The University of the State of New York

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

No. 18-087

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

Appearances:
The Patrick Donohue Law Firm, PLLC, attorneys for petitioner, by Patrick Donohue, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail Eckstein, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at the International Academy of Hope (iHope) for the 2017-18 school year. The 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

With regard to her background, the student's birth and early development was marked by difficulties that resulted in diagnoses of multiple medical conditions and ongoing health issues (Parent Ex. C at p. 1; Dist. Ex. 13 at pp. 1-3). Among other things, the student has received diagnoses of a global developmental delay, cerebral palsy, chronic respiratory failure with hypoxia, tracheomalacia, hypotonia, cortical blindness, and dysphagia and has medical needs, including a need for constant monitoring of her heart and oxygen levels (Parent Ex. I at p. 1; Dist. Ex. 13 at p. 1).

The student is dependent on a tracheostomy tube to breathe and a gastrostomy tube for feeding (Parent Ex. C at p. 1; Dist. Exs. 5 at p. 3, 13 at p. 2; see Tr. p. 188). She is also ventilator

dependent (Parent Ex. I at p. 1). The student is largely nonverbal, and her mobility is limited (Dist. Ex. 5 at pp. 2-3).

The student received services through the Early Intervention Program beginning in early infancy (Dist. Ex. 13 at p. 3). At two years of age, she received speech-language therapy and special instruction twice per week, occupational therapy (OT) three times per week, and physical therapy (PT) four times per week in the home setting as, given her medical conditions, the parent was not interested in sending the student to school (id.). The student transitioned to the Committee on Preschool Special Education (CPSE) and later, the CSE, and received services at home through the 2015-16 school year (see Tr. pp. 55-57, 72, 819-20; Parent Ex. B at pp. 3, 5; Dist. Exs. 13 at p. 3; 20 at p. 28). In or around June 2016 the student was assessed by iHope to determine her then-current levels of functioning as well as her suitability for the iHope program (Parent Ex. B at p. 2).

For the 2016-17 school year, the district deemed the student eligible for special education programs and services as a student with a traumatic brain injury (TBI) and recommended placement of the student in a 12:1+(3:1) special class with related services including five 60-minute sessions per week each of individual OT, PT, and speech-language therapy, and full time 1:1 nursing services in the classroom and on the bus (Parent Ex. B at pp. 1, 21-22).[1] However, the hearing record reflects that the parent notified the district by letter dated August 17, 2016, that she intended to unilaterally place the student at iHope for the 2016-17 school year (Dist. Ex. 1 at p. 1). The parent thereafter unilaterally placed the student at iHope for the 2016-17 school year (Parent Ex. C at p. 1) and, ultimately, the student attended iHope for the 2016-17 school year through a settlement with the district (Tr. pp. 10, 56, 72; see Parent Ex. H at pp. 4-5).

The CSE sent the parent and the staff at iHope notices of CSE meetings in January, May and July 2017 to schedule a CSE meeting to create the student's IEP for the 2017-18 school year (Dist. Exs. 2, 3; 4; 7). The CSE eventually met and created an IEP on May 24, and August 7, 2017 (Dist. Exs. 1a at pp. 12, 14; 5 at p. 12, 14; 6). A recitation of the IEP proposed by the district, including the details of the programming, placement, and recommended related services therein is not necessary given the issues under appeal herein.

A. Due Process Complaint Notice

In a due process complaint notice dated January 12, 2018, the parent requested an impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year (Parent Ex. A at p. 1). Initially, the parent requested an interim decision on pendency (stay-put) for placement of the student at iHope, asserting that the basis for pendency was an August 17, 2016 IEP pursuant to which the district could not "secure a placement [for the student] . . . and so her parents selected iHope as the appropriate school" (id. at p. 2). While a full recitation of the violations that the parent alleged against the district is not necessary

[1] Parent Exhibit B reflects a CSE meeting date of October 13, 2015 (Parent Ex. B at pp. 1, 24, 27); however, other documents in the hearing record refer to Parent Exhibit B as having been created on August 17, 2016 (see Parent Exs. G at pp. 1, 4; H at pp. 2, 7). The parent's February 21, 2018 memorandum of law states that the "IEP issued on August 17, 2016 lists October 13, 2015, as the date of the IEP, however, this was a clerical error" (Parent Ex. H at p. 3). The district's attorney indicated that there was a reconvene of the October 13, 2015 CSE on April 7, 2016, but there is not an April 2016 IEP in the hearing record (Tr. pp. 56-57).

due to the nature of this appeal, generally, the parent asserted that the district committed procedural and substantive errors which contributed to a denial of FAPE for the 2017-18 school year. More specifically, the parent raised allegations related to the composition of the CSE (asserting that the district did not ensure the attendance of the parents, iHope staff, a district physician, or a parent member, that the meeting was not scheduled at iHope, and that the meeting was not scheduled at a mutually agreeable time); the student's classification (contending that the student should have continued to have been classified as having a traumatic brain injury rather than under the multiple disabilities category); the student's management needs (asserting that the IEP did not address the student's needs related to a two-person assist for all transfers, asthma, an augmentative and alternative communication device, and environmental concerns); and the recommendation for a 12:1+(3:1) special class (asserting that such a class could not address the student's highly intensive management needs or offer required 1:1 support) (id. at pp. 3-9). The parent also alleged that the CSE failed to recommend sufficient related services, both in frequency and duration, assistive technology services to support the recommended assistive technology devices, or a 1:1 nurse and 1:1 health paraprofessional (id. at pp. 9-12). Further, the parent objected to the school site designated by the district to implement the IEP (id. at pp. 12-13). For relief, the parent requested direct funding for the student's tuition at iHope for the 2017-18 school year, as well as direct funding for the cost of all related services provided by iHope (id. at p. 14).

B. Impartial Hearing Officer Decision

An impartial hearing convened on January 26, 2018 with the first three days of proceedings limited to the issue of pendency (Tr. pp. 1-106). In a March 16, 2018 interim decision, the IHO denied the parent's request for pendency at iHope noting that it could not be determined whether the program at iHope was substantially similar to the program recommended in the August 2016 IEP (IHO Interim Decision at p. 3).

The impartial hearing continued on April 12, 2018 and concluded on April 27, 2018, after four more days of proceedings (Tr. pp. 107-840). In a decision dated June 20, 2018, the IHO determined the district failed to offer the student a FAPE for the 2017-18 school year, iHope was not an appropriate unilateral placement, and equitable considerations did not favor an award of tuition reimbursement (IHO Decision at pp. 12-18).

With respect to the issue of whether the district offered the student a FAPE, the IHO determined that while the recommended 12:1+4 special class placement "could have accommodated" the student, and the recommended programs "appear[ed] on their surface to have provided the student with a FAPE" noting that both IEPs included appropriate annual goals,[2] addressed the student's management needs, and provided an appropriate level of related services, the district denied the student a FAPE because the IEPs were developed at CSE meetings that did

[2] In this proceeding, the 12:1+ (3:1) student to staff ratio was at times referred to as a 12:1+4 student to staff ratio; however, for purposes of this decision any perceived distinction between the two is inconsequential.

not include the parent, the student's then-current teachers from iHope, a physician, updated evaluations, or a social history update (IHO Decision at pp. 10, 12).[3]

With respect to the appropriateness of iHope as a unilateral placement, the IHO determined that iHope only provided the student four and a half hours per week of direct academic instruction, as well as some instruction during the student's related services, and that this "small amount of academic instruction" was insufficient to provide a reasonable opportunity for the student to obtain educational benefit in academic areas (IHO Decision at pp. 14-15). The IHO also found that the student's progress in any academic area was not sufficiently demonstrated, and that any progress the student made while at iHope had been minimal (id. at p. 15). As an indication that the student did not make academic progress, the IHO noted examples of goals that were labeled as "achieved" in the May 2017 iHope progress report being repeated and labeled as "partially achieved" in the January 2018 iHope progress report (id.). The IHO also found that iHope provided the student with conductive education two times per week, which she found was "a methodology which was not proven to be research based," and was "just another glorified form of PT and OT and has not been shown to provide any educational benefit to the student" (id.).

In addition, the IHO found that as a part of her burden of showing that iHope was an appropriate placement for the student, the parent was required to show that the tuition was reasonable, which the parent did not do (IHO Decision at pp. 16, 17-18). The IHO found that the total cost of the student's tuition at iHope, including tuition, the cost of the related services provided by the iHope employees, and the cost of a 1:1 nurse would exceed $219,300 (id. at p. 16). Separate from the IHO's finding related to the appropriateness of the unilateral placement, the IHO made a finding regarding how related services at iHope were billed. The IHO noted that the total tuition at iHope was $144,000, and did not include the cost of related services, which were an additional cost not specified in the enrollment contract (IHO Decision at p. 11). The IHO further noted that the iHope enrollment contract stated that the parent "agrees" to approach the district to arrange for related services through related services authorizations (RSA's); however, there is no evidence in the hearing record that the parent requested RSA's (id.). The IHO further noted that if the parent did not secure the RSAs, the parent was liable for the cost of the related services (id. at pp. 11-12). Based on the contract, the IHO found that the district should not be required to pay twice for the additional costs of the related services, that is, by paying for tuition and also paying separately for related services that are provided by iHope staff (id. at pp. 15-16).

Finally, with respect to equitable considerations, the IHO found that while the district failed to offer the student a FAPE, it did so due to the actions taken by the parent, either acting on her own or with both her attorney and with iHope (IHO Decision at p. 16). The IHO explicitly found that "the parent did not cooperate with the [district] at all" (id. at p. 17). The IHO noted for example, that the parent failed and refused to attend appointments for evaluations and social history updates; failed to provide updated medical forms on time; insisted on a physician being present at the CSE meetings but did not go to the meetings; and refused to attend CSE meetings unless they were held after 4:00 p.m. (id.). With respect to the parent requesting that the meetings

[3] Although the IHO noted that the CSE did not include a physician, she accepted the district school psychologist's explanation that if the parent had attended the CSE meeting, the district would have had a physician attend as well (IHO Decision at pp. 12-13).

be scheduled after 4:00 p.m., the IHO found that the parent's testimony that she could not attend CSE meetings prior to 4:00 p.m. due to her work schedule was not credible, noting that the parent was able to attend the impartial hearing in person before 4:00 p.m. (id.). The IHO further concluded that the parent failed to make an effort to attend the CSE meetings by telephone, noting that when the CSE called her on the day of the meeting, the parent answered, said she would return after speaking to her attorney, but never did (id. at pp. 6-8, 17). The IHO found the parent's testimony regarding the scheduling of the CSE meetings and evaluations of the student, to be "totally unconvincing and belied by the fact that she along [with] a majority of other iHope parents have refused to attend IEP meetings in a similar fashion" (id.). The IHO found the parent "totally complicit" in making it impossible for the CSE to provide the student with a FAPE and thus determined that equitable considerations did not favor the parent (id.).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in denying the parent's request for pendency at iHope; in failing to find the district in default based on its conduct during the hearing and in finding that the CSE's classification of the student as multiply disabled was appropriate; the recommendation for a 12:1+(3:1) special class was appropriate; the student's IEPs for the 2017-18 school year included appropriate annual goals and management needs (including the need for a full time nurse and 1:1 paraprofessional); 30 minutes was an appropriate duration for the student's related services; the parent did not cooperate with the CSE and contributed to the district's failure to offer the student a FAPE; iHope was not an appropriate unilateral placement; and equitable considerations did not favor the parent's request for tuition at iHope.

The district does not cross-appeal the IHO's determination that it failed to offer the student a FAPE for the 2017-18 school year.[4] In its answer, the district requests that the SRO uphold the IHO's determinations that the hearing record did not demonstrate that iHope was the student's pendency placement, that iHope was not an appropriate unilateral placement, and that equitable considerations did not favor an award of tuition reimbursement.

The parent filed a reply to the district's answer. In the reply, the parent reargues, reasserts, and otherwise provides a counterpoint to each of the district's assertions found in its answer and raises new arguments with respect to pendency. State regulation permits parties to file a reply to "any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the

[4] As the district does not cross-appeal from the IHO's determination that it failed to offer the student a FAPE for the 2017-18 school year, that determination is final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Additionally, as the only relief sought in this proceeding is payment for the cost of the student's tuition and related services at iHope for the 2017-18 school year, and it has already been determined that the district did not offer the student a FAPE for the 2017-18 school year, it is unnecessary to review the parent's challenges of the IHO's findings regarding FAPE.

answer or answer with cross-appeal" (8 NYCRR 279.6[a]). In this instance, the parent's reply is not within the scope of what is permissible in a reply and accordingly is not considered (id.).[5]

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

[5] The reply also includes copies of redacted IHO decisions concerning due process hearings related to other students attending iHope (see Reply). It is unclear what relevance these documents have other than as non-binding support for the parent's legal positions.

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]).[6]

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

[6] 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).

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. Initial Matters

1. 1 Pendency

The parent asserts that the IHO erred in denying her request for pendency at iHope during this proceeding. The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then-current placement" has been found to mean either: (1) the

placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

The parent asserts that the student's pendency lies in the August 17, 2016 IEP and that the IHO erred in finding that the parents sent a 10-day notice effectively rejecting the August 2016 IEP. In a separate interlocutory appeal filed with the Office of State Review, relating to challenging the 2018-19 school year, the parent also asserted the August 2016 IEP as a basis for finding the that the student's pendency should be implemented at district expense at the International Institute for the Brain (see Application of a Student with a Disability, Appeal No. 18-147).[7] In Application of a Student with a Disability, Appeal No. 18-147, an SRO found that the August 2016 IEP was not the student's then-current educational placement for the purposes of that proceeding and that the last agreed-upon IEP was an April 2016 IEP recommending home instruction (id.).[8]

As noted above, the Second Circuit has held that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child" and describes three variations concerning the definition of "then-current educational placement": (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or

[7] SROs may, as a matter within their discretion, take notice of records that are currently, or have been, before the Office of State Review in other proceedings, especially those between the same parties and involving the same student in order to avoid unnecessarily confusing or conflicting factual determinations by the same administrative tribunal (see, e.g., Application of a Student with a Disability, Appeal No. 18-067).

[8] The parent's due process complaint notice in Application of a Student with a Disability, Appeal No. 18-147 was dated July 9, 2018, approximately six months after her due process complaint notice in this proceeding.

(3) the placement at the time of the previously implemented IEP (Dervishi, 653 Fed. App'x at 57-58, quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71; see E. Lyme Bd. of Educ., 790 F.3d at 440; Susquenita Sch. Dist., 96 F.3d at 83; Letter to Baugh, 211 IDELR 481).

Initially, I note that the parent only asserts that the IHO erred in denying pendency based on the August 2016 IEP, therefore, I will address the pendency issue in this fashion.[9] The hearing record shows that the CSE met on August 17, 2016, and on the same day, the parent sent the district a 10-day notice (Parent Ex. B; Dist. Ex. 1).[10, 11] The notice stated, in relevant part, that the parent was unilaterally placing the student at iHope because "there is no private school placement the [district] can recommend which would be appropriate" [emphasis added] (Dist. Ex. 1). Contrary to the parent's assertion, this letter served to challenge the August 2016 IEP, which recommended a public specialized school placement (see Parent Ex. B at p. 24). As such, the challenged August 2016 IEP cannot be the last agreed-upon IEP or placement for the student (see Application of a Student with a Disability, Appeal No. 18-134).

Furthermore, even if the August 2016 IEP were the operative IEP, a review of the hearing record shows that the August 2016 IEP recommended that the student be placed in a 12:1+(3:1) special education class, in a district specialized school, and that the student receive five 60-minute sessions each of individual OT, PT, and speech-language therapy per week, and full time 1:1 school nurse services, a 1:1 nurse while the student is on the bus, and assistive technology—specifically, a speech-generating device—and a 1:1 paraprofessional is noted within the annual goals section (Parent Ex. B at pp. 19-20, 21-22, 24). In contrast, the director of PT at iHope testified that while at iHope the student was placed in an 8:1+1 special class, and that the student

[9] The parent raises additional claims related to pendency in a memorandum of law annexed to the request for review and in a reply. Initially, a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of the Dep't of Educ., Appeal No. 12-131). State regulation directs that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6 [a]). Thus, any arguments included solely within the memorandum of law have not been properly raised and will not be considered or addressed in this decision. Additionally, as already discussed above, the parent's reply is not within the scope of what is permissible in a reply and will not be considered. Finally, while the reply rehashes arguments that were already addressed in Application of a Student with a Disability, Appeal No. 18-147, which was issued on January 23, 2019 (approximately two months prior to the submission of the reply in this proceeding), the reply makes no reference to that decision and offers no reason to depart from the conclusions reached therein.

[10] Although the August 2016 IEP indicates that the CSE meeting occurred on October 13, 2015 (see Parent Ex. B at pp. 1, 24, 27), other documents in the hearing record indicated that this was a typographical error (see Parent Exs. G; H). Additionally, in Application of a Student with a Disability, Appeal No. 18-147, the parties clarified that the CSE meeting took place in August 2016 and that the October 2015 date was a typographical error (see Application of a Student with a Disability, Appeal No. 18-147 at n.1).

[11] There are two district exhibits marked as District Exhibit 1. The first, the August 17, 2016, ten-day notice is a one-page letter, hand marked as "DOE Ex. 1-1", while the second is the May 24, 2017 IEP For purposes of this decision, the August 17, 2016 ten-day notice is referred to as "District Exhibit 1" and the May 2017 IEP is referred to as "District Exhibit 1a" (see Dist. Exs. 1; 1a).

received daily 60-minute individual sessions of both PT and OT, and four days per week she received a 60-minute individual session of speech-language therapy, and once a week she received a 60-minute group session of speech-language therapy (Tr. p. 655).[12] The director of PT also testified that the student received assistive technology "programming" twice per week in 60-minute sessions (id.).

While the program at iHope provided the student with some of the same special education and related services as mandated in the August 2016 IEP, there are critical differences between the two programs. For example, the hearing record shows that iHope was providing the student with an 8:1+1 special class while the August 2016 IEP recommended a 12:1+(3:1) special class (Tr. p. 655; Parent Ex. B at p. 21). Student-to-staff ratio is a relevant factor in determining whether a student's program has changed (M.K. v. Roselle Bd. of Educ., 2006 WL 3193915, at *14-*15 [D.N.J. Oct. 31, 2006]; Henry v. Sch. Admin. Unit No. 29, 70 F. Supp. 2d 52, 60-61 [D.N.H. 1999]; Application of a Child with a Disability, Appeal No. 05-028). State regulations define a change in program as "a change in any one of the components" of an IEP, which includes the size of the special class in which a student is recommended to receive services (8 NYCRR 200.1[g]; 200.4[d][2][a], [b][2]).

In addition, the August 2016 IEP included a recommendation to implement the IEP in a district specialized school (Parent Ex. B at p. 25), whereas iHope is a nonpublic school that has not been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7). As noted above, the parent rejected the district's proposal for the 2016-17 school year and filed a notice of unilateral placement and sought reimbursement for iHope for the 2016-17 school year. Where parents reject a proposed IEP and unilaterally enroll a student in a private school in contravention of the stay-put provision, they take responsibility for the costs of the student's tuition and run the risk that they will not receive reimbursement therefor (T.M., 752 F.3d at 172; Murphy, 86 F. Supp. 2d at 357; see New York City Dep't of Educ. v. S.S., 2010 WL 983719 [S.D.N.Y. Mar. 17, 2010] [holding that if a student's pendency is in the public school when due process proceedings commence, a parent who unilaterally places the child in a private school setting pending the completion of an appeal does so at his own financial risk]). To hold otherwise would create a rule allowing parents to unilaterally shift a student from a publicly authorized placement to a privately selected placement that is unsanctioned by any school district or adjudicative officials by merely invoking a due process proceeding in order to circumvent the financial risk in the Burlington/Carter unilateral placement test. I seriously doubt that the Burlington/Carter test can be so easily evaded.

Finally, the director of PT at iHope testified that the student received four sessions per week of individual speech-language therapy and one session of speech-language therapy in a group; however, the August 2016 IEP recommended five sessions per week of individual speech-language therapy (see Tr. p. 655). Thus, even assuming for the sake of argument that the August 2016 IEP was the basis for determining the student's pendency placement, the hearing record lacks

[12] The district contested that iHope staff did not actually deliver the student's related services, which were paid for through RSAs, and that therefore, the district's recommended program and the program implemented at iHope, without the related services, did not support a finding that the programs were substantially similar (see Tr. pp. 19-21).

sufficient evidence to show that the program offered at iHope for the 2017-18 school year was substantially similar to the August 2016 IEP, due to the differences in the two programs.

2. Scope of Review

As noted above, the district does not cross-appeal the IHO's overall determination that it failed to offer the student a FAPE for the 2017-18 school year, a review of the parent's claims regarding the district's failure to provide the student a FAPE is not necessary, and the inquiry moves to the appropriateness of the parent's selection of iHope as a unilateral placement.

B. Unilateral Placement

The parent asserts that the IHO erred in finding iHope was an inappropriate unilateral placement for the student for the 2017-18 school year. A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a

> unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

While the district has conceded it failed to offer the student a FAPE, an understanding of the student's strengths and deficits is necessary in order to determine if iHope appropriately addressed her needs. According to the student's pediatrician, the student has received numerous diagnoses including cerebral palsy, global developmental delay, chronic respiratory failure with hypoxia, ineffective airway clearance, sleep apnea, tracheomalacia, dysphasia, hypotonia, and growth hormone deficiency (Parent Ex. I; see Tr. p. 645). A 2012 bilingual social history report indicated that the student also received diagnoses early on of encephalopathy, cortical blindness, and glaucoma (Dist. Ex. 13 at p. 1).[13] The privately developed IEP proposed for the student by iHope staff for the 2017-18 school year (iHope IEP) also stated that according to medical reports the student had a history of stroke and anoxic brain injury (Parent Ex. C at p. 1). In addition, the student is tracheostomy, gastrostomy tube and ventilator dependent and at risk for asthma, infections, and subsequent hospitalizations, and requires constant monitoring of her heart and oxygen levels (Parent Exs. C at p. 1; I). The student has a history of requiring a variety of medications and also wears eye glasses (Parent Ex. C at p. 1; Dist. Exs. 5 at p. 1; 13 at p. 2). With regard to her motor development, the student has difficulty with motor control, balance, coordination, motor planning, strength, endurance, and sensory processing (Parent Ex. C at p. 8). While able to walk short distances with minimal assistance, she uses a stroller or wheelchair for ambulation for longer distances (Parent Ex. C at p. 1; Dist. Ex. 5 at p. 3). Her management needs include the use of hand splints and bilateral ankle-foot braces during weight bearing activities (Dist. Ex. 5 at p. 3). In addition to deficits in fine and gross motor skills, the student presents with impairments in cognition, language, memory, attention, reasoning, abstract thinking, judgement, problem-solving, information processing, and speech (Parent Ex. C at p. 4; Dist. Ex. 5 at p. 3). She communicates using a communication device, in addition to using facial expressions, some vocalizing, word approximations, and gestures (i.e., pointing, shaking her head to indicate yes or no, waving hello and goodbye) (Parent Ex. C at pp. 1, 3-5, 7; Dist. Ex. 5 at p. 2). The student is able to demonstrate understanding of some preacademic skills and concepts but requires hand over hand support and physical prompting to participate and access her educational environment, requiring full assistance to manipulate and explore (Parent Ex. C at p. 2; Dist. Exs. 1 at p. 1; 5 at pp. 1, 3). The student is also described as highly distractible at times and requires instruction shielded from visual and auditory distractions (Parent Ex. C at pp. 2, 7).

[13] The hearing record does not include a primary source for these diagnoses.

1. iHope General Background Information

The hearing record includes an iHope brochure containing a "Program Description" that details the iHope mission statement and core values and also provides information regarding the iHope admissions process and an overview of the program for the 2017-18 school year (Parent Ex. F). According to the program description, iHope is a "highly specialized private school focused on educating students with brain injury" (id. at p. 2). The school provides students who have "Acquired Brain Injury" and other brain-based disorders access to the common core curriculum through a multidisciplinary approach that "incorporates the best practices from the medical, clinical and educational fields" (id.). According to the program description, students at iHope are instructed "utilizing the most effective strategies using evidenced based practices" such as "cognitive strategies, direct instruction and compensatory education (using diagnostic-prescriptive approaches), behavior management, physical rehabilitation, therapeutic intervention, social interaction and effective transition services" (id.).

The program description indicates that iHope operates on a 12-month school calendar and provides an extended school day, that runs from 8 a.m. to 5 p.m. (Tr. pp. 639-40; Parent Ex. F at p. 2).[14] The director of PT indicated that the school has six 6:1+1 classrooms and two 8:1+1 classrooms, and that each student is provided with a 1:1 paraprofessional to assist in their activities, academics, related services, activities of daily living (ADLs) and other health-related matters (Tr. p. 639). She further testified that the school has a therapy wing with a large therapy gym, private treatment rooms, an OT sensory gym, a larger speech-language space and a "conductive education" space (Tr. pp. 640-41). She indicated the school also has a nursing office and additional small offices where vision education takes place (Tr. pp. 640-42).

As detailed in the iHope program description, the iHope educational program focuses on the development of academic, cognitive and social skills aligned with each students' iHope IEP, which is tailored to the specific needs and capabilities of each student (Parent Ex. F at p. 4). In order to best meet the individual needs of each student, collaboration takes place between teachers, speech-language therapists, occupational therapists, physical therapists, "conductive educators," teachers of the visually impaired, hearing specialists, paraprofessionals, and families (id.). The teachers at iHope incorporate direct instruction methods into daily lessons while working with students in one-to-one or small group settings for 30-minute sessions throughout the day (id.). Methods and materials for instruction are individualized based on students' needs (id.).[15] According to the iHope program description, the instructional setting at iHope is controlled for visual and sound distractors to increase student focus and engagement (id.). In addition, progress on IEP goals is tracked via individualized, teacher-made data collection measures and is analyzed

[14] Testimony by the director of PT at iHope indicated the school day begins at 8:30 and ends at 4:35 (Tr. p. 640). The student's iHope class schedule ran from 9:00 a.m. o 5:00 p.m (Parent Ex. T).

[15] The iHope program description reflects that direct instruction is a research-supported instructional approach geared specifically towards teaching academic skills to students with brain injuries, citing "Glang 1991" (Parent Ex. F at p. 4). The iHope program description indicates that direct instruction is considered a best practice for this population, in part because of its capacity to be tailored to meeting individual learning needs (id.). The cited research was not made available in the hearing record and I decline to express any opinion regarding iHope's statements regarding "best practices."

and reported on a quarterly basis, allowing teachers to evaluate student progress and adjust instruction if necessary and appropriate (id.; see Tr. p. 786).

As detailed in the program description, iHope programming includes "conductive education," which the academy defines as "a psycho-educational approach that focuses primarily on the brain's ability to change and learn (neuroplasticity), the child's personality and lifestyle, and integrating physiological and medical aspects" (Parent Ex. F at p. 5). The iHope program description further describes conductive education as "an intensive, multidisciplinary holistic approach to education for individuals with cerebral palsy, brain injury, spina bifida and other motor challenges" that "approaches physical disabilities from an educational rather than a medical or paramedical perspective" and focuses on "improving the physical effects of the disability while encouraging motivation and active physical participation, to become independent and increasing [sic] self-esteem" (id.). In addition, the iHope program description indicated that the "desired outcome [of conductive education] is to internalize the intended movement and achieve maximal independence called orthofunction" (id.). The director of PT at iHope explained that "conductive education" is specific to a collaborative education-based program that includes physical, cognitive, social, and educational dynamics and is "similar to an adaptive physical education program" (Tr. p. 662). She indicated it can be done individually or in groups, where students work as a team, and includes a timing component that allows students to work on the rhythm of the movement (Tr. p. 663). The director of PT at iHope testified that conductive education is based on the neuroplasticity principle and generating neuro connections, which she stated research has shown "is beneficial to this population" (Tr. pp. 663-64).[16, 17]

According to the program description, iHope provides related services to students as indicated on their iHope IEP (Parent Ex. F at p. 5). Therapy is provided in a push-in or pullout model by licensed therapists (id.). Related services include but are not limited to speech-language services, assistive technology, hearing education services, "conductive education" services, OT, PT, vision education services, parent counseling and training, health and nursing services, social worker services, and specially designed vocational educational and career development (id. at pp. 5-7; see Tr. p. 639).

2. iHope Program for the Student

With respect to the student in the instant matter, the hearing record shows that while attending iHope during the 2017-18 school year, the student was eight years old and was placed in an 8:1+1 special class, with other students ages six to eight years old (Tr. pp. 750, 775). The hearing record also shows that iHope provided the student with related services, including five 60-

[16] According to the iHope 2017-18 proposed IEP, the student participated in individual conductive education sessions and the strategies used during these sessions helped the student work toward achieving her motor goals (Parent Ex. C at pp. 2-3). The proposed IEP noted that the student had increased her strength, stamina, and independence, had made "great" progress in her walking skills, and was able to walk independently for a longer distance (id.).

[17] In discussing iHope, the iHope director of PT described it as the only school in the area "that's focused specifically on working with this population of brain-based disorders for children that are nonverbal and nonambulatory" (Tr. p. 639).

minute sessions of individual PT and OT per week, each; four 60-minute sessions of individual speech-language therapy and one 60-minute session of speech-language therapy in a group per week; and two 60-minute sessions of individual assistive technology programming per week (Tr. pp. 655, 750-51; Parent Ex. C at pp. 25, 26).[18] The student used an assistive technology device, and was given modeling and prompting to communicate throughout her entire school day (Tr. pp. 771, 774-75). The hearing record also shows that iHope provided the student with the support of a 1:1 nurse and a 1:1 paraprofessional, and that parent counseling and training was provided one time per month for 60 minutes (Tr. p. 643; see Parent Ex. C at pp. 25-26).

The student's February 2018 iHope schedule included a 30-minute academic period each day, as well as a daily 30-minute period to address ADL skills (Parent Ex. T). The student's schedule also reflected that on four days per week she was scheduled for a 30-minute period of "para academics," fine motor skills, a social group, a morning or afternoon meeting time, and a choice time (id.).[19, 20] The schedule also indicated the student worked on movement three times per week, art twice per week, and sensory skills once per week for 30 minutes (id.).

The student's iHope teacher indicated that her own day consisted primarily of providing 1:1 direct instruction and stated her view that 1:1 direct instruction is the "best practice" model for teaching students like the student in this matter, who have been classified with a traumatic brain injury (Tr. pp. 746-47, 770). The teacher indicated that she provides 1:1 direct academic instruction to the student for a half hour each day and that during 1:1 direct instruction, she places the student in an area of the classroom that is free of visual distractions, sometimes using a screen that is placed around the student (Tr. pp. 747, 767). She indicated that because of the small class size, there is also reduced noise distraction (Tr. p. 747). The student's teacher further indicated that the student is given specific materials to use that meet her needs (id.). For example, when working on identifying the letters of her first name, the student used materials that were enlarged, were placed on a surface that had a darkened background and had a different textured feel, that she could place on a Velcro board (Tr. pp. 747-48). She described how, in accordance with the student's IEP goals and objectives, she gives the student a choice between two letters, as her current goal was to identify letters in a field of two (Tr. p. 786; see Parent Ex. C at p. 13). The student's teacher indicated that if the student's response was wrong, she would trace the letter with the student's finger and try again (Tr. pp. 786-87). The teacher also indicated that when working with the student, she breaks skills down into chunks and provides constant repetition, which she stated was very important for the student (Tr. p. 748). In addition, the teacher indicated that at times she also works with the student during a related service session where she pushes into the session at an agreed upon time (Tr. pp. 767-68, 777). For example, during a push-in session, she collaborated with the student's speech-language therapist on how the student could use her communication

[18] Testimony by the director of PT at iHope and the student's special education teacher, indicated that the 3/31/17 iHope draft IEP was in fact, the "finalized" IEP that the student had been working on for the 2017-18 school year (Tr. pp. 648, 762-63).

[19] The student's teacher described "para academics" as a time when the student's para[professional], under the supervision of the teacher, assisted the student in generalizing a skill that the teacher had been working on with the student, using repetition of the skill (Tr. p. 782).

[20] According to the schedule, the student was slated for two 30-minute social groups on Thursdays (Parent Ex. T).

device to work on answering who, what, and where questions related to a story that was read to her (Tr. pp. 751-52; 757-58; see Parent Ex. V at pp. 2, 6).

The student's teacher at iHope described some of the activities in the student's schedule, as well as how the student benefitted from each activity. According to the teacher, movement time, consisted of the student getting up and moving around in order to work on walking and gross motor skills (Tr. p. 781). The teacher indicated that the student was with her paraprofessional during movement time and explained that in addition to working on movement the student had her communication device with her and worked on social interaction and greetings (Tr. pp. 78-82). During social group time the student worked with a small group of up to three peers on an activity that allowed for turn-taking and communication (Tr. pp. 771-72). The teacher reported that in the social group students used their communication devices to greet each other, answer questions, and interact (Tr. pp. 771-72). The student was also able to work on her communication and social skills during PM meeting time, which the teacher described as a meeting of students who are in the class at that time to work on social skills and communication in the context of learning the calendar, days of the week, the date, and counting skills (Tr. p. 770).

The teacher described choice time as the student's opportunity to choose what she would like to do in the classroom such as reading a book or playing a game (Tr. p. 789). According to the teacher the student often chose a book for her paraprofessional to read with her and engage her in (Tr. pp. 789-90). The iHope teacher indicated that the school has a library with books from the preschool level up to first or second grade (Tr. p. 790).

The student's teacher indicated that during the ADL period, which is near the end of the school day, the student worked on skills related to activities of daily living, such as getting her coat on, using the bathroom, and pulling up her pants (Tr. p. 780). The teacher indicated that the student's paraprofessional was primarily involved in this instructional period (id.).[21]

As noted above, iHope developed an IEP for the student (Tr. pp. 762-63), which included annual goals and short-term objectives in the areas of literacy, mathematics, "conductive education," speech-language therapy, PT, OT, and assistive technology as well as goals and short-term objectives related to the responsibilities of the student's 1:1 paraprofessional and 1:1 nurse in assisting the student's participation and in monitoring and addressing her physical, medical, and safety needs (Parent Ex. C at pp. 13-24). The iHope IEP also included an extensive list of management needs specific to the student's health and medical needs, special education needs, and related services needs (id. at pp. 11-12).

3. Progress

Turning next to the issue of whether the student progressed at iHope, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is

[21] The student's iHope teacher did not describe the "Fine Motor" period reflected in the student's schedule; however, her testimony indicated that the student was able to hold big Crayola markers using a loose fist grasp (Tr. pp. 787-88).

appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, [2d Cir. Dec. 26, 2012]; L.K., 932 F. Supp. 2d at 486-87; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).[22] However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

In this matter, the hearing record includes a January 12, 2018 quarterly report of the student's progress toward her goals (Parent Ex. V). Although not required to demonstrate the student's program at iHope was appropriate, the progress report supports the parent's argument insofar as it reflected, with regard to academics, that the student had generally demonstrated "emerging" to "developing" abilities in all areas addressed and had "achieved" or "partially achieved" three of her ten short-term objectives in literacy (id. at pp. 1-2). Testimony by her teacher indicated that at the time of the hearing the student had almost achieved one additional literacy objective and had almost achieved one of her three mathematics benchmarks (Tr. pp. 756-57).

In finding that the student did not make academic progress, the IHO compared the literacy goals and short term objectives on the May 2017 and January 2018 progress reports and indicated that the goals were repeated and it was impossible to tell what the student was working on (IHO Decision at p 15); however, a comparison of the goals and short term objectives is indicative of progress as more was being asked of the student as of the January 2018 progress report. For example, a literacy goal on the May 2017 progress report was for the student to "identify her name within a sentence and within the classroom environment," while the January 2018 progress report included a goal that targeted the student's ability to identify specific letters (those in her first name) (compare Parent Ex. M at p. 1, with Parent Ex. V at p. 1). Another literacy goal on the May 2017 progress report targeted the student's ability to answer "wh" questions, which was similar to a goal on the January 2018 progress report (compare Parent Ex. M at p. 1 with Parent Ex. V at p. 2). However, in reviewing the short-term objectives attached to the goals, as of the May 2017 progress report the student "partially achieved" the objective for answering "what" questions in 4/5 trials, while as of January 2018 the student achieved an objective for answering "who, what, and where" questions in 3/5 trials (id.). Contrary to the IHO's finding, the progress reports identified the skills

[22] Conversely, the Second Circuit has also noted that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

the student was working on and indicated that the student was working on additional skills as of the January 2018 progress report.

With regard to OT, the report indicated the student demonstrated "emerging" ability in two of her nine short-term objectives, "developing" ability in five objectives, and that she had partially achieved two of her short-term objectives (Parent Ex. V at pp. 3-4). However, testimony by the director of PT at iHope indicated that she spoke to the student's providers in preparation for the hearing, who indicated that there had been progress toward almost every goal in every discipline (Tr. p. 665). She noted that the student's occupational therapist indicated that since the time of the progress report, the student had increased from 60 to 75 percent achieved on her first dressing objective (donning a shirt) (Tr. p. 668), from 55 to 70 percent on her second objective (managing clothing fasteners), and from 30 to 50 percent achieved on her third objective (toileting) (Tr. pp. 668-69; see Parent Ex. V at p. 3). In addition, according to the director of PT, the student's occupational therapist indicated that the student was actually enjoying practicing dressing as they played dress-up games and pretend games while working on dressing skills (Tr. p. 668).

With regard to the student's progress in PT, the student demonstrated "emerging" abilities in four of her nine short-term objectives and "developing" ability in five short-term objectives (Parent Ex. V at pp. 4-5). In addition, the director of PT indicated the student had made further progress since the time of the progress report, and had achieved her annual goal to squat, reach for an object, and return to standing (Tr. pp. 669-70).[23]

With regard to the student's progress in speech-language therapy, the report reflected that of the 11 short-term objectives addressed at that time, the student demonstrated "emerging" abilities on one objective, "developing" abilities on six objectives, had "partially achieved" three objectives, and had "achieved" one objective (Parent Ex. V at pp. 5-8). In addition, the director of PT testified that at the time of the hearing the student had increased her ability to follow two-step directives from 40 to at least 60 percent accuracy (Tr. p. 672). She also testified that the student's speech-language therapist had recently told her that the student's attention had improved, that she was "more interested," and was having some success (Tr. pp. 672-73).

The progress report reflected that the student's progress on her "conductive education" goals included "emerging" ability on one of her ten short-term objectives, "developing" ability on two short-term objectives, and that the student had "partially achieved" four short-term objectives and fully "achieved" three of the short-term objectives (Parent Ex. V at pp. 8-9). Testimony by the director of PT indicated that since the January 2018 progress report, the student had achieved all four of the short-term objectives for her first conductive education goal, which related to the student's ability to negotiate an obstacle course independently (Tr. p. 674; see id. at p. 8).

Lastly, the parent testified that in addition to the quarterly progress reports, the school sent the student's progress reports to her, weekly (Tr. p. 797). She testified that since attending iHope, the student no longer required support under her arms while walking, could communicate by pointing and using the LAMP program, was able to use scissors to cut, and could verbalize several

[23] The director of PT was asked during the hearing to highlight one additional area of progress from each specific related service, since the progress report was issued in January 2018 (Tr. pp. 665, 669).

words including yes, no, Dad, Mom, abuela (grandmother), and a few numbers and letters (Tr. p. 798).[24]

Overall, while I understand the IHO's concerns that the majority of the student's program is provided through related services and that iHope only provides the student with academic instruction for 4.5 hours per week, based on the above, iHope provided a program that addressed the student's deficits. In particular, iHope provided the student with instruction in an 8:1+1 special class, PT and OT to address her fine and gross motor deficits, speech-language therapy to address her communication deficits, and the provision of a 1:1 paraprofessional to address her mobility, attention, and instructional needs, as well as a 1:1 nurse to address her medical needs at school.[25] In addition, I note that the academic goals and short -term objectives contained in the iHope IEP were similar to those found in the district's proposed IEP and, as detailed above, the hearing record shows that the student made some progress toward achieving those goals (compare Dist. Ex. 5 at pp. 5-6 with Parent Ex. V at pp. 1-2); The student's needs are detailed and complex and that iHope chose to focus more heavily on the student's functional needs than her academic needs does not make it inappropriate in this instance.

C. Equitable Factors

The parent asserts that the IHO erred in finding that equitable considerations weigh against awarding the parent tuition reimbursement at iHope for the 2017-18 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]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when

[24] As indicated in the student's August 2017 IEP, LAMP stands for language acquisition through motor planning (Dist. Ex. 5 at p. 2). During the hearing the LAMP program was described as a program on the student's iPad (i.e. an app) that she used for communication and that targeted vocabulary (see Tr. pp. 772, 796-97).

[25] While conductive education may have been the preferred method at iHope and I reach a different conclusion than the IHO overall regarding the appropriateness of iHope, I decline to go so far as to explicitly overturn the IHO's conclusions regarding the efficacy of conductive education, at least as it relates to the student in this case. The research referenced by the director of PT at iHope was not offered into evidence (see Tr. pp. 663-64), and the only New York State guidance that I am aware of that discusses conductive education relates to early intervention services (e.g. IDEA Part C services administered by the Department of Health) which indicates that "[n]o adequate evidence was found to demonstrate the effectiveness of conductive education as an intervention for young children who have a motor disorder" and expresses the concern that [t]he conductive education approach may be time-intensive, expensive, and incompatible with other therapies." ("Clinical Practice Guideline: Quick Reference Guide. Motor Disorders, Assessment and Intervention for Young Children (Age 0-3 Years)," Publication No. 4961 [2006], available at https://www.health.ny.gov/publications/4961.pdf). I agree with the IHO insofar as it is difficult to see how the conductive education service or in this case is clearly distinguishable from the PT and OT services that the student receives, but that does not render the unilateral placement inappropriate, especially when viewed in the totality of the circumstances.

parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The IHO first addressed the parent's conduct, as well as the conduct of the staff at iHope and the parent's counsel (see IHO Decision at p. 16 ["The actions taken by the parent either acting on her own or with both her attorney and with iHope demonstrate that equitable considerations do not favor the parent"]). The IHO listed several factors as indicative of the parent's lack of cooperation (id. at pp. 16-17). In particular, the IHO noted that the June 19, 2017 letter requesting an annual review, purportedly written by the parent, indicated that "'[t]ime is of the essence to ensure my daughter has an appropriate IEP in place before the start of the new school year in July 2017'" (id.). The letter further requested that the CSE meeting be scheduled after 4:00 p.m. to allow for the student's doctors to be available in case there were specific questions for them; however, according to the IHO's reasoning, the parent "certainly did not act like time was of the essence" and had "never before mentioned to the CSE that she required that the IEP meeting time be held after 4:00 PM" (id. At p. 17). Moreover, the IHO noted that the parent admitted she did not write the letter requesting a meeting after 4:00 p.m. (id.). The IHO also noted that the parent failed to make an effort to attend CSE meetings by telephone, failed to attend appointments for evaluations and social history updates, and failed to provide medical forms on time (id. at p. 17). The IHO also determined that the parent's testimony as to why she was not able to attend CSE meetings during the school day lacked credibility (id. at p. 17). Based on the above, the IHO found that the parent was "totally complicit" in creating a situation which made it impossible for the [district] to provide FAPE" (id.).

As the parent's cooperation with the CSE process is at issue, a full review of the events leading up to the May 2017 and August 2017 CSE meetings is necessary.

On January 11, 2017 the district notified the parent that it had scheduled a CSE meeting for 9:00 a.m. on January 30, 2017 to conduct an annual review of the student's program and to develop a new IEP for the student (Tr. pp. 156-57; Dist. Exs. 2a at p. 1; 20 at p. 8; see Dist. 8 at p. 1).[26] In a letter to the CSE chairperson dated January 25, 2017, counsel for the parent requested that the district conduct a psychoeducational evaluation, updated social history, and an updated classroom observation of the student prior to her annual review for the 2017-18 school year (Parent Ex. W at p. 1).[27, 28] Counsel for the parent further requested that the district provide any district documents or packets that needed to be updated on an annual basis for the 2017-18 school year, as well as a medical forms packet to continue nursing services for the 2017-18 school year (id.). The letter requested that, once the evaluations were completed and the parent received copies of them, the district coordinate with the education program director at iHope "to identify a date and time whereby all of the mandated participants are available (i.e., student's current special education teacher, related service providers, and parent(s))." (id.). The letter stated that once a date had been determined the iHope education program director would be able to provide the CSE, in advance of the meeting, "with all of the student's updated Progress Reports and any [district] forms necessary to continue services" for the 2017-18 school year (id.). The parent also asked that the district send her a draft of the student's proposed IEP at least five days prior to the CSE meeting (id. at p. 2). The parent's attorney emailed the CSE chairperson on January 26, 2017, informing the district that the meeting scheduled for January 30, 2017 "[wa]s NOT happening, since the parents and some of the other mandated members of the IEP team [we]re not available" and because the parent had not received the requested evaluations and information outlined in the attorney's previous letter (Tr. pp. 164-65; Dist. Ex. 20 at p. 7; see Tr. pp. 480-81; Parent Ex. W at p. 1; Dist. Ex. 8 at p. 1).[29]

On January 30, 2017, the district sent the parent an "appointment letter" indicating an "SHU" (social history update) and psychoeducational evaluation had been scheduled for February 21, 2017 at 10:30 a.m. (Tr. pp. 169-70; Dist. Ex. 20 at p. 7; see Dist. Ex. 8 at p. 1). The parent did

[26] A January 11, 2017 entry in the district's SESIS log also indicated that a notice was sent to the parent requesting any new testing and provider and teacher progress reports (Dist. Ex. 20 at p. 8). According to the SESIS log, the request for updated teacher and therapy reports was reiterated in a conversation with the parent that took place on January 20, 2017 (id.).

[27] Parent Ex. W is described in the hearing record as a January 25, 2017 letter from the parent's counsel to the CSE chairperson requesting medical evaluations (Tr. p. 129; see Parent Ex. W, Tr. pp. 571, 590). It appears that "Parent Exhibit W" was marked as "Parent Exhibit G," but could not be entered as "Parent Exhibit G" because the Parent had entered a memorandum as "Parent Exhibit G" as part of the pendency portion of the hearing (Tr. pp. 129-30).

[28] The hearing record indicates that the district received the January 25, 2017 letter requesting revaluations on January 30, 2017; however, the SESIS log indicates that counsel for the parent emailed a copy of the letter to the district on January 25, 2017 (see Dist. Exs. 8 at p. 1; 20 at p. 7).

[29] Although not stated directly, it appears that counsel for the parent used the term "other mandated members of the IEP team" in reference to staff from iHope (see Tr. pp. 164-65, 480-81; Dist. Ex. 20 at p. 7; Parent Ex. W).

not show for the scheduled appointment; however, when the district reached out to her to determine why she missed the appointment the parent indicated she had been at the hospital with the student, who was having respiratory problems (Dist. Ex. 20 at p. 7). A contemporaneous Special Education Student Information System (SESIS) log entry of the district indicated that the scheduling secretary would call the parent later in the week to have the social history update completed by telephone and to attempt to make arrangements to have the psychoeducational evaluation completed at a more convenient location (id.). The SESIS log indicated that an appointment letter was sent to the parent on March 3, 2017, scheduling a social history update and a psychoeducational reevaluation on March 19, 2017, a Sunday, at 10:30 a.m. (id.; see Tr. pp. 366-67).[30] However, the log indicated on March 19, 2017 that the parent was a "NO SHOW" for this appointment (id.). The district's SESIS log reflected that, on May 2, 2017, the scheduling secretary left a message for the parent to return her call regarding a convenient testing location and indicated in the meantime, the student would be scheduled for another appointment on May 18, 2017 at 4:00 p.m. (id.).[31] That same day an appointment letter was sent to the parent for a social history update and psychoeducational evaluation on May 18th (id. at p. 6).

The SESIS log reflected that on May 10, 2017, the district sent the parent a notice of a CSE meeting—specifically, a reevaluation/annual review—for May 25, 2017 at 1:00 p.m. (Dist. Exs. 3 at p. 1; 20 at p. 6; see Dist. Ex. 8 at p. 1). The log also indicated that on May 11, 2017, the social worker for the CSE team sent notification of this meeting to the associate program director of iHope, via email (Dist. Ex. 20 at p. 6).[32] The associate program director of iHope responded on May 15, 2017, indicating that the "IEP team" from iHope was unable to meet at the proposed time and requested a new date with a meeting time after 4:00 p.m. (Tr. p. 482; Dist. Ex. 20 at p. 6; see Dist. Ex. 8 at p. 1).[33] On May 17, 2017, the district sent an appointment notice for a CSE meeting to take place on May 24, 2017 at 1:00 p.m. (Dist. Exs. 4 at p. 1; 20 at p. 6; see Dist. Ex. 8 at p. 1).[34] According to the SESIS log, later that day, the district social worker notified the associate program director at iHope, via email, that the new meeting had been scheduled for 1:00 p.m. on May 24 and asked for confirmation of iHope's participation (Dist. Ex. 20 at p. 6).

[30] The SESIS log also indicated a telephone conversation with the parent confirming the parent's address because a copy of the classroom observation had been "returned to sender" and further inquiring about the parent's consent for assessments which had been mailed to the parent (Dist. Ex. 20 at p. 7). According to the log, the parent indicated that the classroom observation and consents could be emailed to her (id.).

[31] The SESIS log does not indicate whether the parent was available and/or participated in the May 18th social history update (see Dist. Ex. 20 at pp. 5-6). The district school psychologist testified that she did not think the parent showed for the May 18th evaluation (Tr. p. 368). She explained "the 18th, obviously, we didn't hold a social history, because we would have hold another one in September" (Tr. p. 371). The district conducted a social history update on September 27, 2017 (Dist. Ex. 14).

[32] The associate program director at iHope (Parent Ex. L at p. 2) is alternately referred to as the educational director for iHope by the district school psychologist (Tr. pp. 183-84).

[33] The parent testified that she did not attend the May 25, 2017 CSE meeting "because[of] the time" (Tr. p. 810).

[34] The district school psychologist testified that she was aware at this time that the parent had requested the student's CSE meeting be scheduled between 4:00 p.m. and 7:00 p.m. (Tr. pp. 278-80).

Prior written notice, dated May 18, 2017, was sent to the parent reiterating the sequence of events related to scheduling a CSE meeting for the student for the 2017-18 school year, including iHope's request for a meeting after 4:00 p.m. (Dist. Ex. 8 at p. 1). However, the notice also stated that "[a]s normal CSE business hours are from 8am-4pm, the CSE will proceed on 5/24/17 at 1:00pm with this meeting to ensure that FAPE is timely offered for the 2017-18 school year" (id. at pp. 1-2).

By email dated May 19, 2017, the associate program director of iHope advised the district that it could not go forward with scheduled CSE meeting, that the parents, student, and staff would not be available, and that a mutually agreeable date must be set (Dist. Ex. 20 at p. 5; see Tr. pp. 179-80).

Also, on May 19, 2017, and in response to the notice of the May 24, 2017 CSE meeting, the parent's attorney wrote a letter to the CSE chairperson requesting that the meeting be rescheduled to a time that was convenient for the parent, specifically, closer to 4:00 p.m. (Parent Ex. J at pp. 1-2). The letter indicated that the parent was "eager to participate in the development of the IEP" for the 2017-18 school year and did not consent to the district proceeding with the meeting without the parent present (id. at p. 1). The letter further indicated that the student's special education teacher and related service providers were not invited to the meeting; that the parent should be provided with all evaluations and assessments prior to the meeting; and that the prior written notice inaccurately indicated that the district made multiple attempts to schedule the CSE meeting at a time that was convenient for the parent (id. at pp. 1-2). Counsel for the parent indicated that the district ignored the parent's preference and availability for a meeting in the late afternoon and scheduled a meeting for May 24, 2017 at 1:00 p.m. (id. at p. 2). The parent's attorney asserted that the district had not made any attempt to schedule the student's annual review at a mutually agreed upon date and time before unilaterally deciding to hold the meeting without the parent (id.). In closing, the parent's attorney indicated the parent was eager to meet with the district to develop an IEP and placement for the student for the 2017-18 school year, with the appropriate IEP team composition and at a time that worked for all participants (id.). The parent requested that the district reschedule the CSE meeting at a time closer to 4:00 p.m. and provide all required reports and notifications in writing, prior to the proposed meeting (id.).[35]

According to the SESIS log, on May 24, 2017, shortly after the CSE meeting was scheduled to convene, the special education teacher for the CSE called the parent to ensure her participation in the meeting scheduled for that day (Dist. Ex. 20 at p. 4; see Tr. pp. 372-73). When she reached her, the parent indicated she was unable to participate and requested time to call her lawyer; however, while the CSE team waited on the phone for the parent to speak to her lawyer and return to their call, the parent hung up (Tr. p. 373; Dist. Ex. 20 at p. 4).[36] The CSE team also contacted iHope and left a message for the school to call the CSE, in order to participate in the meeting (Dist. Ex. 20 at p. 4; see Tr. pp. 372-73). According to the district school psychologist, iHope did not call back (Tr. p. 374).

[35] The district school psychologist indicated that the district received this letter after the May 24, 2017 CSE meeting (Tr. pp. 403-04).

[36] The parent testified that she did not remember this incident (Tr. p. 812).

The CSE continued the May 24, 2017 IEP meeting without the parent or representatives from iHope present and ultimately developed an IEP for the student for the 2017-18 school year, based on a classroom observation of the student by the district social worker and information from the student's IEP from the previous year (see Tr. pp. 182, 186, 301, 809-10 and see District Exs. 1a; 18).

The district sent the parent prior written notice dated June 18, 2017 indicating that a CSE meeting took place on May 24, 2017 that the CSE determined the student continued to be eligible for special education, and identified the educational program recommended for the student (Dist. Ex. 9).[37] The district sent the parent a school location letter dated June 19, 2017 identifying the public school to which the student was assigned (Dist. Ex. 11).

In a letter to the CSE chairperson dated June 19, 2017, the parent requested an annual review for her daughter, stating that the district had not yet conducted an annual review for the student for the 2017-18 school year (Parent Ex. K at p. 1).[38] The parent requested that the student's then-current special education teacher, physical therapist, occupational therapist, and speech-language therapist be included as part of the CSE and further requested that the meeting take place late in the afternoon, after 4:00 p.m., so the student's doctors could be available (id.). According to the letter, it included copies of the student's most recent progress report from iHope, a draft IEP from iHope for the 2017-18 school year, and a letter from the parent's attorney (id.). The parent requested that the district coordinate any proposed dates and times with her attorney and the associate program director of iHope (id.). The parent advised the district that "[t]ime [wa]s of the essence to ensure that [the student] ha[d] an appropriate IEP in place before the start of the new school year in July 2017 (id. at p. 2).

On June 20, 2017, through her attorney, the parent provided 10-day notice to the district of her intent to unilaterally place the student at iHope for the 2017-18 school year and to seek public funding for the placement (Parent Ex. S). The letter indicated that the parent remained open to entertaining an appropriate district program or an appropriate public or approved non-public school placement (id.).

In a letter to the CSE chairperson, dated June 21, 2017, the parent's attorney requested a CSE meeting for the student for the 2017-18 school year, noting that the district had disregarded multiple requests made by the parent and the student's private school to schedule a meeting in compliance with the district's standard operating procedures manual (Parent Ex. O at p. 1). The letter indicated that both the parent and iHope staff made repeated requests to the CSE to reschedule the student's annual CSE meeting at a time after 4:00 p.m., to ensure all of the mandated members of the CSE were available to participate (id. at pp. 1-2). Due to the student's extensive management needs and complex medical history, the attorney stated it was critical that the student's doctor be available to participate in the meeting by telephone, if necessary (id. at p. 2). The letter indicated that the managing attorney within the district's Special Education Unit had informed the

[37] The SESIS log indicated that the May 2017 IEP was mailed to the parent on June 18, 2017 (Dist. Ex. 20 at p. 4).

[38] In response to a question as to whether she wrote the contents of the June 19, 2017 letter, the parent replied "I didn't—I—yeah, I reviewed But I didn't completely write it. I told [my attorney]" (Tr. pp. 814).

parent's attorney on May 4, 2017, that the CSE regularly scheduled CSE meetings until 7:00 p.m. on weekdays and where necessary also held CSE meetings on the weekend (id.). The letter identified the "mandated members" as the student's special education teachers, the parent, the district representative, and the student's related service providers, as well as a district school psychologist, and a parent member (id.). The parent also requested the district have a school physician present for the meeting (id.). The attorney also requested the CSE meeting be held at iHope, noting that according to the district's standard operating procedures manual '"[e]very effort should be made to hold the meeting at the school the student attends to facilitate the attendance of the student's teachers'" (id. at p. 3; see Parent Ex. P at p. 8).[39] The letter indicated that to date, no effort had been made to convene the student's CSE meeting at iHope (Parent Ex. O at p. 3). In addition, the attorney requested copies of the student's assessments and evaluations, as well as transportation and medical forms (id.).

In a letter to the CSE chairperson dated June 22, 2017, the associate program director of iHope summarized the student's progress over the 2016-17 school year and described her then-current functioning across domains (Parent Ex. L at pp. 1-2). Included with the letter, iHope provided the district with copies of its proposed 2017-18 IEP, a May 2017 quarterly report, a doctor's letter (TBI justification), transportation accommodation forms, and medication administration forms (id. at p. 2).

On July 13, 2017, the district sent notice to the parent of a CSE meeting to be held on August 7, 2017 at 9:00 a.m. (Dist. Exs. 7; 20 at p. 3). On July 26, 2017 the district informed the associate program director of iHope of the August 7, 2017 CSE meeting (Dist. Ex. 20 at p. 3).

On July 26, 2017 the parent signed an enrollment contract for the student to attend iHope for the 2017-18 school year (Parent Ex. E at pp. 1, 6).

The SESIS log reflects that on July 28, 2017 the district sent a letter to the parent scheduling an August 7, 2017 appointment at 10:30 a.m. for a psychoeducational evaluation and a social history update (Dist. Ex. 20 at p. 3).

On August 7, 2017, an entry in the SESIS log reflected that the district called the parent at 9:21 a.m. regarding the CSE meeting and evaluations scheduled for that day (Dist. Ex. 20 at p. 3). With regard to the CSE meeting, the parent requested that the district speak with her lawyer (id.). Additionally, the parent informed district staff that she had left a message with the CSE on Thursday August 3, 2017, indicating that the student could not come in for the evaluations and that she would like to be called for scheduling in the future (id.). The log indicated that district staff also called iHope that morning and were told that there were no team members available to participate in the meeting that day (id.). The log further indicated that the district requested that the associate program director for iHope or other "school representation" call them back as soon as possible (id.). The SESIS log ultimately reflected that the parent was a "No Show" for the social history update and the psychoeducational evaluation (id. at p. 2).

[39] The district school psychologist confirmed in testimony that no effort was made to have the CSE meeting at the student's school (iHope) (Tr. p. 291). She indicated that the district had and always would hold the meetings at the district (id.).

The August 7, 2017 CSE meeting was held without the parent or iHope providers and representatives present (Dist. Ex. 5 at p. 14). On August 14, 2017, the district sent prior written notice to the parent informing her that a CSE meeting took place on August 7, 2017, that the CSE determined the student continued to be eligible for special education, and identifying the educational program recommended for the student (Dist. Ex. 10 at pp. 1-2). The prior written notice indicated that the evaluative information considered by the CSE included a December 2016 classroom observation and a March 2017 teacher report (id. at p. 2).

According to the SESIS log a notice was sent to the parent setting up a social history update for September 27, 2017 (Dist. Ex. 20 at p. 2). The social history update was completed on September 27, 2017, via telephone, with the parent serving as the informant (Dist. Ex. 14 at pp. 1-2).[40]

Having reviewed the events surrounding the development of the student's IEPs for the 2017-18 school year, the evidence in the hearing record supports some of the IHO's findings related to the parent's conduct. Most notably, the parent failed to participate in a social history and failed to produce the student for a psychoeducational evaluation after multiple scheduling attempts by the district (Tr. pp. 365, 367, 368, 392; see Dist. Ex. 20 at pp. 2, 6-7). Overall, as discussed above, the hearing record indicates that the parent did not appear for scheduled evaluations on February 21, 2017, March 19, 2017, May 18, 2017, and August 7, 2017 (Dist. Ex. 20 at pp. 2, 7). Although the parent had a valid reason for not appearing for the February 21, 2017 evaluation and there is an indication in the hearing record that she called the CSE prior to not appearing for the August 7, 2017 evaluation, there is no explanation as to the other two evaluation dates.[41] Overall, this supports the IHO's determination that the parent failed to attend appointments for evaluations and social history updates, an equitable factor weighing against granting the parent's request for relief (see 20 U.S.C. § 1412[a][10][C][iii][II]; 34 CFR 300.148[d][2]). Additionally, this failure was compounded by the district not having information available from iHope until June 2017—well after the May 24, 2017 CSE meeting (see Parent Exs. K; L), despite a request by the district for such information in January 2017 (Dist. Ex. 20 at p. 8), and iHope having completed its own proposed IEP for the 2017-18 school year in March 2017 (Parent Ex. C).[42]

Separate from the parent's failure to make the student available for evaluations, the IHO found the parent's actions surrounding her lack of attendance at CSE meetings unreasonable (see 20 U.S.C. § 1412[a][10][C][iii][II]; 34 CFR 300.148[d][2] [a request for tuition reimbursement

[40] A request for consent for additional assessments was sent to the parent on September 27, 2017 (Dist. Ex. 20 at p. 1).

[41] As the March 19, 2017 evaluation was scheduled for a Sunday and the May 18, 2017 evaluation was scheduled for 4:00 p.m., the parent's explanations as to why she did not make the student available for evaluation, discussed below, would not apply to these appointments (see Dist. Ex. 20 at pp. 6, 7).

[42] There is evidence in the hearing record regarding the CSE development process for other students attending iHope (Tr. pp. 399-400). While a pattern of conduct, in which a nonpublic school encouraged the parents of students enrolled in the school to impede the IEP development process, may be relevant to equitable considerations, there should be evidence in the hearing record connecting that conduct to the specific parent's actions. In this matter, the parent testified that she was not told by anyone not to attend the scheduled meetings (Tr. p. 811). Under these circumstances, the focus is on the parent's actions leading up to the development of the IEPs and whether the parent's conduct impeded the CSE process.

may be reduced or denied upon a finding of unreasonableness with respect to the actions taken by the parents]). As discussed in greater detail above, much of the difficulty in scheduling a CSE meeting with the parent present was based on requests from the parent's counsel and staff at iHope to hold the meetings after 4:00 p.m. (see Parent Ex. J; Dist. Exs. 8 at p. 1; 20 at pp. 4-6).

Testimony by the district school psychologist indicated that the district attempted to schedule an IEP meeting at least three times before going forward with a CSE meeting on May 24, 2017 without the parent (Tr. p. 151). The SESIS log corroborates this testimony (Dist. Ex. 20 at pp. 6, 7).

According to the CSE representative, the parent was told in advance that she could participate in the CSE meetings by phone, and the representative testified that "We told her -- we begged her to participate by phone. But she chose not to. She -- she hung up the phone" (Tr. p. 402). The CSE, concerned that it needed to create an IEP, convened without the parent on May 24, 2017, and the parent was contacted via telephone to participate in the CSE meeting, however, the parent responded that she was unable to participate, and she requested time to call her lawyer (Dist. Ex. 20 at p. 4; see Tr. p. 141). While the CSE team was waiting on hold for the parent, she hung up the phone and did not return a call to the CSE (id.). Also, the CSE called iHope to try and get the participation of the student's providers, but the phone call went to voicemail, and no one from iHope returned the CSE's call (id.).

Additionally, consistent with the IHO's finding that the parent's testimony regarding her non-attendance at the scheduled CSE meetings was not credible, the parent's reason for not attending the CSE meetings was not communicated to the district until her testimony during the hearing. The first request included in the hearing record as to the timing of the CSE meeting was on May 15, 2017 from the associate program director of iHope indicating iHope wanted a CSE meeting scheduled for after 4:00 p.m. (Dist. Ex. 20 at p. 6; see Dist. Ex. 8 at p. 1). On May 19, 2017, the parent's attorney wrote a letter to the CSE requesting that the meeting be rescheduled closer to 4:00 p.m. (Parent Ex. J). The letter indicated that through "emails and phone calls" it was communicated to the district that the parent and iHope staff were only available for late afternoon appointments (id. at p. 2). The letter did not provide a reason for the parent's unavailability during the day (see id.). In her June 19, 2017 letter the parent requested that "the meeting take place late in the afternoon to have [the student's] doctors available" (Parent Ex. K at p. 1). In his June 21, 2017 letter, counsel for the parent indicated that the request for a meeting after 4:00 p.m. was "to ensure all of the mandated members of the IEP [we]re available" while noting the importance of having the student's physician present at the meeting (Parent Ex. O at pp. 1-2). In contrast to the letters, during the hearing, the parent testified that she was not able to attend the CSE meeting scheduled for May 24, 2017 at 1:00 p.m. because she was unavailable due to her work schedule (Tr. pp. 808-810).[43]

Nevertheless, it is the district's obligation "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, including . . . [s]cheduling the meeting at a mutually agreed on time and place" (34

[43] In her testimony, the parent referenced the May 19, 2017 and June 22, 2017 letters as the method she used to convey her request to have the CSE meeting after 4:00 p.m. (Tr. pp. 799-801).

CFR 300.322[a]). The district school psychologist testified that the CSE was "definitely" aware that the parent had specifically requested the IEP meeting be scheduled from 4:00 to 7:00 PM any day during the week (Tr. p. 278), yet scheduled meetings at 1:00 p.m. more than once (see Dist. Exs. 3 at p. 1; 4 at p. 1; 7 at p. 1). Notably, the district school psychologist testified that 1:00 p.m. on May 24, 2017 was not a mutually agreed upon time for the parent's attorney and that she guessed it was not a mutually agreeable date and time for the parent, simply because her attorney was not available (Tr. p. 280). Additionally, the district school psychologist testified that on rare occasions, CSE meetings had taken place after 4:00 p.m., but also testified that the CSE only held individualized education services program (IESP) meetings (for students who are parentally placed at nonpublic schools at the parent's expense) until 7:00 p.m. during the week (Tr. pp. 268-69, 340-44). However, the district social worker for the CSE indicated that CSE meetings could be held between 4:00 and 7:00 p.m., especially when compliance was at issue (Tr. pp. 534-35).

While the parent's rationale for requesting a meeting outside of regular school hours is a factor that weighs on whether the parent's actions were unreasonable, under these circumstances, particularly considering the district's admission that it knew the parent requested that a meeting be held after 4:00 p.m. and that the district had the ability to hold CSE meetings at the parent's requested time, the parent's actions related to the scheduling of the CSE meetings looked at on their own do not warrant a reduction of tuition reimbursement.

Overall, based on the parent's conduct, most specifically her failure to participate in the evaluative process, a reduction in the award for tuition reimbursement is justified. Therefore, I will reduce the award of tuition reimbursement by twenty-five (25%) percent.[44]

Finally, with respect to the IHO's determination that the parent did not explain why the cost of related services was not included in the iHope tuition and has not shown that the cost of tuition at iHope was reasonable, such concerns are one of the factors that may warrant a reduction in tuition under equitable considerations (see E.M., 758 F.3d at 461 [whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). While the IHO's suspicions regarding the reasonableness of the cost of the tuition at iHope may have been borne out if he exercised his 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]), and the IHO may consider evidence regarding whether the tuition charged by the nonpublic school was unreasonable or regarding any segregable costs charged by the nonpublic school for services that

[44] To the extent that the parent is requesting direct funding of the student's tuition at iHope, although the parent testified during the hearing as to her concern over missing work in order to attend CSE meetings (see Tr. pp. 799, 808-810), the parent did not otherwise submit any evidence, either at the impartial hearing or on appeal, with regard to her financial inability to make tuition payments. Accordingly, as the hearing record contains no evidence directly related to the parent's ability to make tuition payments, I am unable to order the district to directly fund the costs of the student's attendance at iHope for the 2017-18 school year (see Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 428 [S.D.N.Y. 2011][indicating that parents "have a right to retroactive direct tuition payment relief" only if, in addition to satisfying the requirements for tuition reimbursement, they "lack the financial resources to 'front' the costs of private school tuition"]; Application of a Student with a Disability, Appeal no. 12-183 [denying direct funding where parent submitted incomplete information regarding her financial status]). However, the district remains obligated to reimburse the parent for the costs of the student's attendance at iHope, less the reduction for equitable considerations, upon satisfactory proof of payment.

exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016]), the hearing record does not include such evidence with respect to the tuition charged by iHope. Accordingly, and considering that the district did not assert an argument and the IHO did not inquire with the parties during the impartial hearing whether the cost of the student's tuition at iHope was unreasonable, the IHO erred in holding this lack of evidence against the parent when reaching a decision.

VII. Conclusion

Based on the above, I find that under the totality of the circumstances iHope met the minimal criterion to establish that it was an appropriate educational placement for the student (Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 364; see M.S., 231 F.3d at 104). I further find that upon consideration equitable factors and the parent's conduct, reimbursement for tuition and related services at iHope should be reduced by twenty-five (25%) percent (see E.M., 758 F.3d at 461; C.L., 744 F.3d at 840). [45]

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portion of the IHO decision dated June 20, 2018, which found that iHope was not an appropriate unilateral placement is reversed;

IT IS FURTHER ORDERED that the portion of the IHO decision dated June 20, 2018, which found that equitable considerations barred the parent from an award of tuition reimbursement is modified consistent with the discussion above so that the award of tuition reimbursement is reduced by twenty-five (25%) percent due to the parent's lack of cooperation with the district; and

IT IS FURTHER ORDERED that upon submission of proof of payment by the parent, the district shall reimburse the parent for seventy-five (75%) percent of the costs of the student's tuition and related services at iHope for the 2017-18 school year.

Dated: **Albany, New York**
May 8, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER

[45] Although the hearing record indicates that related services were provided to the student by iHope staff, the hearing record is not clear as to whether those services were funded by iHope and chargeable to the parent or funded in the first instance by the district through RSAs (see Parent Exs. C; D; E at p. 2). The district is only obligated provide reimbursement for related services that have been delivered to the student at iHope and for which the parent has become legally obligated to pay.