" (id.).

As noted in numerous forums, ,in the present case, the then-current educational placement is based upon the parties agreement, as reflected in an IHO interim decision dated January 3, 2018 (i.e. a consent order), in proceedings concerning the 2017-18 school year, which ordered the district to fund the student's unilateral placement at iHope (see Tr. pp. 452-55; Parent Exs. B, E; Application of the Dep't of Educ., Appeal No. 20-044; see M. v. New York City Dep't of Educ., 420 F. Supp. 3d 107, 115, 122 [S.D.N.Y. 2019]).[5] Applying Ventura de Paulino to the instant dispute, when the parent unilaterally enrolled the student at iBrain for the 2018-19 school year, she did so at her own financial risk (959 F.3d at 534). As the Court in Ventura de Paulino explained:

> When the impartial hearing officers in these tandem cases concluded that iHOPE was an appropriate placement for the Students and the City chose not to appeal the ruling to a state review officer, the City consented, by operation of law, to the Students' private placement at iHOPE. At that moment, the City assumed the legal responsibility to pay for iHOPE's educational services to the Students as the agreed-upon educational program that must be provided and funded during the pendency of any IEP dispute.

(959 F.3d at 532 [emphasis added]).

The next question arises as to whether a district is required to show that it "had a seat" to offer a student in a given pendency location, however, more recently, the Second Circuit Court of Appeals specifically rejected this requirement that the district obtain a seat for the student in the nonpublic school and held, under similar facts, that: "iHOPE became the student['s] pendency placement not at the [district's] instigation, but rather by operation of law after the [district] chose not to appeal the ruling[] of [an] impartial hearing officer[] holding that iHOPE was an appropriate

[5] A final IHO decision in favor of the district was issued in May 2018 finding iHope inappropriate during the 2017-18 school year and that equitable considerations favored the district. That matter was appealed for State-level review, but after the instant proceeding was commenced in July 2018 the parent eventually withdrew the appeal related to the 2017-18 school year and the May 2018 IHO determination prior to the issuance of an SRO decision.

placement for th[is] student[]" (Neske v. New York City Dep't of Educ., 2020 WL 5868279, at *1 [2d Cir. Oct. 2, 2020]). Based on this, the Court "deemed the [district] to have implicitly chosen iHOPE as the pendency placement" (Neske, 2020 WL 5868279, at *1; see also Aruajo v. New York City Dep't of Educ., 2020 WL 5701828, at *4 [S.D.N.Y. Sept. 24, 2020] [rejecting the parents' argument in that case that, because the district "had not yet provided the students with any pendency placement, Ventura [wa]s inapplicable"]).

In this matter, the parent also contends that Ventura de Paulino left open the question of what may happen if a student's prior nonpublic school placement was not available to provide pendency services. The parent asserts that iHope was "unavailable" as a pendency placement, because there were differing contract clauses concerning tuition and deposit payment provisions, and offers additional evidence in the form of iHope enrollment contracts for the 2017-18 and 2018-19 school years (Req. for Rev. ¶ 16, Exs. A; B).

However, in Neske, the Second Circuit also rejected the argument that the facts of that matter fell under a footnote in Ventura de Paulino, where the Court left open the question as to what would happen if a student's prior nonpublic school placement was not available to provide pendency services and the district either refused or failed to provide pendency services (Neske, 2020 WL 5868279, at *2; Ventura de Paulino,959 F.3d at 534 n.65). The Court in Ventura de Paulino cited a decision by the Fourth Circuit Court of Appeals, which held that 20 U.S.C. § 1415(j) does not impose any affirmative obligations on a school district to seek out alternative placements when a student's then-current educational placement is not functionally available (Wagner, 335 F.3d at 301 [finding that "the question of availability is entirely irrelevant to the task of identifying the child's then-current educational placement, and it is only the current placement, available or unavailable, that provides a proper object for a 'stay put' injunction"]). However, the Fourth Circuit noted two situations in which a student's pendency placement could be changed: either by an agreement of the parties or by "a preliminary injunction from the district court, changing the child's placement" (Wagner, 335 F.3d at 302). This follows the long-standing principle that "the stay-put provision in no way purports to limit or pre-empt the authority conferred on courts" (Honig, 484 U.S. at 327; see 20 USC 1415[i][2][C][iii]). These situations do not contemplate the parent's exercise of self-help in the form of moving the student to a different nonpublic school. In any event, as with the facts in Neske, the current matter does not present such an instance, as the evidence in the hearing record does not support a finding that iHope was not available or that the district "refuse[d] or fail[ed] to provide pendency services as iHOPE" (2020 WL 5868279, at *2).

Thus the IHO correctly applied new and controlling Second Circuit case law that was issued after the decision in the previous State-level appeal, and while the parent clings to the directives in Application of the Dep't of Educ., Appeal No. 20-044, they are of no help to the parent because the substantial similarity test as applied in that decision has been explicitly rejected by the Second Circuit.

Finally, in its answer, the district points out that the District Court has already applied the Second Circuit's Ventura de Paulino decision to the issue of the student's pendency placement as presented in this case. Notably, the counsel for the parent failed to state in the request for review that the district court has already ruled against the parent on the same issue. Judge Ramos has already determined in this matter, indicating that, "[w]hat [the parent] cannot do, however, 'is determine that the child's pendency placement would be better provided somewhere else, enroll

the child in a new school, and then invoke the stay-put provision to force the school district to pay for the new school's services on a pendency basis' This is exactly what [the parent] is attempting to do here" (M. v. New York City Dep't of Educ., 2020 WL 4273907, at *7 [S.D.N.Y. July 24, 2020], reconsideration denied, 2020 WL 5117948 [S.D.N.Y. Aug. 31, 2020]). The parent's arguments through counsel in her answer to the cross appeal—that Judge Ramos did not preclude a pendency order for iBrain—are baseless. There has been no change in facts since Judge Ramos ruled, and counsel for parent is attempting to relitigate the issue in a lower administrative tribunal when a tribunal with greater authority has already spoken. However sympathetic the needs of this profoundly disabled student, that alone does not permit the parent to press forward with the same facts and arguments that have already been dismissed by the courts which amounts to nothing more than vexatious litigation brought in bad faith by the parent's counsel.[6]

Based on the foregoing, I find that the IHO correctly refused to find that iBrain was the student's stay put placement and the parent's appeal of this issue is dismissed as lacking in merit.

B. Unilateral Placement

As the district has not cross-appealed from the IHO's determination that it failed to offer the student a FAPE for the 2018-19 school year based upon the district's concession, that issue has become final and binding upon the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]). Therefore, the next issues to be addressed regarding the 2018-19 school year are whether iBrain was an appropriate unilateral placement and whether equitable considerations support an award of tuition reimbursement.

Thus, I turn first to the district's cross-appeal of the IHO's finding that iBrain was an appropriate unilateral placement for the student during the 2018-19 school year. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate,

[6] It also appears that counsel for the parent also separately pursued pendency at iBrain in another overlapping lawsuit before Judge Schofield in Araujo v. New York City Dep't of Educ., (2020 WL 5701828, at *3–4 [S.D.N.Y. Sept. 24, 2020], reconsideration denied, 2020 WL 6392818 [S.D.N.Y. Nov. 2, 2020]). The parent lost in that case as well, and counsel for the parent also failed to disclose that contrary ruling by the district court in her request for review.

"[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

With regard to the parties' dispute over whether iBrain was appropriate to address the student's needs, I note that the district's cross appeal was limited to the sole claim that iBrain failed to provide sufficient vision education services to the student.

IHO 3 reviewed the evidence with respect to the student's needs and determined that the student required a small class with 1:1 support from a paraprofessional, the presence of a nurse, and a variety of related services including OT, PT, speech-language therapy, and vision education services (IHO 3 Decision at pp. 14-15). Next, IHO 3 determined that iBrain provided the student with an extended school day program, a 6:1+1 special class with a paraprofessional for each student, the presence of a nurse, and the required related services for the entire school year with the exception of vision education services (id. at p. 15). She also reviewed the hearing record with respect to the student's progress at iBrain, and found that he had made limited progress, in light of his unique circumstances, toward meeting goals in the iBrain IEP in multiple domains (id.; see Parent Exs. J; K).

IHO 3 next addressed several specific arguments against the appropriateness of iBrain raised by the district in its closing brief, and identified the "most troublesome" assertion as that concerning the lack of vision education services in place at iBrain at the beginning of the 2018-19

school year (IHO 3 Decision at pp. 15-17). IHO 3 reviewed two progress reports in the hearing record and noted that an October 2018 progress report did not mention vision education services, but a January 2019 progress report did, such that it was a "fair assumption" that vision education services were implemented for the student beginning in November or December 2018 (id. at p. 16; see Parent Exs. J; K).[7] While noting that the hearing record showed that the student did not receive "everything defined as appropriate for his needs at iBrain beginning in July 2018," IHO 3 found that given the scope of the student's needs and the services he did receive, a delay in one service was not sufficient to render the program inappropriate overall and found that the parent met the burden of proof to demonstrate that iBrain was appropriate (id. at pp. 16-17).

Upon review of the evidence in the impartial hearing record, I find no basis to disturb IHO 3's finding that iBrain was an appropriate unilateral placement for the student during the 2018-19 school year.

According to testimony of iBrain's director of special education, the student began attending iBrain on July 9, 2018 (Parent Ex. Z at pp. 1, 3).[8] Although the student was projected to receive vision education services at the rate of three one-hour individual sessions per week per the iBrain IEP, at the start of the school year there was no vision education services provider at iBrain (Tr. pp. 384-85; Parent Exs. G at p. 34; Z at p. 3). Also, according to iBrain's director of special education, the student began receiving vision education services in mid-September 2018; "14, 15, around there" of September (Tr. pp. 388; Parent Ex. Z at p. 1).

I agree with the district's assertion that the student's need for vision education services was clear from the evaluative information in the hearing record, and vision education services were a required component of an appropriate special education program for the student (see Parent Exs. F at pp. 6-12, 23-24, 33; G at pp. 6-9, 18-19, 23-24, 34; H at pp. 11-12; Z at pp. 2-3). And while the district argues that iBrain was an inappropriate unilateral placement because it did not offer sufficient related services to meet the student's vision needs at the beginning of the 2018-19 school year, it is nonetheless well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). "The test for the private placement 'is that it is appropriate, and not that it is perfect'" T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877–78 [2d Cir. 2016] [citations omitted]). As discussed above, although the student did not receive services provided by a vision therapist for a period of time at the beginning of the 2018-19 school year, iBrain otherwise endeavored to meet the student's unique

[7] It appears that IHO 3 may have mis-dated Parent Exhibit J, which is a January 2018 progress report from iHope, rather than a January 2019 progress report from iBrain (see IHO 3 Decision at p. 16; Parent Ex. J at p. 1).

[8] In a somewhat muddled mess, the direct testimony by affidavit of the iBrain director and the parent contained in the hearing record are unsigned and unsworn, and the transcript and IHO 3's decision notes that they are "undated" (IHO 3 Decision at p. 27; see Parent Exs. Z-BB; Tr. 429, 430). Both IHOs 2 and 3 referenced different exhibits with the same identifying letters and it appears that the director may have signed a copy of an affidavit at one point in time (Tr. pp. 348; 358-60; 375, 429-30; 434, 463, 467). There appears to be no challenge to IHO 3's decision to admit undated affidavit testimony into the record, and thus I will not disturb the IHO's finding on this basis.

vision needs through his specially designed instructional and related services programming and, in considering the totality of the circumstances, I decline to find that iBrain was not an appropriate placement due solely to the lack of vision education services during that time period and given all of the other deficits that the iBrain services were addressing. As discussed above, and as recognized by IHO 3, iBrain identified the student's special education needs and provided a program that addressed those needs in which he demonstrated limited progress during the 2018-19 school year.

C. Equitable Considerations

On the one hand, the parent asserts that the IHO erred in finding that equitable considerations weigh against awarding the parent full tuition reimbursement at iBrain for the 2018-19 school year. On the other hand, the district does not cross-appeal from IHO 3's decision to award partial reimbursement. As further described below, upon review of the evidence in the impartial hearing record, I decline to disturb the IHO's determination that equitable considerations warranted a partial reduction in the tuition reimbursement awarded.

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

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory

provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Turning to the parties' disagreement over equitable considerations in this case, the parent contends that the IHO erred in reducing the reimbursement for the student's tuition at iBrain for the 2018-19 school year by "roughly 33%" based upon the parent's failure to fully cooperate with the CSE, while the district contends that the IHO should have eliminated tuition reimbursement entirely upon equitable considerations. I am not persuaded by either argument in this matter and I find IHO 3's determinations with respect to equitable considerations to be a reasonable exercise of the discretion afforded to IHOs in impartial hearings under the IDEA.

IHO 3 noted that in many cases the "third prong" of the Burlington-Carter tuition reimbursement analysis is a "minor issue", yet in this matter it was "very troubling" (IHO 3 Decision at p. 17). Initially, IHO 3 noted that the impartial hearing record showed that the parent had fully cooperated with the CSE during the formulation of the student's education program in February and March 2018 by consenting to and participating in evaluations of the student (id.; see Dist. Exs. 6-8; 12-13). However, IHO 3 determined that the credible evidence in the hearing record shows that thereafter the parent's cooperation with the CSE ceased (IHO 3 Decision at p. 17). For example, IHO 3 noted that CSE meetings scheduled for April 10, 2018 and April 19, 2018 were canceled by the parent and that phone calls from the CSE to the parent were not returned (id.; see Dist. Exs. 10-11; 15 at p. 1). Thereafter, on April 19, 2018 the parent wrote the CSE requesting a new CSE meeting to be held upon specific days after 3:00 p.m. and requested the presence of the student's providers at iHope and for a "DOE school physician" to participate "in person" (Parent Ex. P).

IHO 3 found that the CSE accommodated the parent's requests by scheduling a CSE meeting at 3:15 p.m. on May 15, 2018 and securing the "telephonic participation" of a physician (IHO 3 Decision at p. 17; see Dist. Exs. 18-19). However, neither the parent, nor the student's iHope providers appeared at the meeting, and the meeting was held in their absence (IHO 3 Decision at p. 17; see Dist. Exs. 22; 30 at pp. 4-5). The parent argues that the failure of the CSE to provide a physician at the CSE meeting in person was a valid reason for the parent to have refused to participate in the CSE meeting, however, IHO 3 determined that a physician's appearance by telephone was a reasonable method to obtain their participation and that the parent's excuse was "manufactured . . . to obstruct the IEP process in this case" (IHO 3 Decision at p. 18; see Tr. pp. 527-28). Further, IHO 3 determined that a "better explanation" for the parent's refusal to cooperate with the CSE could be found in a memorandum entered into the impartial hearing record by the district (id.; see Dist. Exs. 28; 30 at pp. 3-4). IHO 3 found that the memorandum was "convincing evidence" of a concerted effort by the parents of students at iHope—who had been advised by their attorney to refuse to cooperate with the CSE in developing IEPs for iHope students—and that the parent had followed that advice and chose not to assist the CSE as called for in the IDEA (IHO 3 Decision at p. 18; Dist. Exs. 28; 30 at pp. 3-4).

IHO 3 next determined that the CSE had "tried very hard" to accommodate the parent's requests and secure her cooperation with the CSE by rescheduling the CSE meeting several times, scheduling the meeting to occur after 3:00 p.m., and securing the participation of a parent member, a social worker, as well as a physician, albeit by telephone (IHO 3 Decision at p. 18). IHO 3 noted

that the IEP and CSE process is designed to be collaborative and would benefit from the cooperation of the parent, and further that the parent's failure to cooperate was a "serious impediment to the CSE performing its legal obligations under the IDEA" (id.). I concur.

Lastly, IHO 3 determined that the "balance of equities" was not in the parent's favor and that the tuition reimbursement award should be "adjusted accordingly" by reducing the order for direct funding of tuition at iBrain for the 2018-19 school year by "about 33% or $48,000" (IHO 3 Decision at pp. 18-19). As set forth above, I find that IHO 3's reduction of the tuition funding at iBrain upon equitable considerations was a reasonable exercise of her sound discretion in this matter, and I will not disturb that finding herein for the reasons asserted by the parent in this appeal.

VII. Conclusion

In light of the unappealed determination that that the district failed to offer the student a FAPE for the 2018-19 school year and, having determined that the evidence in the hearing record supports the IHO's determinations that the unilateral placement at iBrain was appropriate for the 2018-19 school year and that equitable considerations supported a partial reduction in tuition reimbursement for the costs of the student's attendance at iBrain for the 2018-19 school year, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 22, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER