The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 21-081

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:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Cynthia Sheps, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondents, by Peter G. Albert, 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 a free appropriate public education to respondents' (the parents') daughter and ordered it to reimburse the parents for a portion of their daughter's tuition costs at the International Institute for the Brain (iBrain) for the 2019-20 school year. The parents cross-appeal from that portion of the IHO's decision which reduced the award of tuition reimbursement based on equitable considerations. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

This appeal arises from an IHO's decision issued after the matter had been remanded by an SRO for further development of the hearing record (see Application of a Student with a Disability, Appeal No. 20-142).

The student is described as being non-verbal, non-ambulatory and medically fragile, and has received diagnoses of hypoxic encephalopathy cerebral palsy, a seizure disorder, and gastrointestinal reflux (Tr. p. 322; Dist. Exs. 1 at p. 3; 6 at p. 1). For the 2018-19 school year (fifth

grade), the parent unilaterally placed the student at the International Institute for the Brain (iBrain) (Dist. Ex. 10 at p. 1).[1]

In a letter to the district dated February 19, 2019, the parents informed the district that they were in receipt of district email correspondence regarding efforts to schedule a CSE meeting for the student's 2019-20 school year and requested a "[f]ull [c]ommittee [m]eeting" (including the in-person participation of a district school psychologist, a district social worker, a district physician, and an additional parent member) and that meeting notices be sent to staff at iBrain (Parent Ex. H at p. 1). In addition, the parents informed the district that they were "available to schedule this meeting on Mondays through Friday between the hours of 10am-2pm" but would be unavailable on February 25 and 28, March 27, and April 18 and 30 (id. at p. 2). Furthermore, the parent requested the CSE consider a placement in a non-public school and that any necessary evaluations for such consideration be completed prior to scheduling a meeting (id.). The parent also stated that the parents were providing consent for new testing and assessments for the student to determine the student's needs (id.). Finally, the parent indicated that once "a mutually agreeable" meeting time was scheduled, the parents would provide the student's most recent progress reports and any other documentation for consideration, and further requested that the meeting be recorded (id.).

A classroom observation of the student at iBrain was conducted on March 13, 2019 by a district social worker (Tr. p. 118; Dist. Ex. 5 at pp. 1-2). On March 21, 2019, a social history update and a psychoeducational evaluation were completed by the district (Dist. Exs. 4; 10). On the same date, the parent signed the district consent form for additional assessments of the student as part of a "requested reevaluation or mandated three-year evaluation" of the student (Dist. Ex. 13 at p. 1). On April 18, 2019, the district completed an assistive technology evaluation of the student (Dist. Ex. 6 at pp. 1-2).

In preparation for the student's 2019-20 school year, the district sent a CSE meeting notice to the parents on April 23, 2019, indicating that a CSE meeting had been scheduled for May 23, 2019 at 9:00 a.m. (Dist. Ex. 16). The notice indicated that attendees would include a district special education teacher/related service provider, a district representative, a district school psychologist, a district social worker, a physician and a parent member, as well as the parent, and from iBrain, the director of special education and five additional iBrain staff members (id. at pp. 1-2).

In an email to the parent dated May 13, 2019, the district reminded the parent of the upcoming CSE meeting and forwarded the student's most recent assessments (Dist. Ex. 17 at p. 1). The email requested that the parent assist the CSE in obtaining school progress reports and any other appropriate school records prior to the May 23, 2019 CSE meeting (id.).

In a letter to the CSE social worker dated May 23, 2019, the parents' advocate informed the district that the CSE meeting scheduled for that day could not proceed because the parents had previously sent a letter on February 19, 2019 indicating they were unavailable to attend an IEP meeting before 10:00 a.m. (Parent Ex. H at pp. 1-2; Dist. Ex. 19 at p. 1). The parents' advocate requested the that district propose an alternate date and time for the meeting, and further indicated that the parents would not consent to the district proceeding with the CSE meeting for the student

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

without them being present (Dist. Ex. 19 at p. 1). According to testimony by the CSE social worker, the district did not ever receive a letter indicating the parents were unavailable before 10:00 a.m. (Tr. p. 129).

By letter dated May 24, 2019, the district informed the parent of a new date and time for the student's CSE meeting, specifically, June 12, 2019 at 12:30 p.m. (Dist. Ex. 21 at p. 1). The meeting notice included the names and titles of the persons who would attend the meeting including a district physician, a parent member, and the student's special education teacher and related service providers as requested by the parents (id. at pp. 1-2). A prior written notice also dated May 24, 2019, documented the new date and time for the CSE meeting (Dist. Ex. 20 at p. 1). The notice reflected that the CSE meeting had initially been scheduled for May 7, 2019, that the CSE had reached out to the parents in February to inquire about their availability to attend the student's IEP meeting, and that on May 6, 2019 the CSE also mailed the parent all available assessments, a HIPPA [sic] form, medical accommodation form, and nursing package for the 2019-20 school year (id.).[2] The notice further indicated that the CSE social worker, school psychologist, and special education teacher would participate in the meeting and that a parent member would be available as per the parents' request, however, while an "OSH" physician would participate in the meeting, the parents' request that the physician participate in person was denied (id.).[3]

The CSE social worker indicated that on June 11, 2019, the director of special education at iBrain sent the CSE approximately 50 -70 pages of documents including progress reports, iBrain's proposed IEP and the medical accommodations form; however a HIPAA form was not included in the package (Tr. p. 133; see Parent Ex. L).

The CSE convened on June 12, 2019 to develop the student's IEP for the 2019-20 school year (see Dist. Ex. 1). The hearing record reflects that the student's June 2019 CSE meeting initially began as scheduled; however, after approximately 10 minutes, the meeting proceeded without the parents and iBrain staff (Tr. pp. 134-38; Dist. Exs. 2 at p. 8; 22 at p. 2). When the parents learned that the physician could not participate in the meeting due to illness, the student's mother indicated she would not continue with the meeting, despite the CSE's encouragement to do so (Dist. Exs. 2 at pp. 8-9; 22 at p. 2). However, before she and the iBrain staff left, the parent signed the HIPPA release form (Tr. p. 139; Dist. Exs. 2 at p. 8; 12 at p. 3). The district school psychologist acknowledged the parent's concern regarding the lack of a physician but informed her that the CSE would move forward with the meeting without her because otherwise the meeting could not be done until summer and in addition, she could not guarantee the doctor would be available at that time (Tr. p. 140; Dist. Ex. 2 at pp. 8-9; Dist. Ex. 22 at p. 2). The iBrain staff members who were participating telephonically indicated that if the parent was not attending the meeting they would not participate and accordingly, hung up the phone (Tr. p. 140; Dist. Exs. 2 at p. 9; 22 at p. 2).

[2] Health Insurance Portability and Accountability Act (HIPAA).

[3] Office of School Health (OSH).

Despite the parent not being present, the CSE continued with its annual review, and found the student eligible for special education services as a student with multiple disabilities (Dist. Exs. 1 at p. 1; 22 at p. 2). The CSE recommended the student attend a 12:1+(3:1) special class and receive related services of three 30-minute sessions per week of individual OT, four 30-minute sessions per week of individual PT, four 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual vision education services (Dist. Ex. 1 at p. 21). The CSE also recommended one 60-minute session per month of parent counseling and training, as well as a full-time 1:1 paraprofessional and a full-time group transportation paraprofessional (id.). The CSE further recommended the student be provided assistive technology devices and/or services including a Tobii eye gaze device with Snap+Core and Look 2 Learn software (id.). The IEP outlined approximately 30 different strategies to address the student's management needs (id. at p. 8).

On June 21, 2019, the student's mother signed an enrollment contract for the student to attend the International Institute for the Brain (iBrain) for the 2019-20 school year (Parent Ex. D at pp. 1, 7).[4] In a letter dated June 21, 2019, the parents asserted that the district had failed to offer the student a program or placement that could appropriately address her needs, and notified the district that they were unilaterally enrolling the student at iBrain for the 2019-20 school year and intended to seek public funding for that placement (Parent Ex. K).[5] The parents continued to request that "the CSE [] conduct a [f]ull [c]ommittee meeting along with a [district] school physician in person to develop an appropriate IEP for the 2019-2020 school year" (id.). The parents further requested that the CSE schedule the meeting at a mutually agreeable date and time to allow for all mandated members of the CSE to participate (id.).

In a prior written notice to the parent dated June 24, 2019, the district documented the CSE's recommendation as it was reflected in the June 12, 2019 IEP (Dist. Ex. 3 at p. 1). Also on June 24, 2019, the district provided the parents with a letter indicating the location of the school the student would be attending (id. at p. 5).

A. Due Process Complaint Notice and Impartial Hearing Officer and State Review Officer Decisions

By due process complaint notice dated July 8, 2019, the parents asserted that the student was denied a FAPE for the 2019-20 school year and generally contended that the district committed "many substantive and procedural errors under the IDEA and state law while

[4] On July 8, 2019, the student's mother signed a school transportation service agreement for the 2019-20 school year (Parent Ex. E at pp. 1, 5).

[5] The student attended iBrain for the 2019-20 school year (see Parent Ex. D). iBrain created an IEP for the student for the 2019-20 school year on June 1, 2019 and recommended a 6:1+1 special class placement with five 60-minute sessions of individual PT per week, five 60-minute sessions of individual 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 (Dist. Ex. 15 at pp. 1, 40). The iBrain IEP also reflected recommendations that the student receive 12-month services and the services of a full-time 1:1 paraprofessional and school nurse (id. at pp. 40, 41). The iBrain IEP also recommended one 60-minute session per month of parent counseling and training, assistive technology devices and services for the student, and training supports for school personnel on behalf of the student (id. at p. 41).

developing the [June 2019] IEP" (Parent Ex. A at p. 2). The parents argued that the district impeded the student's right to a FAPE and significantly impeded their opportunity to participate in the decision-making process (id.). Further, the parents requested an order of pendency that directed the district to "prospectively pay for the student's [f]ull [t]uition at iBrain" (id. at pp. 1-2).

Specifically, the parents asserted that the CSE was not properly composed, as the district did not comply with their request for a full committee meeting which included a district physician and parent member present and that the CSE failed to hold the meeting at a mutually agreeable time (Parent Ex A at p. 2). Next, the parents argued that the proposed June 2019 IEP would "expose [the student] to substantial regression due to the significant and unsubstantiated reduction in the related services mandates and student-to-teacher ratio of the recommended class size" (id.). Additionally, the parents asserted that the IEP was "not the product of any individualized assessment of all [the student's] needs" and would "not confer any meaningful educational benefit" for the 2019-20 school year (id.).

Further, the parents contended that the June 2019 IEP was inappropriate, as it did not properly classify the student as having a traumatic brain injury and failed to reflect the student's individual needs (Parent Ex. A at p. 2). Regarding the CSE's recommendations, the parents asserted that the district failed to offer the student "an appropriate school program and placement that me[]t [the student's] highly intensive management needs," which required "a high degree of individualized attention and intervention" (id.). The parents also contended that the district's recommended program was not in the least restrictive environment (id.). They argued that the recommended class ratio of 12:1+(3:1) was insufficient to address the student's needs and too large "to ensure the constant 1:1 support and monitoring" the student required (id. at p. 3). The parents also asserted that the district's recommended program did not offer the student an extended school day, which they opined was necessary for the student to make meaningful progress (id.). For relief, the parents requested direct payment to iBrain for the costs of the student's program and placement for the 2019-20 school year, including the cost of transportation and a 1:1 paraprofessional as well as a reconvene of the student's annual review CSE meeting (id.).

An interim order on pendency was issued on September 10, 2019 by the IHO (IHO I) "[on consent] of the parties" after waiver of a hearing on pendency (IHO Ex. III at p. 2).[6] In an "order on consent," IHO I indicated that the student's pendency program consisted of "the educational program provided at iB[rain], and the costs of being transported to and from iB[rain], in accordance with" an unappealed IHO decision dated July 16, 2019 (id. at p. 3).

On October 25, 2019, the parties proceeded to an impartial hearing which included documentary and testimonial evidence received over three nonconsecutive dates (Tr. pp. 1-262). The June 17, 2020 hearing date concluded while a district witness was testifying (Tr. p. 259). Prior to concluding the hearing date, IHO I reiterated that the parties would reconvene to continue the witness' cross-examination on July 10, 2020 (Tr. pp. 258-60). The district and IHO I appeared by telephone on July 10, 2020 for the next hearing date; however, neither the parents' attorney nor the parents appeared (Tr. pp. 263-69). IHO I noted on the record that the parent had not requested an

[6] The IHO's interim order on pendency has not been paginated. For the purposes of this decision, and consistent with the pleadings, the cover page is designated as page 1 with the remaining pages assigned page numbers 2-4.

adjournment and given that the school year had concluded and, by operation of pendency, the parents had received all of their requested relief, he was inclined to dismiss the parents' claims "as moot, by pendency and for the Parent's failure to appear today" (Tr. pp. 265-66). Thereafter, the district made a motion for IHO I to find that the parents had abandoned their claims based on their nonappearance and failure to communicate (Tr. p. 267). IHO I granted the district's motion on the record noting the lack of opposition (Tr. pp. 267-68).

By decision dated July 17, 2020, IHO I determined that the parents' claims had been rendered moot by operation of pendency and also granted the district's motion to dismiss the parents' claims for their failure to appear at the July 10, 2020 hearing (IHO Ex. II at pp. 14, 15). IHO I further ordered the district to reevaluate the student in all areas of suspected disability that had not been evaluated "within the last two years" and upon completion reconvene a CSE to "produce a new IEP" that considered all of the student's available evaluations and any related information for the 2020-21 school year (id. at p. 15). Lastly, IHO I determined that any other relief sought by the parents and not addressed by the IHO's decision was "found to be either resolved by the parties, withdrawn by the Parent, outside the scope of the IHO's authority or unsupported by the record" (id.).

The parties appealed IHO I's decision and, in a decision dated October 8, 2020, an SRO remanded the matter to the IHO for further administrative proceedings (see Application of a Student with a Disability, Appeal No. 20-142). With respect to IHO I dismissing the parents' due process complaint notice, based on the parents' failure to appear at the July 10, 2020 impartial hearing date, the SRO found that the "outright dismissal of this matter, without attempting to get some input from the parents or parents' counsel, was improper." The SRO also found that the IHO erred in finding that the matter was "moot" due to the parents receiving all of their requested relief through the September 2019 order on pendency. Accordingly, the SRO found that the appropriate remedy for the IHO's decision to dismiss the proceeding based on mootness and the parents' nonappearance at one hearing date was a remand to continue the proceedings at the point they were interrupted. Thus, the SRO remanded the case back to IHO I to "review the parents' reason for not appearing at the July 10, 2020 hearing and to determine whether the district offered the student a FAPE for the 2019-20 school year, and thereafter, if necessary, whether iBrain was an appropriate unilateral placement and whether equitable considerations weighed in favor of the parents' request for relief."

B. Impartial Hearing Officer Decision after Remand

Upon remand, the matter was assigned to a different IHO (IHO II) after the recusal of IHO I (see Tr. p. 272).[7] On November 6, 2020, the parties resumed the impartial hearing, which concluded on December 18, 2020 after two days of post-remand proceedings (see Tr. pp. 272-476). The IHO issued a corrected final decision dated March 4, 2021 and found that the district denied the student a FAPE for the 2019-20 school year, that iBrain constituted an appropriate unilateral placement, and that equitable considerations warranted a 35 percent reduction in the amount of tuition reimbursement awarded (see Mar. 4, 2021 IHO Decision at pp. 19-39).

[7] For the remainder of this decision, "IHO II" will be referred to simply as "the IHO."

With respect to the parents' argument that the district failed to issue proper meeting notices because the initial CSE meeting notice indicated that a meeting had to be held no later than February 12, 2019 and the CSE was attempting to schedule a CSE meeting three months later, on May 23, 2019, the IHO found that this was mitigated by the district's offer to provide the student with a FAPE pursuant to her IEP in effect at that time, and that since the student never attended a single class in the district for the 2019-20 school year, there was no evidence that this delay resulted in an educational loss for the student (Mar. 4, 2021 IHO Decision at p. 21). With regard to the district physician not being present at the June 12, 2019 CSE meeting, the IHO found that the district's actions significantly impeded the parent's opportunity to participate and that even if the parent had remained at the CSE meeting, the parent would not have had the district physician's input to make decisions and recommendations regarding the student's IEP (id. at p. 23). The IHO further found that the district's denial of the parents' request to reconvene the June 12, 2019 CSE meeting constituted a denial of FAPE (id. at p. 24). The IHO noted that when the parent initially requested to reschedule the CSE meeting on June 12, 2019, there were 18 days left before the end of the school year to reschedule the CSE meeting at a mutually agreeable time and to include the district physician (id. at p. 25). The IHO also noted that despite the fact that the parent's non-participation during the CSE meeting was due in part to her own actions, she did not participate in the development of the student's IEP and, even if she had, it would not have been meaningful due to the absence of the district physician (id.).

Turning to the parents' substantive claims, with respect to the parents' argument that the student should have been classified as a student with a traumatic brain injury, the IHO found that there was no basis in the record to find that the student's classification as a student with multiple disabilities denied the student a FAPE (Mar. 4, 2021 IHO Decision at p. 30). The IHO also found that the June 2019 CSE's recommendation of a 12:1+(3:1) special class was not appropriate for the student based upon testimony from the district school psychologist and iBrain director (id. at pp. 30-32). Next, the IHO found that the June 2019 CSE's recommended 30-minute sessions for the student's related services were not appropriate because iBrain's recommended duration of 60-minute sessions were based upon the recommendations and substantiation of the student's related services providers and the student's goals were meant to be addressed in 60-minute sessions rather than 30-minute sessions (id. at pp. 32-34).

Turning to the appropriateness of iBrain, the IHO found that based on the testimony and documentary evidence, iBrain was appropriate because it was specifically designed to meet the student's unique needs and the student made meaningful progress (Mar. 4, 2021 IHO Decision at p. 35). With respect to equities, the IHO reduced the amount of the student's tuition reimbursement at iBrain for the 2019-20 school year based on the following: (1) 8.33%, which is approximately one month's tuition because of the approximate one month the student remained on remote instruction during the 2019/20 school year, after the students were allowed to return to in-person instruction at iBrain in May 2020; (2) 16.67%, representing the one out of six days of hearing scheduled for the case that neither the parents nor their attorney attended; and (3) 10% for the remaining equitable considerations as stated in the decision (Mar. 4, 2021 IHO Decision at p. 38).[8]

[8] The IHO decision noted equitable considerations such as "last minute [CSE meeting] cancellations and provision of documents for such [] meetings," the parent not signing the HIPAA release until the June 12, 2019 CSE meeting, and the parents not visiting the public school placement recommended by the CSE.

Accordingly, the IHO ordered the district to fund the student's tuition at iBrain for the 2019-20 school year in the amount of $99,450 (65% of $153,000) which included the costs of a 1:1 paraprofessional and school nurse, as well as transportation costs including a 1:1 paraprofessional (id. at p. 39).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in finding that it denied the student a FAPE for the 2019-20 school year. Initially, the district argues that there is no requirement that a district physician is a mandatory member of the CSE and that it made efforts to conduct the June 2019 CSE meeting with a district physician in attendance. The district also argues that the June 2019 CSE's decision to proceed without the parent in attendance was not a procedural violation that resulted in a denial of a FAPE. Next, the district argues that the IHO erred in finding that the district denied the student a FAPE because the CSE did not reconvene after the June 2019 CSE meeting. The district argues that it never received the parents' June 21, 2019 letter requesting the CSE to reconvene and in any case, the CSE had available information with respect to the students' medical condition and medical needs which was reviewed by a physician, such that the failure to reconvene did not rise to a denial of a FAPE. Next, the district argues that the IHO erred in finding that the student's June 2019 IEP was substantively invalid. More specifically, the district argues that the IHO erred in finding that the June 2019 CSE's program recommendation of a 12:1+(3:1) was not appropriate. The district argues that the 12:1+(3:1) was appropriate and is precisely the program that will address the student's needs. The district also argues that the IHO erred in finding that the recommended 30-minute sessions for the student's related services were not appropriate when the hearing record supports that the student's documented difficulties with fatigue and alertness levels requires 30-minute sessions for related services in order for the student to make progress toward her annual goals. Lastly, the district argues that the IHO erred in finding a 35% reduction in tuition reimbursement for iBrain for the 2019-20 school year when there should be a total bar of tuition reimbursement due to the parents' failure to cooperate with the CSE process.

In an answer with cross-appeal, the parents respond to the district's allegations and generally argue to uphold the IHO's findings that the district failed to offer the student a FAPE for the 2019-20 school year. Specifically, the parents argue that the presence of a medical doctor at the CSE meeting for a medically fragile child, like their daughter, was important to assist the other members of the CSE regarding medical issues affecting the student's educational placement, and that no reconvened CSE meeting was held with a district physician present in person, despite the parents' request in their 10-day notice regarding enrolling the student at iBrain. The parents cross-appeal from the IHO's reduction of tuition reimbursement for iBrain for the 2019-20 school year by 35% on equitable grounds. The parents also cross-appeal the IHO not finding that the district failed to issue proper meeting notices, the IHO's holding that it was de minimis that both CSE meetings were scheduled well after the date by which the district was required to complete the student's annual review and the IHO's finding that the student was properly classified by the district as a student with multiple disabilities.

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]).[9]

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. June 2019 CSE Process

On appeal the district argues that the IHO erred in finding that it failed to offer the student a FAPE for the 2019-20 school year in part due to the district physician not attending the June 2019 CSE meeting. The district specifically asserts that the lack of a district physician at the June 2019 CSE meeting, despite the parents' request for one to be present, does not rise to the level of a denial of a FAPE. The parents argue to uphold the IHO's finding and contend that the presence of the district physician at the CSE meeting for their medically fragile daughter would assist other members of the CSE regarding medical issues affecting the student, and that not having the district physician present at the June 2019 CSE meeting resulted in the denial of a FAPE.

State regulation requires, in pertinent part, that a CSE must be composed of the following persons: the parents or persons in parental relationship to the student; not less than one regular education teacher of the student whenever the student is or may be participating in the regular education environment; not less than one special education teacher of the student, or, if appropriate, not less than one special education provider of the student; a school psychologist; a

[9] 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).

district representative who shall serve as the CSE chairperson; an individual who can interpret the instructional implications of evaluation results; a school physician if requested in writing 72 hours prior to the meeting; an additional parent member if requested in writing 72 hours prior to the meeting; other persons having knowledge or special expertise regarding the student, and if appropriate, the student (8 NYCRR 200.3[a][1]).

As detailed above, in a letter to the CSE dated February 19, 2019, the parents requested that the CSE meeting for the student's 2019-20 school year be what they termed a "Full Committee Meeting" which included, among other members, the in-person participation of a district physician, (Parent Ex. H at p. 1). In a prior written notice for the June 12, 2019 CSE meeting, the CSE responded to the parents' request and indicated that while an "OSH" physician would participate in the meeting, the parents' request that the physician participate in person was not granted (Dist. Ex. 20 at p. 1). The CSE meeting notice sent on May 24, 2019 also indicated that the district physician would participate at the June 2019 CSE meeting (Dist. Ex. 21 at p. 2).

On June 12, 2019, a CSE meeting took place in preparation for the student's 2019-20 school year and the June 2019 CSE participants included the district special education teacher, district general education teacher, district social worker, district school psychologist (who also served as district representative), a parent member, the parent advocate, the student's teachers and related service providers at iBrain, the director of iBrain and the student's mother (Dist. Ex. 1 at p. 26). The district physician was not in attendance (id.). The district school psychologist testified via affidavit that the district physician was scheduled to appear by phone but was "ill" the day of the June 2019 CSE meeting (Dist. Ex. 22 at p. 2). She further testified that the CSE had another doctor scheduled as a "backup"; however, that doctor did not feel comfortable appearing at the June 2019 CSE meeting as he did not have time to review the student's medical records (id.). The district school psychologist further testified that during the June 12, 2019 CSE meeting, the parent and certain iBrain staff appeared in person and that she "conferenced" in the other iBrain participants (id.). She indicated that once the parent was informed that the district physician could not participate at the meeting because he was ill and that the backup doctor did not feel comfortable participating, the student's mother left the CSE meeting (id.). In addition, the district school psychologist indicated that she "encouraged" the parent to stay at the CSE meeting and informed the parent that she would continue the CSE meeting if she left (id.). Prior to leaving the CSE meeting, the parent requested to reschedule the CSE meeting with a district physician in attendance (Dist. Ex. 2 at pp. 8-9). The parent was told that the CSE could not reconvene until after the summer began and that it could not be guaranteed that a doctor would be available (Dist. Ex. 2 at pp. 8-9). The district school psychologist also testified that once the iBrain staff was aware that the parent left, they disconnected the phone (Tr. p. 140; Dist. Ex. 22 at p. 2). Prior to leaving the CSE meeting, the parent signed the HIPAA release form (Tr. p. 139; Dist. Exs. 12 at p. 3; 22 at p. 2).

Based on the above, the parents made a timely request for the attendance of the district physician prior to the June 12, 2019 CSE meeting; however, the district physician did not attend. Accordingly, the absence of the district physician at the CSE meeting is a procedural violation related to the composition of the June 2019 CSE. However, this procedural violation would only result in a finding that the student did not receive a FAPE if the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation

of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

In the instant case, the hearing record indicates that the parents' concerns in wanting the district physician to participate during the June 2019 CSE meeting in order to discuss the student's needs were warranted. As discussed briefly above, the student was described as being medically fragile, and having received diagnoses of hypoxic encephalopathy cerebral palsy, a history of seizures, and gastrointestinal reflux; she required nutrition, hydration and medication through a gastronomy tube; was unable to use both eyes simultaneously due to a severe outward turning from central alignment (an apparent exotropia) of the right eye; exhibited "what appear[ed] to be a fairly severe torticollis" (head is twisted to her right side); frequently presented with low energy and discomfort due to digestive issues; and was nonverbal and non-ambulatory (Tr. p. 322; Parent Ex. M at p. 2; Dist. Exs. 1 at pp. 3, 4, 6, 7; 5 at p. 2; 6 at p. 1; see Parent Ex. 15 at pp. 17, 41; Dist. Ex. 22 at p. 4).[10, 11] In addition, the student was dependent on others for wheelchair mobility and had limited range of motion, bilateral hip, shoulder, elbow and wrist flexion contractures and presented with spasticity and hypertonia in her arms, legs, and trunk and required support and positioning in sitting (Dist. Ex. 6 at p. 1). The student's most commonly used mode of communication was a low tech communication system (PECS) that used pictures and symbols but she also communicated through facial expressions, head turning, activating switches with verbal prompting, and locating and looking at desired items (Dist. Exs. 15 at p. 1; 22 at p. 3). The student presented with many "orthopedic involvements" that adversely affected her ability to use her hands and arms as reliable access points for communication (Dist. Ex. 15 at p. 4).

Consistent with the student's extensive physical and medical needs, the recommended IEP from iBrain reflected that although the student was reported to demonstrate intellectual and cognitive potential to learn, her "rate of progress [was] dictated by her physical health and well being" (Dist. Ex. 15 at p. 1). In addition, her absences from school due to her health status, impacted her ability to demonstrate consistent performance across all domains (id. at p. 6). The district school psychologist indicated in her affidavit that the student required support to address her management needs related to safety (possible seizures) and to provide a level of monitoring of the student's health issues (Dist. Ex. 22 at p. 4). Notwithstanding this, the district representative relied on generic information from some other doctors to make decisions regarding this student's needs, for example, the appropriate length of her related services sessions (Dist. Ex. 22 at pp. 6-7; see Tr. pp. 247-49, 325-26). Furthermore, the district representative indicated in her affidavit that the CSE had many questions for iBrain's providers but since they were not in attendance, the CSE was "unable to gain the information that [they] needed from the iBrain team or the parent," yet the CSE proceeded to make decisions related to the length of sessions and related to the student's goals

[10] The June 12, 2019 IEP reflects that the student's "physical discomfort often means that [the student] can spend her entire [therapy] session crying in pain and pushing up in her wheelchair in an attempt to get some relief" (Dist. Exs. 1 at p. 4; 15 at p. 3).

[11] The June 2019 IEP indicated that in April 2019 the student underwent an updated modified barium swallow study that according to the parents "showed no signs or symptoms of aspiration or penetration" (Dist. Ex. 1 at p. 6). The student was reportedly cleared for a pureed diet, however, at the time the IEP was drafted no feeding therapy was taking place in school (id.).

this pertinent and admittedly necessary information in the absence of the iBrain staff and the parent (Dist. Ex. 22 at p. 7).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [holding that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *18-*20 [S.D.N.Y. Jan. 2, 2013]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language and Commc'n Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]).

Moreover, under the unique circumstances of this case, another procedural safeguard also comes into play that is related to the parents' participation in the CSE process. In addition to the district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). However, a district's failure to comply with procedural requirements of the IDEA only constitutes a denial of a FAPE if the procedural violation deprived the student of educational benefits or significantly impeded the parents opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

As an initial matter, the district never objected to the attendance of a district physician at the CSE meeting. Rather, in a prior written notice for the June 12, 2019 CSE meeting, the CSE responded to the parents' request and indicated that a district physician would participate in the meeting, albeit not in person, and the CSE meeting notice sent on May 24, 2019 also indicated that the district physician would participate at the June 2019 CSE meeting. Inclusion of a district physician at the meeting was particularly important here given that the student presented with multiple complex diagnose and medical needs, as well as potential safety issues given her seizure disorder and the presence of other physical ailments which caused her pain and discomfort. At

least one decision issued by an SRO has determined that the lack of a district physician at a CSE may require the CSE to reconvene where the physician's input may be deemed "essential" to the CSE process (see, e.g., Application of a Child With A Handicapping Condition, Appeal No. 90-12 [affirming IHO's directive to the CSE to reconvene where the parent had requested the presence of a district physician at the CSE meeting concerning a student with cerebral palsy and a seizure disorder, and the district failed to secure the attendance of a district physician, stating that "[i]n this instance, the judgment of the [district's] physician as to the physical and occupational therapy needs of the pupil would have been essential for the CSE to reach an informed decision as to the pupil's needs" because of the physician's professional expertise]). Although the district argues that information with respect to the student's medical condition was available to the CSE, the district has not demonstrated that the other CSE members were able to address the concerns of the parent with respect to how the student's medical conditions would impact her attendance at a district school or that the CSE members were able to factor her medical conditions into their recommendations absent the presence of a district physician at the meeting who had the requisite expertise to assist the CSE and the parent with determining and understanding how the CSE's recommendation could provide appropriate supports and services to the student given her complex medical needs. In addition, the district's argument that a district physician reviewed the student's medical documentation and approved the student's "recommendations in the June 2019 IEP" is unavailing, as the district cites to the affidavit of the district school psychologist who testified that the student's medical documentation was reviewed by a district physician to review the student's special transportation needs, and not the student's program recommendations or related services (Req. for Rev. ¶ 10; Dist. Ex. 22 at p. 4). Finally, the rationale provided at the meeting for not reconvening the CSE appeared to have more to do with the potential difficulty of scheduling another CSE meeting so close to the end of the school year than with a substantive decision that the attendance of the physician would not affect the recommendations made at the initial meeting (see Application of a Student with a Disability, Appeal No. 15- [finding that the district violated the IDEA by failing to either reconvene the CSE in response to the parents' request or respond with written notice stating the reasons why the district did not believe a reconvene was necessary and such violation contributed to a denial of FAPE], see also Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; 34 CFR 300.503; 8 NYCRR 200.5[a]; Application of a Student with a Disability, Appeal No. 13-172; Application of the Dep't of Educ., Appeal No. 12-128). While I recognize the district's efforts to have a district physician attend and the attempt to have a "back up" district physician at the June 2019 CSE, which was ultimately not successful, I nevertheless find that continuing the CSE meeting, without the participation of the district physician, denied the parent meaningful participation in the CSE process and, therefore, I need not disturb the IHO's finding that the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student was significantly.

Closely related to, and further compounding the initial procedural violation at issue, was the CSE's failure to reconvene although requested to do so by the parents. Although the hearing record is not clear as to whether the district received the parents' June 21, 2019 letter with the parents' request for a reconvene of the June 2019 CSE meeting, the IHO found that, aside from the parents' written request to reconvene, they initially requested a reconvene of the CSE meeting during the June 12, 2019 CSE meeting when the student's mother was advised that the district physician could not participate. However, as stated above, the CSE advised the parent that the CSE would move forward with the meeting without her because otherwise the meeting could not

be done until summer and, in addition, the CSE could not guarantee the doctor would be available at that time (Tr. p. 140; Dist. Ex. 2 at pp. 8-9; Dist. Ex. 22 at p. 2). Despite the district's reasoning for not reconvening the CSE meeting, the IHO found that there were 18 days left before the end of the school year to reschedule the CSE meeting and this would have afforded the district, including the district physician, time to review the approximately 50 to 70 pages of documents provided by iBrain the day before the June 12, 2019 CSE meeting (Mar. 4, 2021 IHO Decision at p. 25). Moreover, unlike in situations where a reconvene of the CSE is unlikely to yield any new information or any information that has the potential to impact the CSE's recommendations (see Application of a Student with a Disability, Appeal No. 14-158 [finding that because information forming the basis for a parent's request to reconvene did not reflect a change in the student's needs and abilities to such an extent that the placement recommended by CSE became inappropriate as a result, "based on the unique circumstances" of the matter, the parents' participation was not impeded based on the CSE's failure to reconvene the CSE]), here, the district physician was initially anticipated to participate in the meeting and it is entirely possible that his or her participation may have impacted the recommendations made or, at the very least, allowed the CSE members and parents to more fully engage at the meeting in an informed manner with respect to questions and concerns related to the impact of the student's complex medical conditions on her educational programming and placement, including her medical fragility and safety concerns related thereto. Accordingly, I see no reason to depart from the IHO's findings because, as previously discussed, it was incumbent on the district to secure the attendance of the district physician in order to assist the members of the CSE and the parents to make informed educational decisions regarding medical issues affecting the student. As such, the CSE's failure to secure the attendance of the district physician, coupled with its subsequent failure to reconvene the CSE at the parents' request, which potentially could have rectified the lack of the district physician at the initial CSE meeting, deprived the parents of a meaningful opportunity to participate in the CSE process regarding the provision of a FAPE to the student and, therefore, deprived the student of a FAPE.[12]

B. Equitable Considerations

As the district has not cross-appealed from the IHO's determination that iBrain constituted an appropriate unilateral placement for the student, 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]).

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

[12] Having determined not to disturb the IHO's finding that the district failed to offer the student a FAPE for the 2019-20 school year, it is not necessary to address the remaining FAPE issues raised in the request for review and the parents' answer and cross-appeal as there would be no practical effect. As noted by the district and herein, the student received pendency for the 2019-20 school year, as well as prospective funding for the 2020-21 school year (see Req. for Rev. fn. 1 at p. 3; Araujo v. New York City Dep't of Educ., 2020 WL 5701828, at *2-*4 [S.D.N.Y. Sept. 24, 2020], reconsideration denied, 2020 WL 6392818 [Nov. 2, 2020]).

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., 758 F.3d at 461 [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. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [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. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68).

The IDEA provides that the amount of tuition reimbursement must not be reduced or denied due to the lack of a 10-day notice if it would "likely result in physical harm to the child" (20 U.S.C. § 1412[a][10][C][iv][I][cc]; see 34 CFR 300.148[e][1][iii]). In addition, a hearing officer may, in his or her discretion, excuse the lack of a 10-day notice if compliance "would likely [have] result[ed] in serious emotional harm to the child" (20 U.S.C. § 1412[a][10][C][iv][II][bb]; see 34 CFR 300.148[e][2][ii]).

Turning to the parents' cross-appeal over equitable considerations in this case, the parents contend that the IHO erred in reducing the reimbursement for the student's tuition at iBrain for the 2019-20 school year by 35%. The district argues that the IHO should have eliminated tuition reimbursement entirely based on equitable considerations.

As mentioned above, the IHO reduced the parents' tuition reimbursement at iBrain for the 2019-20 school year based on the following: (1) 8.33%, which is approximately one month's tuition because of the approximately one month the student remained on remote instruction during the 2019-20 school year, after the students were allowed to return to in-person instruction at iBrain

in May 2020; (2) 16.67%, representing the one out of six days of hearing scheduled for the case that neither the parents nor their attorney attended; and (3) 10% for the remaining equitable considerations as stated in the decision (Mar. 4, 2021 IHO Decision at p. 38).

First, with respect to the IHO's reduction of tuition reimbursement due to the student's remote instruction for one additional month during the 2019-20 school year at iBrain and the one impartial hearing date that neither the parents nor their attorney attended, there is no authority that the conduct of the parents or their counsel in failing to appear for a hearing date particularly where, as here, they and their counsel participated for the majority of the proceedings would weigh against the parents in determining whether to reduce the amount of tuition to be reimbursed to them. Similarly, given the extraordinary circumstances presented by the Covid-19 pandemic during the latter part of the 2019-20 school year, the parents' decision to keep the student on remote instruction for one month past the re-opening of in-person instruction at iBrain does not, without more, present a compelling reason to reduce the amount of tuition to be reimbursed on equitable grounds. With respect to the IHO's reduction of an additional 10% of the tuition, upon my independent review of the record, I find that despite some delays and meeting cancellations on the part of the parents, they nonetheless substantially cooperated with the CSE process and, in any event, the procedural violations underpinning the denial of FAPE in this instance were attributable to the district and the parents' actions did not contribute. Under these circumstances, the portion of the IHO's reduction of tuition reimbursement by 35% must be reversed.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record supports the IHO's determination that the district denied the student a FAPE for the 2019-20 school year and that iBrain was an appropriate unilateral placement for the student; however, the IHO's determination that equitable considerations warranted a reduction of the relief granted is reversed. As such, 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 SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated March 4, 2021, is modified, by reversing the portion of the decision which determined that tuition reimbursement should be reduced by 35%; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the full costs of the student's unilateral placement at iBrain for the 2019-20 school year.

Dated: **Albany, New York**
April 23, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER