The University of the State of New York

The State Education Department
State Review Officer
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No. 21-136

Application of a STUDENT WITH A DISABILITY, by his parents, 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 petitioners, by John Henry Olthoff, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the International Institute for the Brain (iBrain) for the 2018-19 school year.[1] Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate it offered to provide an appropriate educational program to the student for the 2018-19 school year. The appeal must be sustained. 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

[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).

psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has been the subject of prior State-level administrative review proceedings, including an appeal involving the student's stay-put placement during the pendency of the present matter (see Application of a Student with a Disability, 21-063, Application of a Student with a

Disability, 20-178; Application of a Student with a Disability, Appeal No. 20-051; Application of a Student with a Disability, Appeal No. 18-139). The student has received diagnoses of Lennox Gestaut Syndrome, epilepsy, global developmental delays, traumatic brain injury (TBI), dysphagia, and hypotonia (Dist. Ex. 2 at p. 1). The student is nonverbal and non-ambulatory and requires "full assistance" with all activities of daily living (id. at pp. 1, 3-4). The student uses a wheelchair as well as other adaptive equipment (id. at pp. 3-4).

On May 11, 2017, at an annual review the CSE determined that the student was eligible for special education and related services as a student with multiple disabilities (Dist. Ex. 2 at p. 1). The student's management needs were described as requiring a "[s]mall highly structured environment" to "address his global and medical needs" (id. at p. 4). The May 2017 CSE recommended a 12:1+(3:1) special class placement in a specialized school on a 12-month basis (id. at pp. 14-15). In addition, the May 2017 CSE recommended the following related services: three 30-minute sessions per week of individual occupational therapy (OT), three 30-minute sessions per week of individual physical therapy (PT), and five 30-minute sessions per week of individual speech-language therapy (id. at p. 14). The CSE also recommended individual health paraprofessional services to assist with the student's feeding, ambulation and seizure disorder (id. at p. 15).

The parents disagreed with the May 2017 CSE recommendations and unilaterally placed the student at the International Academy of Hope (iHope) for the 2017-18 school year (see Parent Ex. D). As discussed below, the parents' unilateral placement of the student at iHope for the 2017-18 school year was the subject of a prior administrative hearing (see Parent Ex. B).

On June 14, 2018, the CSE met for the purposes of an annual review (see Dist. Ex. 9). The student continued to require a "[s]mall highly structured environment" with "multisensory learning" and "limited auditory and visual distractions" (Dist. Ex. 9 at p. 4). The June 2018 CSE again recommended a 12:1+(3:1) special class placement in a specialized school on a 12-month basis (id. at pp. 16-17). Additionally, the June 2018 CSE recommended related services as follows: one 30-minute session per week of individual OT, one 60-minute session per month of parent counseling and training, three 30-minute sessions per week of individual PT, five 30-minute sessions per week of individual speech-language therapy, and two 30-minute sessions per week of individual vision education services (id. at p. 16). The June 2018 CSE continued to recommend individual health paraprofessional services to assist with the student's feeding, ambulation and seizure disorder, and full-time individual transportation paraprofessional services (id.).

Again, the parents disagreed with the recommendations contained in the June 2018 IEP, and as a result, notified the district of their intent to unilaterally place the student at iBrain for the 2018-19 school year (see Parent Ex. M).

A. Prior Due Process Proceedings

On or about January 25, 2018, the parents filed a due process complaint notice alleging that the district failed to provide the student with a free appropriate public education (FAPE) for the 2017-18 school year (Parent Ex. B at pp. 3, 7). In that matter, the IHO found iHope to be an appropriate unilateral placement and that equitable considerations favored the parents (id. at p. 7). As relief, the IHO ordered the district to pay the cost of tuition at iHope for the 2017-18 school

year including a 1:1 paraprofessional and related services of PT, OT, vision education services, speech-language therapy, and parent counseling and training (id.). The IHO further ordered the district to provide the student with special transportation and to provide/maintain the student's current assistive technology device both in school and at home (id. at p. 8).

B. Due Process Complaint Notice

In a due process complaint notice, dated July 9, 2018, the parents alleged that the district failed to offer the student a FAPE for the 2018-19 school year (see Parent Ex. A).

The parents alleged "several procedural and substantive errors" that impeded the parents' opportunity to participate in the CSE process resulting in a denial of FAPE to the student (Parent Ex. A at p. 2). More specifically, the parents argued that the district failed to timely hold a CSE meeting, failed to issue a school placement recommendation prior to the beginning of the school year, failed to hold a full CSE meeting, failed to recommend an appropriate IEP, and failed to hold a CSE meeting at a "mutually agreeable" date and time to the parents (id.).

Furthermore, the parents requested pendency at iBrain for the 2018-19 extended school year, including transportation costs and a 1:1 travel aide. As final relief, the parents requested tuition funding at iBrain for the 2018-19 school year, with special transportation services, and for the CSE to reconvene an annual review meeting (Parent Ex. A at p. 2).

C. Pendency

Although pendency is not appealed in this case, the procedural history pertaining to pendency is worth briefly mentioning.

A pendency hearing was held on September 7 and 18, 2018 (Tr. pp. 5-58). In an interim decision dated October 16, 2018, the IHO determined that a parent may not unilaterally move their child from one school to another and retain the right to pendency services (Oct. 16, 2018 Interim IHO Decision at p. 1). The IHO noted that the parent attempted to distinguish a prior SRO decision from the instant matter by arguing that the holding in that appeal "pertain[ed] only to services which are not mandated by law," but the IHO disagreed and found that the decision "pertain[ed] to tuition as well as related services" (id.; see Application of the Bd. of Educ., Appeal No. 00-073). As a result, the IHO ordered that the student's pendency placement remain at iHope and that "pendency services w[ould] only attach at such time as" the student re-enrolled in iHope (id.).

The parent appealed the October 16, 2018 Interim IHO Decision arguing that the IHO "erroneously" and exclusively relied on one SRO decision to make her determination. Specifically, the parent argued that the IHO misapplied the law and misconstrued a sentence in one SRO decision stating that "parents are not free to unilaterally transfer their child from one school to another." The parent argued that, in context, the full quotation reflects that "[a]lthough a change in location is not necessarily a change in educational placement," parents are not entitled to move a student from one school to another "with the assurance that special services will be provided by the school district at the new location." As a result, the parent contended that the case cited by the IHO was not relevant to the facts at issue in this case. The parent also argued that the IHO's failure to make a determination as to whether the programs offered at iHope and iBrain were substantially similar was reversible error. For relief, the parent requested that the IHO's

determination on pendency be reversed and that the SRO order the district to fund the cost of the student's tuition at iBrain for the 2018-19 school year.

Among other findings made by the SRO, she held that the hearing record supported a finding that, at the time of the pendency hearing, the parents' placement of the student at iBrain constituted a "change in placement" for the purposes of pendency and, as such, there was no basis to reverse the IHO's denial of the parent's request that the district fund the student's attendance at iBrain (see Application of a Student with a Disability, Appeal No. 18-139).

Thereafter, the parents appealed to the United States District Court for the Southern District of New York seeking a preliminary injunction for pendency at iBrain for the 2018-19 school year (see Ferreira v New York City Dept. of Educ., 2020 WL 1158532, at *3 [SDNY Mar. 6, 2020], affd,, 2020 WL 8838249 [2d Cir Nov. 4, 2020]). In relying on Neske v. N.Y.C. Dep't of Educ., 2019 WL 3531959, at *6 (S.D.N.Y. Aug. 2, 2019), and Hidalgo v. N.Y.C. Dep't of Educ., No. 19-CV-2590, 2019 WL 5558333, at *6 (S.D.N.Y. Oct. 29, 2019), the Court held "that parents are not entitled to stay-put funding where, as here, they unilaterally change their child's pendency-funded school and a school district has not agreed to the switch, through an IHO or otherwise" (Ferreira, 2020 WL 1158532, at *3). Accordingly, the Court denied the parents' request for a preliminary injunction (id). The parents then appealed to the Second Circuit Court of Appeals, wherein the Court determined that summary judgment for the district was "appropriate because the issues on appeal were squarely resolved against the Appellant by this Court's decision in *Ventura de Paulino v. New York City Department of Education*, 959 F.3d 519 (2d Cir. 2020)" (Ferreira, 2020 WL 8838249, at *1). Consequently, the parents' complaint was dismissed (id).

D. Impartial Hearing Officer Decisions

An impartial hearing convened on August 14, 2018 and concluded on March 4, 2021 after 12 days of proceedings (Tr. pp. 1-503).

On July 8, 2019, the parents filed another due process complaint notice alleging that the district failed to offer the student a FAPE for the 2019-20 school year. The parents requested consolidation of the new case with the July 8, 2018 due process complaint notice. The IHO issued an order on July 15, 2019 denying the parents' request to consolidate the two cases (July 15, 2019 Interim IHO Decision at p. 1). The IHO held that even though both requests involved the same student, one case resolution period had ended and the other case resolution period was still open, and therefore it would "not promote efficiency to consolidate the two cases" (id.).

In a decision dated May 10, 2021, the IHO determined that the district failed to offer the student a FAPE for the 2018-19 school year, 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 at iBrain (IHO Decision at pp. 31-33).

The IHO summarized the parties' respective positions in the case (IHO Decision at pp. 15-20, 22-31). The IHO found that central to the district's position was that the parents failed to cooperate with the CSE in scheduling the CSE meeting for the 2018-19 school year (id. at p. 16). The IHO relied on the testimony of the district's CSE chairperson finding her "testimony to be completely credible" and that her testimony was supported by "documentary evidence" (id. at pp.

18, 21). He noted that the testimony of the district's CSE chairperson detailed "a pattern of non-cooperation that the undersigned has witnessed in other cases involving the same private school, represented by the same attorney(s) and the [district]" (id. at p. 20). The IHO cited to Application of a Student with a Disability, 20-070, where a similar set of facts were presented to the IHO, and the SRO denied the "request for tuition reimbursement on the grounds of equitable considerations" (id.).

The IHO agreed that "some of the evaluative materials relied upon" by the June 2018 CSE were "outdated," but "it is not equitable, or fair, to hold that against the [district] in a case where the [p]arent[s] [have] not cooperated with the [district] and allowed the student to be re-evaluated" (IHO Decision at p. 23). The IHO next discussed the parents' request that the school physician be "physically present at the [CSE] meeting" (id. at p. 24). Relying on the district's arguments that the regulations were "silent" on in-person attendance versus telephonic presence, the IHO held that the parents' "position that a physician needed to be present in person is a legal fiction" (id. at pp. 24-25). The IHO noted that the school physician was able to attend the June 2018 CSE meeting by phone, and that, in and of itself, did not result in a denial of FAPE (id. at p. 25).

The IHO noted the parents' argument that the CSE failed to consult with and schedule the CSE meeting at a "mutually agreeable time and place," which denied the parents meaningful participation in the CSE process (IHO Decision at p. 30). However, the IHO held that there "is no mandate that the [p]arent[s] be personally spoken to" in scheduling a CSE meeting (id.). The parents further complained that the meeting notice for the June 2018 CSE failed to list those individuals who would be present at the CSE meeting (id.). The IHO agreed that the district's failure to list those individuals who would be attending the CSE meeting "may constitute a procedural deficiency, [but] it does not follow that such a deficiency justifies the [p]arents[']' persistent failure to cooperate with the [district]" (id.).

Ultimately, the IHO held that "[i]t has already been noted above that the [p]arent was not present at the June 14, 2018 IEP meeting and that the evaluative materials relied upon at the meeting were dated. This could easily result in a denial of FAPE" (IHO Decision at p. 31). Then, in the next sentence, the IHO proceeded to discuss the appropriateness of iBrain (id.). The IHO held that the testimony of the director of special education at iBrain was sufficient to demonstrate that the student received specially designed instruction to meet his needs and to benefit from instruction at iBrain (id. at pp. 31-32).

Lastly, the IHO discussed equitable considerations in reference to the parents' cooperation with the CSE (IHO Decision at p. 32). The IHO held that the parents "did not fairly cooperate with the [district] and engaged in a pattern of behavior that in essence created those procedural and substantiative failures, where present, and was meant to stymie the [district's] efforts to produce a procedurally and substantively viable IEP" (id.). The IHO based this conclusion on the fact that the parents failed to participate in the June 2018 CSE meeting and failed to permit the district to evaluate the student (id.).

Although the IHO denied the parents' requested relief, the IHO ordered the district to conduct a re-evaluation of the student, and for the CSE to reconvene after the completion of the evaluation and to consider all available information to develop an IEP for the 2021-22 school year (IHO Decision at pp. 33-34).

IV. Appeal for State-Level Review

The parents appeal. The central issue presented on appeal is whether the IHO erred in determining that the equitable considerations did not favor awarding the parents tuition at iBrain. As relief, the parents seek a determination that the district denied the student a FAPE for the 2018-19 school year, that the student's placement at iBrain was appropriate, and that the equities favored an award of tuition and related services, together with transportation at iBrain, for the 2018-19 school year.

The parents argue that the IHO was correct in finding that the district's failure to secure the parents' presence at the June 2018 CSE meeting and the CSE's reliance on outdated evaluations resulted in a denial of FAPE to the student for the 2018-19 school year. The parents also argue that the IHO correctly found that iBrain was appropriate for the student.

The parents focus their arguments on the IHO's finding that they failed to cooperate with the district. The parents argue that the district "consistently and unilaterally scheduled meetings without [their] input" (Req. for Rev. at p. 7). The parents reference the State regulations wherein the CSE must "take steps" to ensure the participation of the parents at the CSE meeting and schedule the CSE meeting at a "mutually agreed on time and place" (8 NYCRR 200.5[d][1][ii]; Req. for Rev. at p. 8). Additionally, the parents argue that the district's meeting notice was "flawed" as it failed to list the names of the individuals attending the June 2018 CSE meeting (Req. for Rev. at p. 8).

Further, the parents contend that the IHO placed the blame of not attending the June 2018 CSE meeting on the parents' counsel. In his decision, the IHO stated that since the parents were represented by counsel, the district's failure to have the notices in their native language was not a procedural defect. However, the parents argue that they had a right to be present and participate in the CSE process and the district is not relieved of its responsibilities because the parents are represented by counsel.

Finally, the parents contend that the IHO based his findings on "non-record evidence" (Req. for Rev. at p. 10). Specifically, the parents reference the IHO's discussion of Application of a Student with a Disability, Appeal No. 20-070, and that the IHO was "predisposed" to making a finding against the parents and failed to base his decision on the hearing record. Ultimately, the parents request a reversal of that portion of the IHO decision that denied tuition at iBrain based on equitable considerations.

In its answer, the district generally denies the allegations contained in the parents' request for review. The district seeks a finding that it offered the student a FAPE for the 2018-19 school year, or in the alternative, the district requests an affirmance of the denial of tuition at iBrain based on equitable considerations.

The district cross-appeals arguing that the IHO should have found that the district offered the student a FAPE for the 2018-19 school year. The district argues that the IHO erred in "placing any weight on the [district's] inability to obtain updated evaluative material" (Answer at p. 5). The district also argues that this issue was not raised in the due process complaint notice. It is the district's contention that the June 2018 CSE considered several reports, progress updates and

evaluations from 2014-2015 and 2017. The district sought to obtain "an updated social history and updated psychometric testing" but the parents failed to make the student available for the testing (id.). The district also argues that the parents obstructed the district's efforts to obtain updated information pertaining to the student, and the IHO should not have "faulted" the district for preparing the June 2018 IEP with the information it had available.

Next, the district argues that it proceeded with the June 2018 CSE meeting without the parents because they had cancelled the meetings previously scheduled for the annual review. The district details its efforts to reschedule the CSE meeting and argues that it held the June 2018 CSE meeting without the parents after attempting to secure their attendance.

Even if there is a determination that the district failed to offer a FAPE for the 2018-19 school year, the district argues that equitable considerations do not favor an award to the parents. The district agrees with the IHO's finding that the parents "lack of cooperation" "obstructed" the district's efforts to comply with its obligations under IDEA (Answer at p. 9). Lastly, the district argues that the IHO's decision did not improperly rely on "non-record evidence."

In reply to the cross-appeal, the parents mainly argue that the issue of "outdated" evaluations at the June 2018 CSE meeting was addressed in the due process complaint notice, and further that the district's special education teacher's testimony opened the door to the issue of the evaluative information available to the June 2018 CSE.

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]).[2]

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

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

VI. Discussion

A. Preliminary Matters

1. Scope of Impartial Hearing

Before reaching the merits of the parties' appeals, the first issue to be addressed is whether the IHO erred in determining that the district's "outdated" information relied upon at the June 2018 CSE meeting resulted in a FAPE denial (IHO Decision at p. 31). The district argues that the IHO erred in determining that the district's reliance on "outdated" evaluative information resulted in a denial of a FAPE. Further, the district contends that this issue was not contained in the parents' due process complaint notice, and therefore, it was improper for the IHO to make such ruling (see 8 NYCRR 200.5[j][1][ii]).

State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]).

[2] 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).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Here, the parents' due process complaint notice does not specifically raise the issue pertaining to the district's lack of evaluative information at the June 2018 CSE meeting. Instead, the parents generally argue that the district committed "several substantive and procedural errors" under the IDEA (Parent Ex. A at p. 2). These general allegations without any further specificity cannot be said to give the district proper notice of the parents' specific claims relating to the development of the June 2018 IEP.

Further, to the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see B.M., 569 Fed. App'x at 59; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]), here, the subject of evaluative information was first addressed on cross-examination of the CSE chairperson by the parents' attorney (Tr. p. 246). Specifically, the CSE chairperson was questioned about the use of a 2014 psychological report in the June 2018 IEP, however, the CSE chairperson was unable to respond as she did not develop the June 2018 IEP (id.). In addition, the district's special education teacher was questioned on cross-examination by the parents' attorney about discussions at the June 2018 CSE meeting regarding obtaining evaluations (Tr. pp. 401, 403-04). During the line of questioning the district's attorney objected to the questions stating that the "four corners" of the due process complaint notice did not allege "anything relating to the evaluations" (Tr. pp. 401-402). The IHO

confirmed that the parents' attorney was attempting to demonstrate "that there was an evaluation used at the [CSE] meeting that was outdated" (Tr. p. 402). Accordingly, this line of questioning by the parents' attorney cannot be construed as the district opening the door in defense of the parents' claims.

Accordingly, the hearing record demonstrates that the district did not open the door to the parents' claim that the district did not have sufficient evaluative information at the June 2018 CSE meeting (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9). The lack of evaluative information was an issue that was not properly raised and was outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]").

2. Scope of Review

In a second preliminary matter, it is necessary to identify which of the parties' arguments are properly before me on appeal. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Specifically, the district has not cross-appealed from the IHO's determination that iBrain was an appropriate placement for the student for the 2018-19 school year.[3] As such, the IHO's finding that iBrain was an appropriate unilateral placement for the student has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

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

As the district correctly points out, the IHO did not make an explicit finding of a denial of FAPE. Instead, the IHO referred to the parents' absence from the June 2018 CSE meeting and the district's lack of updated evaluations at the CSE meeting as "easily" resulting in a denial of FAPE (IHO Decision at p. 31; Answer at p. 4). Further, it appears that the IHO "implicitly" found a FAPE denial when he considered the appropriateness of iBrain and determined that equitable considerations did not favor the parents (Answer at p. 4).

As the IHO did not make any substantive findings with respect to the denial of a FAPE for the 2018-19 school year, and as previously explained the evaluative information issue was not a

[3] In the district's notice of intention to cross-appeal, the district did check the box for unilateral placement as one of the issues sought to be addressed on appeal. However, in its answer and cross-appeal the district fails to argue that the IHO erred in finding that iBrain was appropriate.

proper subject of the impartial hearing, the discussion of whether the district denied the student a FAPE for the 2018-19 school year shall be limited to whether the district's decision to go forward with the June 2018 CSE meeting without the parents' participation denied the student a FAPE for the 2018-19 school year.

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

In this case, on February 14, 2018, a meeting notice was sent to the parents scheduling a CSE meeting for March 20, 2018 (Dist. Exs. 16 at p. 1; 17 at p. 2).[4] The CSE chairperson testified that at the request of iHope, the CSE meetings already scheduled for iHope students were rescheduled to accommodate the parents and iHope (Tr. pp. 233-34).[5] Accordingly, on February 27, 2018, another meeting notice and email was sent to the parents notifying them that the CSE meeting was rescheduled for May 2, 2018 (Tr. p. 239; Dist. Exs. 15 at p. 1; 17 at p. 2).

On May 1, 2018, a CSE representative called the mother to remind her about the May 2, 2018 CSE meeting and to request that the mother provide the teacher report for the student (Dist. Ex. 17 at p. 3). In response, on the same day, the mother notified the district by email that she was unable to attend the meeting scheduled for May 2, 2018, and that she would follow-up within the week to determine a "mutually agreeable date and time" (Dist. Exs. 5; 14 at p. 2; 17 at p. 3). The CSE chairperson testified that the parent did not contact her to reschedule the CSE meeting (Dist. Ex. 17 at p. 3).

Then, in a meeting notice dated May 31, 2018, the district notified the parents via email of a CSE meeting scheduled for June 14, 2018 (Dist. Exs. 5; 6 at p. 1; 14 at p. 1; 17 at p. 3). The names and titles for the special education teacher/related service provider, general education teacher, district representative, and school psychologist were all listed "external evaluator" with no specific name (Dist. Ex. 6 at p. 1).[6] The notice also stated that the parents may request, in

[4] Each meeting notice contained in the hearing record was provided to the parents in both English and Spanish (see Dist. Exs. 6, 15-16; 17 at p. 2).

[5] State regulation provides that "[t]he [IHO] may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination" (8 NYCRR 200.5[j][3][xii][f]).

[6] CSE meeting notices should include the names of the proposed CSE members (see 34 CFR §300.322[b][1][i]; 8 NYCRR 200.5[c][2][i] [(the notice shall) inform the parent(s) of the purpose, date, time, and location of the meeting and the name and title of those persons who will be in attendance at the meeting]).

writing, "participation of the school physician" at the CSE meeting three days prior to the meeting (see id. at p. 2; 8 NYCRR 200.3[a][1][vii].

The CSE chairperson's affidavit testimony was that on June 4, 2018 an email was sent to the parent regarding the CSE meeting on June 14, 2018 and requested updated progress reports (Dist. Ex. 17 at p. 3). The parent did not respond to the email (id.). On June 10, 2018, the district's social worker left a message on the mother's voicemail reminding the parents about the June 14, 2018 CSE meeting and again requesting progress reports (id. at p. 4). The district did not receive a return telephone call (id.).

On June 13, 2018, the district's psychologist sent the mother another email reminder regarding the CSE meeting on June 14, 2018 (Dist. Ex. 17 at p. 4). Thereafter, on June 13, 2018 at 7:16 pm, the parents' attorney sent a letter via email to the district's CSE chairperson stating that the June 14, 2018 meeting "should not proceed for the reasons outlined" in the letter (Dist. Ex. 7 at p. 1). First, the attorney stated that the date "does not work for the parent" (Parent Ex. S at p. 1; Dist. Exs. 7 at p. 1; 7A at p. 1; 17 at p. 4). Second, the parents' attorney sought "additional proposed dates and times so the parent can identify a mutually agreeable date and time" (Parent Ex. S at p. 1; Dist. Ex. 7 at p. 1).[7] Third, the letter requested a full CSE meeting with a school physician to "participate in person" (id.).[8] The district's CSE chairperson responded by email that as a result of multiple meeting cancellations the CSE intended to "move forward" with the June 2018 CSE meeting as the district was "committed to providing timely and appropriate services" to the student (Dist. Exs. 7A at p. 1; 17 at p. 4). In explaining why the CSE proceeded without the parents at the June 2018 CSE meeting, the CSE chairperson explained that the student was in a "12-month program, which is an extended year program that runs from July 1, 2018 through June 30, 2019" and therefore, a CSE "meeting would have to occur no later than the middle of June in order for the CSE to conduct the [CSE] meeting, provide the student with a school location and for the family to have enough time to visit the proposed location" (Dist. Ex. 17 at p. 4).

The district members of the CSE convened the meeting on June 14, 2018 in the parents' absence, and developed the student's IEP, which was to be implemented on July 6, 2018 (Tr. pp. 310-11; Dist. Exs. 8 at p. 1; 9 at p. 1; 17 at p. 4). The June 2018 CSE meeting minutes reflect that at the meeting the parent was contacted during the meeting by telephone on two occasions but did not answer the telephone (Dist. Ex. 8 at p. 1). The district's physician did participate by telephone during the June 2018 CSE meeting (Dist. Ex. 9 at p. 21).

On June 21, 2018, the parents sent a 10-day letter notifying the district that the parents were unilaterally placing the student at iBrain for the 2018-19 school year (Parent Ex. M). The 10-day notice "serves the important purpose of giving the school system an opportunity, before

[7] The IHO was correct in holding that "there is no mandate that the [p]arent[s] be personally spoken to in order to schedule an IEP meeting" (IHO Decision at p. 30).

[8] The IHO properly held "that the attendance of a physician via telephone at the IEP meeting, does not, in and of itself support a finding of a denial of FAPE" (IHO Decision at p. 25). As to whether State regulations allow the parents to compel the attendance by the physician in person, I note that the regulations do provide the CSE members with the ability to make other arrangements for CSE participation (see 8 NYCRR 200.5[d][7]["When conducting a meeting of the committee on special education, the school district and the parent may agree to use alternative means of participation, such as videoconferences or conference telephone calls"]).

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]). Here, the district did not attempt to reconvene the CSE or evaluate the student but instead sent the parents notice of the CSE's recommendations for the 2018-19 school year together with notice of the public school the district assigned the student to attend for that school year (see Dist. Exs. 10-11).

It should be noted that the above referenced telephone calls, letters, and emails were all communications with the student's mother, and there is no evidence in the hearing record that written communication or telephone calls were made by the district to the student's father.[9] According to the student's father, the student has lived with him and he has been the student's "primary caregiver" for the last three years (Parent Ex. U at p. 1). The student resided with his father during the weekdays and with his mother on weekends (Parent Ex. C at p. 1). On several of the medical information documents from 2017 in evidence the student's father is listed as the primary contact, and the mother is listed as an alternate emergency contact (Parent Exs. N at pp. 1, 3, 5, 11, 13-14; O at pp. 1, 4, 6, 11-12). This documentation evidences that the student's father was involved with the student's education and the district made no effort to also reach out to him when trying to secure parental attendance at the CSE meeting.

The question becomes whether the district followed through with its obligations to attempt to secure the parents' attendance at the CSE meeting. With regard to a CSE meeting, federal regulations require that:

> (c) Other methods to ensure parent participation. If neither parent can attend [a CSE] meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls, consistent with § 300.328 (related to alternative means of meeting participation).
>
> (d) Conducting [a CSE] meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as—
>
> > (1) Detailed records of telephone calls made or attempted and the results of those calls;
> >
> > (2) Copies of correspondence sent to the parents and any responses received; and
> >
> > (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

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

[9] The father testified that he was not aware of the June 14, 2018 CSE meeting (Tr. p. 499).

Although the IHO found that the testimony of the CSE chairperson was supported by a "plethora of accompanying documentary evidence," missing from the hearing record was the district's Special Education Student Information System (SESIS) events log referenced in the testimony (Tr. pp. 157-58).[10] The testimony of the CSE chairperson regarding the log without the opportunity to view the document makes any reliance on the testimony difficult, confusing and unreliable (Tr. pp. 173-174, 201, 312, 322-24).

In this case, the parent was clearly aware of the CSE meeting in view of the attorney's correspondence on the day before the meeting, but he requested to reschedule the meeting rather than refused to attend at all (see Parent Ex. S). In Board of Education of the Toledo City School District v. Horen, the district court discussed the difference between an affirmative refusal to attend versus a request to reschedule a meeting (2010 WL 3522373, at *15-*18 [N.D. Ohio Sept. 8, 2010]; see Doug C. v. Hawaii Dep't of Educ., 720 F.3d 1038, 1044 [9th Cir. 2013] [noting that parental involvement requires the agency to include the parents in a CSE meeting unless they affirmatively refused to attend]). The email and letter on June 13, 2018 in this case show that the parent wanted to reschedule the meeting, and that the district explained, again in an email on June 13, 2018, that "the CSE will have to move forward with this meeting since we are committed to providing timely and appropriate services" to the student (Dist. Ex. 7A at p. 1). This conundrum faced by the district was well described by the Ninth Circuit in Doug C., in which the parent vigorously objected to the school district holding an IEP meeting without him and asked the school district to reschedule the meeting for the following week:

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

(Doug C., 720 F.3d at 104 [internal citations omitted], quoting Shapiro v. Paradise Val. Unif. Sch. Dist. No. 69, 317 F.3d 1072, 1079 [9th Cir. 2003]). Under the facts of Doug C. and Horen, the courts ultimately rejected the school district's respective arguments that parental participation was the less important requirement in those circumstances (but see A.L. v. Jackson Cnty. Sch. Bd., 635

[10] The IHO explained that SESIS "is a printout, usually of a program maintained by the [district], where people who are involved in the student's education, providers, teachers, CSE, committees make entries and log this student's educational history" (Tr. pp. 157-58).

Fed. App'x 774, 780 [11th Cir. Dec. 30, 2015] [finding that repeated refusals to attend four separately scheduled meetings during a four-month period in person or by telephone were tantamount to refusal to attend]; J.G. v. Briarcliff Manor Union Free Sch. Dist., 682 F. Supp. 2d 387, 392, 396 [S.D.N.Y. 2010] [finding that, when contacted by telephone, the parent affirmatively declined to participate in the CSE meeting]).

In this case, I accept the district's argument that it was unlikely that an IEP would be developed in time, especially in light of the rescheduling requests that the parent had made of the district. This case is unlike the circumstances in the J.G. case, in which "[t]he record . . . show[ed] that when the Parents did not show up to the August 9 meeting, Lavin called Mr. G to invite him to participate by phone. Mr. G, however, declined the opportunity to participate"; under those circumstances, the arguably preferable course was to proceed with the CSE meeting without the parent in attendance (682 F. Supp. 2d at 396). In this case, I find that the district did not take the steps necessary to sufficiently document its attempts to encourage the parents, especially the student's father's, participation in the CSE meeting on June 14, 2018, and the parents did not outright refuse to attend the CSE meeting (see Doug C., 720 F.3d at 1045 [noting that the district's obligation is owed to the child and the parent's obstinance or the "fact that it may have been frustrating to schedule meetings with or difficult to work with [the parent] does not excuse the [school district's] failure to include him in [the student's] IEP meeting when he expressed a willingness to participate"]).

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]). Here, the failure of the district to take all mandated steps to secure the parents' presence at the June 2018 CSE meeting denied them the opportunity to meaningfully participate in the development of the student's IEP and, accordingly, constituted a procedural violation that resulted in a denial of FAPE to the student for the 2018-19 school year.

Accordingly, I decline to find that the IHO erred in determining that the June 14, 2018 CSE's decision to proceed without the parent in attendance was a procedural violation that resulted in a denial of a FAPE.

C. Equitable Considerations

The parents assert that the IHO erred in finding that equitable considerations weighed against awarding them tuition at iBrain for the 2018-19 school year. 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]).[11] 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"]).[12]

The IHO acknowledged that the central issue in this case was the equitable considerations with respect to the parents' cooperation "or lack thereof" with the district (IHO Decision at p. 32). The IHO found that the parents "did not fairly cooperate" with the district "and engaged in a pattern of behavior that in essence created those procedural and substantive failures, where present, and was meant to stymie the agency's efforts to produce a procedurally and substantively viable IEP" (id.). The IHO referred to the parents' nonattendance at the June 2018 CSE meeting and failing to allow the district to evaluate the student as the reasons for the parents' lack of cooperation with the district (id.). Ultimately, the IHO found that the parents' "actions" "were unfair and unreasonable and denied [the district] the opportunity to offer the student a FAPE for the 2018-[]19 school year" (id. at p. 33).

In light of the IHO's decision, I shall separately evaluate whether the parents' interactions with the district in failing to produce the student for evaluations and failing to attend the June 2018 CSE meeting weighed so heavily against the parents as to deny them tuition reimbursement.

1. Evaluation of the Student

The district sought to have the student evaluated in preparation for the development of the 2018-19 IEP (Dist. Exs. 3; 17 at p. 2). Specifically, notice was sent to the student's mother notifying her that an appointment had been scheduled for March 29, 2018 to conduct a social history update and the Vineland (id.).[13]

[11] Here, the district does not assert that the costs of tuition at iBrain, the separate costs of the related services, and the cost of transportation services are excessive (see Carter, 510 U.S. at 16).

[12] Although not raised by the parties, I will further note that the parents provided timely notice of the unilateral placement at iBrain (see Parent Ex. M). 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]).

[13] The CSE chairperson testified that the Vineland was a parent questionnaire, and the social history was obtained

According to the affidavit testimony of the CSE chairperson, the parents did not produce the student for the scheduled evaluations (Tr. pp. 181, 316; Dist. Ex. 17 at p. 3). However, the district did not follow-up to reschedule the evaluations, and there was no further documentary evidence pertaining the evaluation of the student (Tr. pp. 181, 240-41).

In this case, for unknown reasons, the parents failed to produce the student for the evaluations in March 2018. But the hearing record contains no evidence that the district attempted to contact the parents to reschedule or obtain the requested information in a different format, i.e., telephone or email. Based upon the foregoing, I cannot agree with the IHO's finding that the parents' failure to produce the student for evaluations on one occasion rose to the level of non-cooperation by the parents (IHO Decision at pp. 32-33). Therefore, the IHO's finding that the parents' failure to produce the student for the evaluations obstructed the district's efforts to offer the student a FAPE is reversed.

2. Parent Cooperation

Based upon the foregoing, the claim that equitable considerations did not favor the parents falls solely on the issue of the parents' non-attendance at the June 2018 CSE meeting.

Since I have already determined that the district's failure to demonstrate that it took adequate steps to secure the parents' participation at the June 2018 CSE meeting resulted in a denial of a FAPE to the student, it would be somewhat contradictory to conclude that the actions of the parents related to their failure to attend the June 2018 CSE meeting weighed more heavily against them than the actions of the district. Accordingly, in balancing equitable considerations, I cannot agree that the actions of the parents were so uncooperative as to warrant a full denial of tuition reimbursement to them under the unique circumstances of this case (see 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]).

With respect to the context within which the June 2018 meeting occurred, it is useful to consider the affidavit of the CSE chairperson, who testified that a call was placed to the administration at iHope to discuss their participation in CSE meetings (Dist. Ex. 17 at p. 3). The CSE chairperson testified that beginning in January 2018 she had a meeting with iHope administrators regarding the scheduling of CSE meetings (Tr. pp. 233-34). The CSE chairperson was notified by both the chairman of the board of iHope and the program director at iHope "that the [p]arents at iHope were advised by their attorney not to participate in the IEP process" (Dist. Ex. 17 at p. 3). The CSE chairperson also referenced a memorandum, dated April 6, 2018, from iHope's chairman of the board, to iHope parents which stated that he had been informed that "certain parents have been advised by their attorney to cancel IEP Meetings," noted that attorneys representing parents did "not represent iHope," and that the particular attorney's "strategy towards the IEP meetings may differ from the school's" (Dist. Exs. 4 at p. 1; 17 at p. 3). The cited email also stated iHope's commitment to abide by its understandings with the CSE to conduct CSE meetings on the schedule agreed to and offered to help parents find alternative legal representation (Dist. Ex. 4 at pp. 1-2). Although it is unknown if the student's parents specifically received this

through parent interview (Tr. p. 319).

memorandum or any such directive from their attorneys, the communications between the CSE and iHope and the contents of the memorandum generally evidence that cooperation between iHope parents and the district had been an ongoing issue and that some efforts were underway to improve cooperation between iHope parents, their counsel and the district with respect to the CSE process.

In his decision, the IHO compared this matter to Application of a Student with a Disability, Appeal No. 20-070, stating that both matters had "an almost identical pattern" of parental conduct and noting that he had he denied the parents' request for tuition on grounds of equitable considerations in the decision underlying the 20-070 appeal (IHO Decision at p. 20).[14] The IHO referenced the testimony of the CSE chairperson and noted that her testimony detailed a "pattern of non-cooperation" in cancelling CSE meetings and demanding that the school physician be present in person that he had "witnessed in other cases involving the same private school, represented by the same attorney(s) and the [district]" (id. at pp. 16-18, 20). The IHO further noted that in that matter he had determined "the [p]arent's numerous cancellation[s] of scheduled IEP meetings were part of an orchestrated campaign to stymie the [district's] effort to create IEPs for the students that had been attending the student's previous private school but were now disenrolling from that school and enrolling in mass at the student's current private school" (id. at p. 21).[15]

However, while the IHO based his equitable considerations determination on the hearing record before him, his analysis of the evidence presented at the impartial hearing in this matter as being comparable to the facts presented in 20-070 lacks support. With respect to any alleged "pattern" exhibited by the parents in this matter, there is no evidence in the hearing record concerning non-cooperation by the parents during prior school years and the student's mother attended the May 11, 2017 CSE meeting (Dist. Ex. 2 at p. 18). The CSE meetings scheduled for May 2, 2018 and June 14, 2018 were canceled by the parents but each time the cancellations were accompanied by a request to reschedule (see Parent Ex. S; Dist. Exs. 5, 7). Moreover, there was only one occasion where the counsel for the parents requested that the school physician be physically present at the CSE meeting (Parent Ex. S at p. 2; Dist. Ex. 7 at p. 2).

Accordingly, I find, in the exercise of my discretion, that a total denial in tuition reimbursement is unduly harsh and that the prevailing equitable considerations identified do not weigh entirely against the parents. In addition, the procedural violations underpinning the denial of FAPE in this instance were attributable to the district and, in effect, resulted in impeding the parents' participation in the CSE process and ability to collaborate with the CSE in its

[14] To the extent that the parents argue that the IHO erred by relying on other cases involving students unilaterally placed at iBrain, while an IHO should not rely on matters that are solely outside the record to make a finding of fact, the IHO in this case did not do so. Here, while the IHO noted that he has observed a pattern of conduct with respect to the parents of iHope or iBrain students and those parents' counsel, his determination regarding equitable considerations in this matter, while incorrect, was primarily based on the evidence regarding the parents and their counsel contained in the hearing record before him.

[15] However, one notable factor that distinguishes Application of a Student with a Disability, Appeal No. 20-070 from this matter, was that the IHO inquired about the reasons the parent did not attend the CSE meeting during the impartial hearing and found that the parent had been available to attend the CSE meeting (Application of a Student with a Disability, Appeal No. 20-070 at pp. 21-22); therefore, the IHO did not give credibility to the parent's testimony with respect to parental cooperation in 20-070 (id. at p. 22).

recommendation of an appropriate program and placement. Under these circumstances, I am compelled to weigh equitable considerations as being much closer to equipoise with respect to the conduct of the parents and the district during the 2018-19 CSE process and, accordingly, the IHO's decision to deny any tuition reimbursement for the 2018-19 is reversed.

While the parents' conduct discussed above may not have been optimal with regard to scheduling CSE meetings, it does not follow that the district should be absolved of its obligation to follow all of the federal procedures "to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate" (34 CFR 300.322[a], [c]). Given the totality of evidence in the record, and despite the parents' lack of perfect adherence to the CSE process requirements, I decline to find that the parents' shortcomings in this regard demonstrate a level of unreasonableness sufficient to warrant a reduction in the amount of tuition reimbursement to be awarded (see Application of a Student with a Disability, Appeal No. 19-076).

VII. Conclusion

Having determined that the evidence in the hearing record supports a finding that the district failed to offer the student a FAPE for the 2018-19 school year, that iBrain was an appropriate unilateral placement, and that the equitable considerations favor an award of tuition to the parents, 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 SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated May 10, 2021, is modified, by reversing that portion which denied the parents tuition and transportation costs at iBrain for the 2018-19 school year; and

IT IS FURTHER ORDERED that the district shall be required to reimburse and/or directly fund the costs of the student's attendance at iBrain for the 2018-19 extended school year, including the costs of related services, transportation, and 1:1 travel aide.

Dated: **Albany, New York**
August 2, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER