The University of the State of New York

The State Education Department
State Review Officer
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No. 19-107

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Brian Davenport, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondent, by Peter G. Albert, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondents' (the parents') daughter for the 2018-19 school year were appropriate, but which nonetheless ordered the district to reimburse the parents for the cost of related services and special transportation during the 2018-19 school year. The parents cross-appeal from that portion of the IHO's decision which denied their request for tuition reimbursement at the International Institute for the Brain (iBRAIN) for the 2018-19 school year. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B];

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

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

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

III. Facts and Procedural History

The student has been diagnosed as having cerebral palsy and reported to have global developmental delays and a visual cortical impairment (Parent Exs. C at p. 5; U at p. 2; V at p. 2; Dist. Ex. 3 at pp. 1-2). She was born prematurely and at two weeks of age she experienced decreased circulation on the right side of her body and had to have three fingers amputated (Parent

Ex. C at p. 1; Dist. Ex. 3 at p. 2). At three months of age, the student suffered a seizure and an intracranial bleed that resulted in left hemiparesis and "'right hemispheric volume loss[]'" (Parent Ex. C at p. 1; Dist. Ex. 3 at pp. 1-2). Due to hydrocephalus, the student had a ventriculoperitoneal shunt implanted (Parent Ex. C at p. 1; Dist. Ex. 3 at p. 2). The student received services, including in-home therapies, through the Early Intervention Program and later "transferred to the public program" (Tr. pp. 622-23). At age eight, the student underwent bilateral hip osteotomies due to poor circulation (Parent Ex. C at p. 10; Dist. Ex. 3 at p. 2).

The student attended the International Academy of Hope (iHOPE from July 2015 through June 2018, followed by her parental placement at iBRAIN starting July 9, 2018 for the 2018-19 school year (Parent Exs. J at p. 1; Q at p. 1; Dist. Ex. 3 at p. 1).[1] At the time the impartial hearing began, the student was 10 years old and was non-verbal and non-ambulatory (Dist. Ex. 3 at p. 1). She was dependent on adults for all activities of daily living (Dist. Ex. 3 at p. 1).

On December 20, 2017 a district school psychologist conducted an observation of the student during an occupational therapy session at iHOPE (Dist. Ex. 2). The resultant classroom observation report, dated January 25, 2018, indicated that the student demonstrated a low frustration tolerance that resulted in self-injurious behaviors such as biting and hitting (Dist. Ex. 2 at p. 2). According to the observation report, the student spoke using one to two-word simple phrases with compromised intelligibility (id.). The report also noted that the student responded to verbal and physical redirection (id.). Following the classroom observation, on February 6, 2018, a district social worker interviewed the student's parents for the purpose of updating the student's social history (Dist. Ex. 3). According to the social worker, the parent indicated that they were pleased with iHOPE and that student had made "a great deal of progress" there (Dist. Ex. 3 at pp. 1-3).[2]

By meeting notice dated February 14, 2018, the district informed the parents that it had scheduled an CSE meeting for the student for March 26, 2018 (Dist. Ex. 5 at p. 1).[3] At the request of the parents the meeting was rescheduled and took place on March 19, 2018 (Tr. pp. 230-31; Dist. Exs. 6 at pp. 1; 8 at p. 14; 9 at p. 1).

The March 19, 2018 CSE determined that the student was eligible for special education services as a student with multiple disabilities and developed an IEP for the student for the 2018-19 school year (Dist. Ex. 8). More specifically, the March 2018 CSE recommended that the student

[1] For the 2017-18 school year, the parents unilaterally placed the student at iHOPE and filed a due process complaint notice alleging that the district failed to offer the student a free appropriate public education (FAPE) because the IEP process was procedurally and substantively flawed (Parent Ex. B at p. 3).

[2] As with many notices, letters, and communications with the school, this interview was conducted by a district social worker in the parents' native language (Dist. Ex. 3 at p. 1; see Dist. Exs. 5 at pp. 4-5; 10 at pp. 5-8).

[3] The February 14, 2018 meeting notice indicated that the CSE meeting needed to be held no later than January 9, 2018 (Dist. Ex. 5 at p. 1).

attend a 12-month program consisting of a 12:1+(3:1) special class in a specialized school,[4] together with three 30-minute sessions per week of individual occupational therapy (OT); five 30-minute sessions per week of individual physical therapy (PT); four 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of group speech-language therapy; two 30-minute sessions per week of individual vision education services; and one 60-minute session per month of group parent counseling and training (id. at pp. 1, 11-12). In addition, the CSE recommended a 1:1 full-time paraprofessional for the student at school as well as a 1:1 full-time paraprofessional for transportation; daily group service for support of the student's use of her assistive technology device; and adaptive seating (id. at p. 11). The CSE also recommended that the student participate in alternate assessment; receive specialized transportation including a lift bus and limited travel time; and resources to address her management needs (id. at pp. 13-14). In addition, the CSE recommended numerous annual goals and associated short-term objectives (id. at pp. 13-14).

In a letter to the CSE dated April 27, 2018, the parents indicated that they "wanted to follow up on reconvening [the student's] IEP meeting" to develop "an appropriate and timely IEP for the 2018-19 school year" (Parent Ex. N at p. 3). The parents requested that the meeting be a "[f]ull [c]ommittee [m]eeting" and that a district physician participate in the meeting in person (id. at p. 3). The parents further requested that the student's special education teacher and related service providers from iHOPE (listed in the letter) be included on any IEP notice sent to them at iHOPE (id. at p. 3). The parents indicated that they were available to meet anytime on Mondays and requested that the meeting take place at iHOPE (id. at p. 3). The parents further requested that the CSE consider placement in a non-public school and conduct the necessary evaluations for such consideration and any other evaluations prior to scheduling the meeting (id. at p. 3). The parents proposed that meeting dates and times be emailed to eliminate confusion (id. at p. 4). The parents stated that once the parties scheduled a mutually agreeable date and time the parents would provide the CSE with the most recent progress reports and any other documentation for its consideration (id. at p. 4). Lastly, the parents requested that the CSE meeting be recorded (id. at p. 4).

Also, on April 27, 2018, the IHO—who presided over a prior impartial hearing between the parties—issued a decision regarding a due process complaint filed by the parents regarding the 2017-18 school year (Parent Ex. B). In her decision, the IHO ordered that the district fund the cost of the student's tuition and related services at iHOPE for the 2017-18 school year and that the CSE reconvene and draft an IEP that incorporated all of the components of an iHOPE proposed IEP

[4] In terms of special class size for students with disabilities, State regulation indicates that the maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students. In addition to the teacher, the staff/student ratio shall be one staff person to three students. The additional staff may be teachers, supplementary school personnel and/or related service providers (see 8 NYCRR 200.6[h][4][iii]). On the student's March 2018 IEP, the CSE recorded its recommended class size for the student as a 12:1+(3:1) special class (Dist. Ex. 8 at p. 10). It appears that the 12:1+(3+1) setting means that up to 4 additional personnel would be assigned to the class, but that groups of three students would share one or more of the additional providers. It is not clear from the hearing record if, hypothetically speaking, a class only had 9 students enrolled rather than 12, there would be only three additional personnel present in the class at all times rather than four as a practical matter due to low enrollment. However, throughout the impartial hearing the parties refer to the special class size as 12:1+4, which would be the ratio of the special class in any event if it were at or near capacity, and so for purposes of this decision, I will simply refer to the setting as a 12:1+4 special class.

dated February 23, 2017 (id. at p. 5). In the ordering clause directing the CSE to reconvene, the IHO also ordered that the student's "classification is traumatic brain injury" (id. at pp. 3, 5).

By letter to the CSE chairperson dated May 11, 2018, the parents' counsel requested that the CSE reconvene for an IEP meeting, citing the parents' April 27, 2018 written request for a meeting with a full committee including a district physician (Parent Ex. O at p. 1). The attorney noted that the parents had received a phone call alerting them about a proposed CSE meeting date of May 18, 2018 but that the CSE "inexcusably" failed to send either a prior written notice or meeting notice to the parents (id. at p. 1). The parent's attorney stated that "[d]ue in part to the failure to send the parents proper written notice" the meeting should not proceed (id.). He highlighted several reasons for his assertion noting initially that the parents requested that the district send them a "'few proposed dates and times in writing'" and the district instead called and offered only one proposed date and time (id.). According to the attorney, the parents had stated in their letter that they were "only" available on Mondays and therefore the meeting notice given over the phone did not propose a suitable time for the parents (id.). The parents' counsel requested that the district send a few additional times and dates to the parents via email so that they could identify a time and date that was mutually agreeable (id.). In addition, he reiterated the parents' requests for a full committee meeting and that the district physician participate in person (id. at p. 2). He noted that the parent also requested that a parent member participate in the meeting (id.). The parents' counsel further stated that the lack of a meeting notice and prior written notice left the parents without any indication of who would be attending the student's CSE meeting and requested that a meeting notice be attached to all future prior written notices (id.). Specifically, he requested that any new meeting notice confirm in writing the name of the parent member and school physician and that they would be participating in person (id.). The parents' counsel reminded the district that the parents had to indicate in writing their agreement that a mandated member of the CSE did not have to participate in person (id.). Next, he noted that the March 2018 annual review was not appropriate because the CSE relied on the 2017-18 IEP developed by the district which the IHO invalidated in her previous decision (Parent Ex. O at p. 2; see Parent Ex. B). He also pointed out that the parents had requested the district conduct any evaluations necessary for the CSE to consider a non-public school placement (Parent Ex. O at p. 2). He cited the district's standard operating procedure manual which he noted "require[d] a psychological assessment as well as 'an assessment of special educational needs of the student completed within the last six months' when considering a non-public school placement" (id.). The parents' attorney directed the district to send a draft agenda for the CSE meeting, in writing, at least seven days in advance of the meeting to ensure an efficient and effective meeting and also requested that an interpreter be present at the meeting; id. at pp. 1-2).

On May 16, 2018, the parent signed a "school transportation service agreement" for the student to be transported to and from iBRAIN by a private company for the 2018-19 school year (Parent Ex. K at pp. 1-11; see Tr. p. 653).

In a meeting notice dated May 21, 2018, the district informed the parents that a CSE meeting had been scheduled for June 11, 2018 (Dist. Ex. 11 at p. 1). The notice included the names and titles of members scheduled to attend the meeting; however, it noted that the school physician and parent member were to be determined (id. at pp. 1-5).

In a prior written notice dated May 22, 2018, the district summarized its response to the parents' request to reschedule the student's CSE meeting noting that the request had been granted, as had the parents' requests for a physician to participate in the meeting, and for the meeting take place on a Monday (id.). However, the prior written notice also indicated that the CSE could not agree to hold the meeting at iIHOPE without further information regarding the parents' request (id. at pp. 1-2). The prior written notice stated that, in collaboration with the parent and the school, the student's CSE meeting had been scheduled twice and that the neither the parents nor the school had "show[n] up" (Dist. Ex. 13 at p. 1). The district indicated that to ensure appropriate and timely services for the 2018-19 school year the CSE meeting would be held on June 11, 2018 (id.).

On June 5, 2018, the parent signed an enrollment contract with iBRAIN for the 2018-19 school year (Parent Ex. J at pp. 1-11).

By letter to the district dated June 8, 2018, the parents' counsel stated that the June 11, 2018 CSE meeting could not go forward because the meeting notice sent by the district did not include the following mandated CSE members: a parent member, a district physician, and a social worker (Parent Ex. P at p. 2). He noted that there was no reason to exclude these members and the parents had not waive the right to have these mandated members participate, in fact they had requested their participation (id.). He further stated that the prior written notice did not indicate that a district physician would participate in the CSE meeting in person or at all and reiterated that the parents must agree in writing to waive the in-person participation of a mandated CSE member (id.). Moreover, he noted that in his previous letter he had indicated that the district physician was expected to participate in person and he had advised the district to only schedule CSE meeting dates when the district physician was able to participate in person (id.). The parents' counsel requested that the district provide, in writing, the names of the district physician and parent member and confirm that they would be participating in person (id.). He also reiterated the parents request that the district conduct evaluations necessary for consideration of a non-public school placement and a meeting agenda (id.).

Hearing testimony indicated that the parents did not appear for the June 11, 2018 reconvene of the CSE (Tr. pp. 243-44).

By letter dated June 21, 2018 the parents' counsel provided the district with 10-day notice of their intent to unilaterally place the student at iBRAIN for the 2018-19 school year and seek public funding for the placement (Parent Ex. Q at pp. 1-2).

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated July 9, 2018, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (Parent Ex. A at pp. 1-3). The parents requested that pendency be determined to consist of prospective payment of tuition at iBRAIN and special transportation on the basis of an unappealed IHO decision regarding the student's placement at iHOPE in the previous school year (id. at pp. 1-2).

With respect to the alleged denial of a FAPE, the parents contended that the March 19, 2018 CSE meeting was not held at a time that was mutually agreeable to the parents, did not

comply with the parents' request for a "full committee" meeting and that the district's CSE members "feigned interest" in the independent evaluative information the parents offered, which impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the student (Parent Ex. A at p. 2). The parents alleged that the March 19, 2018 IEP, which recommended a 12:1+4 placement in a district specialized school, reduced the student-to-teacher ratio significantly and with no substantiation for the change, would not provide the "1:1 direct instruction the student requires" to make progress, and did not place the student in her least restrictive environment (LRE) (id. at pp. 2-3). The parents further alleged that the March 2018 IEP reduced the recommended related services mandates, did not adequately describe the student's then present levels of performance or management needs, lacked an extended school day and contained immeasurable goals (id.).

Lastly, the parents alleged that the district failed to develop an appropriate IEP for the student because it "ignored" a written request for a reconvene of the March 19, 2018 CSE meeting submitted to the district in a letter dated April 27, 2018 (Parent Ex. A at p. 2). For relief, the parents requested direct funding of the student's program at iBRAIN for the 2018-19 extended school year with transportation and other costs, and an order for the CSE to reconvene an annual review meeting for the student (id. at p. 3).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on August 17, 2018, and concluded the pendency portion of the hearing on January 14, 2019, the fifth day of proceedings (Tr. pp. 1-178).[5] By interim decision dated March 5, 2019, the IHO found that the student's pendency was at iHOPE on the basis of an unappealed April 2018 IHO decision, and denied interim funding at iBRAIN (March 5, 2019 Interim IHO Decision at pp. 6-7). According to the parents, the March 5, 2019 interim IHO decision concerning the student's pendency was appealed by the parents to the United States District Court for the Southern District of New York, and that via a subsequent district appeal of an order of that court, that matter is now pending a determination by the Second Circuit Court of Appeals (Parent Mem. of Law at p. 6, n. 3).

On March 11, 2019 the IHO began conducting the impartial hearing on the merits of the parents' FAPE claim for the 2018-19 school year (Tr. pp. 179-84). Evidence and witness testimony were taken on three additional hearing dates, and the impartial hearing concluded on June 13, 2019 after a total of nine hearing dates (Tr. pp. 1-673).

In a final decision dated September 21, 2019, the IHO found that the district offered the student a FAPE for the 2018-19 school year, that the parents' unilateral placement at iBRAIN was not appropriate, and that equitable considerations did not favor tuition reimbursement, among other findings (IHO Decision at pp. 1-32). Initially, the IHO described the parents' claims raised in their due process complaint notice, described the procedural posture of the case and outlined the issues that were in dispute (IHO Decision at pp. 1-3). In making her determination that the district

[5] I note that the first two hearing dates, consisting solely of pre-hearing conferences, were presided over by a different IHO than the IHO who issued the September 21, 2019 final decision that is the subject of this appeal and cross-appeal (see Tr. pp. 1-29). As noted above, the IHO who rendered the decisions in this case had also presided over the parent's claims with respect to the 2017-18 school year (see Parent Ex. B).

offered a FAPE during the 2018-19 school year the IHO addressed each of the parents' arguments in turn, including the parents' claim that the March 2018 CSE meeting was untimely, the claim that the March 2018 CSE was not properly composed, the parents' request for a reconvene of the March 2018 meeting, and the district's failure to reconvene a CSE after a prior IHO decision concerning the 2017-18 school year ordered the district to reconvene a CSE and draft an IEP (id. at pp. 3-11). Having found that none of those allegations resulted in a denial of FAPE, the IHO addressed the parents' allegation that the student's disability classification should have been traumatic brain injury (TBI) rather than multiple disabilities, their claim that the IEP's recommended 12:1+4 classroom ratio and resources to address the student's management needs were inappropriate, their assertion that the frequency and duration of the recommended related services were insufficient, the recommended services and annual goals were inappropriate and, lastly, their claim that the March 2018 IEP was predetermined (id. at pp. 11-18).

Having found that the March 2018 IEP offered the student a FAPE, the IHO nonetheless turned to the adequacy of the parents' unilateral placement at iBRAIN and determined that the school was not an appropriate placement for the student, primarily on the ground that the school lacked the vision education services the student required at the start of the 2018-19 school year, and that there was no coherent plan to implement make-up vision services (IHO Decision at pp. 19-23).

Next, the IHO addressed equitable considerations and made a number of findings that were adverse to the parents (IHO Decision at pp. 23-27). Initially the IHO discussed the student's removal from iHOPE and made a finding that the baseline tuition at iBRAIN was not reasonable in light of the amount of academic instruction it offered and the failure to fully implement certain parts of the student's program (id. at pp. 24-25). Next the IHO found that the iBRAIN contract called for the parents to seek related services authorizations (RSAs) from the district while the school had regular salaried related service providers, which the IHO found would constitute "double dipping" (id. at p. 25). The IHO also noted that she had "concerns" with the IEP prepared by iBRAIN because it appeared to be a copy of an iHOPE IEP and prepared for litigation purposes (id. at pp. 25-26). The IHO further noted that there was no evidence in the record concerning the reasonableness of the fees charged by the parents' private transportation contractor (id.). Lastly, the IHO identified three statements that put the parents' credibility in question and found that after attending the March 2018 CSE meeting, the parents and the parents' counsel ceased to fully cooperate with the student's educational planning and failed to attend two CSE meetings scheduled at the parents' request after expressing disagreement with the March 2018 IEP (id. at pp. 26-27).

After finding that the district's recommended IEP offered the student a FAPE, that the parents' unilateral placement at iBRAIN was inappropriate and equitable considerations did not favor the parent, the IHO denied tuition reimbursement for iBRAIN, but nonetheless ordered the district to fund certain aspects of the private program unilaterally provided by the parent to the student (IHO Decision at pp. 3-27). The IHO ordered the district to fund the student's transportation costs at a rate "commensurate with prevailing DOE contractual rate for similar services not to exceed $315 per day upon submission of compliance with prevailing city and state regulations" (id. at p. 27). The IHO also ordered the district to fund "related services" at the district's "prevailing rate for the frequency and duration of services as recommended in the March 2018 IEP" (id.).

IV. Appeal for State-Level Review

The district appeals.[6] The district asserts that the IHO correctly determined that the district's recommended IEP offered the student a FAPE, that the parents' unilateral placement at iBRAIN was inappropriate and that equitable considerations did not favor the parent. The district also asserts that the IHO correctly denied the parents' request for tuition reimbursement at iBRAIN for the 2018-19 school year, but erred in ordering the district to fund related services at iBRAIN and the cost of the student's transportation. The district also asserts that there were additional reasons for finding that iBRAIN was not an appropriate unilateral placement than those relied upon by the IHO; specifically, that iBRAIN offers insufficient academic instruction, that related services were delivered in the program in excessively long sessions, and that the program lacked sufficient assistive technology services. For relief, the district requests reversal of the IHO's order for reimbursement of the cost of related services and transportation at iBRAIN.

In an answer and cross-appeal, the parents respond to the district's request for review and seek reversal of the IHO's decision in its entirety and an award of tuition reimbursement and related services costs at iBRAIN to the parents. Initially, the parents assert that the IHO erred in failing to find that iBRAIN constitutes the student's pendency placement and requests such a finding in the present matter. Next, the parent asserts that the IHO erred in finding that the March 2018 IEP offered the student a FAPE for the 2018-19 school year because the district failed to offer the student a FAPE for a variety of procedural and substantive reasons. Chief among them, the parents contend that the IHO erred by ignoring the "educational status quo" established by the unappealed IHO decision involving this student's educational program for the 2017-18 school year, which established that the student's unilateral placement at iHOPE was appropriate. The parents next assert that the IHO erred in failing to find that the March 2018 CSE meeting was untimely because it was held two months after the "regulatory deadline." The parents also assert that the February 2018 CSE meeting notice failed to list the names of the persons who would attend the March 2018 CSE meeting, which substantially impaired the parents' opportunity to participate in the IEP process. Relatedly, the parents contend that as part of her determination that the March 2018 CSE meeting was procedurally appropriate, the IHO erred in finding that the parents had not provided any medical records at the CSE meeting.

The next salient argument from the parents is that the IHO erred in failing to find that the district "improperly denied" the parents' request to reconvene the March 2018 CSE meeting. The parents assert that a CSE reconvene was required in order to secure the attendance of a school physician and an additional parent member, and that the IHO erred in finding the CSE's failure to

[6] State regulations call for a petitioner challenging an IHO's decision to file a request for review and a respondent to file an answer or an answer with cross-appeal if the respondent also challenges the IHO's decision (8 NYCRR Part 279). However, multiple requests for review were served by both parties at different times on the same date, each appealing different aspects of the IHO decision as petitioners. In a letter dated November 8, 2019, the Office of State Review returned the parents' papers due to service irregularities and failing to make a complete filing, and consequently they were directed to re-submit corrected pleadings as respondents in order to align the matter with practice regulations governing State-level review procedures. One responsive pleading by the district was also returned with the directive to align it with the procedures in State regulation.

reconvene was excusable because the parents' request for a school physician was "inconsequential" and "disingenuous."

Moving on to the parent's concerns with the substance of the March 2018 IEP, the parents contend that the CSE improperly changed the student's disability classification from TBI to multiple disabilities because the hearing record shows TBI is the most appropriate classification. The parents contend that the IHO erred in finding the recommended 12:1+4 placement was appropriate because the hearing record demonstrates that the student's management needs were "highly intensive" and required a "high degree of individualized attention and intervention" necessitating, as set forth in State regulations, a placement classroom containing of, at most, six students. Next, the parents contend that the IHO erred in finding that the related services mandated in the March 2018 IEP were sufficient, because the student required longer (60-minute) therapy sessions in order to make progress. The parents next assert that the IHO erred in finding that the CSE's failure to recommend assistive technology services, for a non-verbal student, did not rise to the level of a denial of FAPE. They further assert that the IHO erred in failing to find a "violation" regarding special transportation because the CSE improperly delegated its legal responsibilities to recommend transportation as a related service to a "non-CSE" entity. Lastly with respect to FAPE, the parents assert that the IHO erred by finding that there was no evidence that the district predetermined the student's placement because the hearing record shows that students with TBI were "typically" classified by the district as students with multiple disabilities and given the same suite of unindividualized services.

With respect to the IHO's finding that iBRAIN was not an appropriate unilateral placement for the student, the parents take issue with the record basis for this finding and assert that the IHO erred. For example, while the IHO noted that iBRAIN had not been "vetted" by a state or regional credentialing agency, the parents assert that there is no legal requirement that it do so. Similarly, while the IHO noted that iBRAIN's program had moved from one building to another without input from certain staff, the parents assert that this fact is irrelevant because the move occurred after the end of the 2018-19 school year. The IHO also found that iBRAIN did not offer an individualized program to the student, and the parents assert that the hearing record instead shows that each student at iBRAIN receives an individualized program adjusted for their unique needs. Lastly, the parents contend that the IHO erred in finding that there was no evidence that the student received vision education and assistive technology at iBRAIN because the hearing record showed that the student received all her mandated services.

With respect to the IHO's finding that equitable considerations did not favor the parents, the parents assert that the IHO erred in finding that iBRAIN's tuition was not reasonable, erred in her credibility findings, and erred in finding that the parents did not fully cooperate with all aspects of the IEP process. Accordingly, the parents request that the IHO's decision be reversed, and request an order for the district to fund the cost of tuition and related services at iBRAIN for the 2018-19 school year.

In an answer to the parents' cross appeal, the district asserts that the SRO should refrain from issuing a new pendency determination in this matter, because the question of the student's pendency placement is currently pending in the Second Circuit Court of Appeals. The district also asserts that allegations regarding the unappealed IHO decision concerning the student's 2017-18

school year are not properly raised in the present matter and are outside the SRO's jurisdiction because the instant matter only concerns the student's 2018-19 school year.

With respect to the parents' primary contention that the student was denied a FAPE because the CSE did not reconvene following the March 2018 CSE meeting, the district counters that the CSE had scheduled a new CSE meeting for June 11, 2018 and that "one business day" prior to the meeting the parents stated their refusal to attend in a letter to the district. The district asserts that the parents' reasons for refusing to attend were "contrived". For example, the parents argued that the meeting notice and the prior written notice were flawed because they did not identify the name of the additional parent member or the school physician, yet the notice did name one parent and specified that a school physician would attend. The parents argue that a school physician must attend in person, but offered no basis as to why a school physician could not attend telephonically and no State regulation requires the appearance to be in person. The district argues that the CSE meeting notice and the prior written notice complied with State regulations and that the parents' refusal to attend the June 11, 2018 reconvened CSE meeting precipitated the result which they now challenge. The district further asserts that the March 2018 CSE meeting and the IEP offered the student a FAPE both procedurally and substantively, which the IHO correctly determined.

Accordingly, the district contends that the cross-appeal should be dismissed, because the IHO correctly determined that the district offered the student a FAPE, that iBRAIN was not an appropriate unilateral placement and that the equities did not favor the parents.

V. Applicable Standards

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

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

violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]

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

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

VI. Discussion

A. The Student's Pendency Placement

I will first address the parents request for reversal of the IHO's interim decision dated March 5, 2019 regarding the student's pendency placement and the district assertion that the undersigned should refrain from rendering such a determination based on the procedural posture in this matter.[8]

[7] 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).

[8] 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]).

Here, both parties agree that the student's pendency placement has already been the subject of litigation in the federal court system, with an action currently pending before the Second Circuit Court of Appeals (Answer ¶12; Parent Mem. of Law p. 6, n. 3; Dist. Answer to Cross Appeal ¶2, p. 10). In June 2019, Judge McMahon issued a thorough and detailed Memorandum Decision and Order vacating the IHO's interim March 5, 2019 decision dated and granted the parents' request for a preliminary injunction directing the district to pay for iBRAIN under a pendency (M. N. C., v. New York City Dep't of Educ., 384 F. Supp. 3d 441, 465 [S.D.N.Y. 2019]).[9]

As the parents elected to appeal the IHO in issue of the student's pendency directly to the district court, and there is no basis upon which I can act—it should go without saying that I do not sit in review of a district court's determination. The parents have, in effect, selected judicial review as their preferred method challenge IHO's interim decision, and accordingly, I will not address the IHO's vacated decision in this matter (see, e.g. Application of a Student with a Disability, Appeal No. 19-089).

B. March 2018 CSE Meeting and IEP

I will turn next to the parents contention in their cross-appeal regarding the IHO's previous April 27, 2018 decision finding that the district had denied the student a FAPE during the 2017-18 school year and determination that the student's unilateral placement at iHOPE during that school year was appropriate (Parent Answer ¶¶ 8, 10). The parents argue that the IHO's determination that the student's placement at iHOPE during the 2017-18 school year was appropriate in a different, prior proceeding creates a "status quo" that should confer a finding that the student's placement at iBRAIN during the 2018-19 school year, the school year at issue here, was somehow de facto appropriate as well (id.). Essentially, the parent's argument amounts to a theory that the IHO's April 27, 2018 determination of the parties' 2017-18 school year dispute involving a different nonpublic school should bind the determination in this proceeding. However, the parents offer no legal support for such bootstrapping.[10] For purposes of a tuition reimbursement claim, each school year must be treated separately (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL

[9] If the district court had not yet spoken on the issue, I might have been more inclined to offer a pendency analysis in the event the court, while not bound by an administrative determination, might nevertheless find an objective viewpoint helpful. Additionally, if the parents had a favorable administrative determination from this forum before the court ruled, they might have been able to withdraw the matter and saved the court the trouble. However, they selected another forum and events have already run their course, Consequently, an administrative determination is no longer useful.

[10] The relevance of IHO's April 27, 2018 determination is significant for pendency purposes, but that has already been disposed of by the district court (M. N. C., 384 F. Supp. 3d 441). Hypothetically, if the IHO had ruled in favor of the district in the 2017-18 school year proceeding, and the district was now arguing that the outcome was binding on the 2018-19 proceeding as well, I think the parents would be arguing against such a bootstrapping rule.

4890440, at *16 [E.D.N.Y. Oct. 30, 2008]). The IHO correctly rejected this theory and the parents' claims with respect to litigation concerning the 2017-18 school year are not considered because the parents' due process complaint notice in this proceeding only raised claims concerning the 2018-19 school year, each school year is separately considered in any event, and only claims with respect to the 2018-19 school year are properly resolved in this proceeding (see IHO Decision at p. 10; Tr. pp. 294-99; Parent Exs. A; B).[11] The parents' arguments to the contrary are without merit.

1. Timeliness of the March 2018 CSE meeting

Next the parents take issue with the IHO's finding that the timing of the March 2018 CSE meeting did not constitute a procedural violation that impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE to the student, or cause a deprivation of educational benefits (IHO Decision at pp. 5-6). There is no reason to disturb the IHO's determination.

The IDEA and State Regulations require the CSE to meet "at least annually" to review and, if necessary, to revise a student's IEP (see 20 U.S.C. § 1414[d][4][A] [emphasis added]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]); however, there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194). Further, the regulations do not preclude additional CSE meetings, specifically prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). The IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). Failure to provide a finalized IEP before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE (see Application of a Student with a Disability, Appeal No. 15-099 [district's failure to finalize an IEP until after start of school year contributed to a denial of FAPE despite evidence of the parties' extensive efforts to locate an appropriate placement]).

Here, there is testimony to the effect that the "IEP meeting must be held no later than" date on the CSE meeting notice is automatically inputted by the district's Special Education Student Information System, a computer record system, referred to as "SESIS," and that the date is "in terms of the last meeting – that occurred, or when it was opened" (Tr. pp. 278-80). The district supervisor of psychologists explained that SESIS "automatically populates" the date and that

[11] While not set forth in the parents' request for review, the parents briefly present arguments concerning nursing services, IEP goals and an extended school day in their memorandum of law (Parent Mem. of Law at pp. 18-19); however, it has long been held that a party is required to set forth the issues for review in their pleading and that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see, e.g., Application of a Student with a Disability, Appeal No. 19-021; Application of the Bd. of Educ., Appeal No. 16-080). Accordingly, the parents' claims in this regard will not be further discussed.

"many times it is erred" (Tr. p. 279).[12] The IHO noted that although the timing of the March 2018 CSE meeting could "possibly" constitute a procedural violation, any delay would not be significant, and did not prejudice the student or the parents, because the March 2018 IEP was to be implemented in July 2018 at the start of the 2018-19 school year (IHO Decision at pp. 5-6). Thus, the creation of the March 2018 IEP after the CSE meeting with the parents satisfied the district's obligation to have an IEP in effect at the beginning of the 2018-19 school year. Although the parents claim that the timing of the March 2018 CSE meeting impaired their opportunity to participate in the IEP process, they do not specify any particular impairment and the hearing record shows—as discussed in the other portions of this decision—that they fully participated in the March 2018 CSE meeting. Accordingly, I decline to reverse the IHO's finding on this issue.

2. Predetermination

The parents next procedural challenge is that the IHO erred in parents' predetermination claim. As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dept. Of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P., 2015 WL 4597545 at *8, *10; E.F. v. New York City Dep't of Educ., 2013 WL 4495676 at *17 [E.D.N.Y. Aug. 19, 2013] [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides

[12] Glitches in this computer system appear to be a recurring theme as similar claims have arisen in other cases (see, e.g., Application of a Student with a Disability Appeal No. 19-097).

not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

"[T]he IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

Rather than asserting that the March 2018 CSE did not have an open mind as to the contents of this particular student's IEP, the parents' claims herein assert that the district uses a "one-size-fits-all" approach to all students, rather than individualizing programs for each disabled student.

To the extent that the parents' claim amounts to an argument that the district's adherence to policy is a systemic violation, an impartial hearing under the IDEA is limited to issues "relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child" (34 CFR 300.507[a][1]; see 20 U.S.C. § 1415[b][6]). Generally, "systemic violations [are] to be addressed by the federal courts," as opposed to "technical questions of how to define and treat individual students' learning disabilities, which are best addressed by administrators" (Levine v. Greece Cent. School Dist., 2009 WL 261470, at *9 [W.D.N.Y. 2009], aff'd, 353 Fed. App'x 461 [2d Cir. Nov. 12, 2009]).

Specific to the March 2018 CSE meeting and the resulting IEP, the hearing record does not show that the CSE lacked an open mind with respect to the details of the student's program. For example, the student's father testified that he liked to be involved with the student's CSE meetings, and that although he disagreed with the results, he attended and interacted with the March 2018 CSE that generated the IEP at issue herein (Tr. pp 626-27). The student's father stated that he expressed disagreement with certain features of the IEP and advocated for "more therapy time" (Tr. pp. 627-28). He testified that both the student's parents attended the March 2018 CSE meeting with an advocate, and that the student's teacher and multiple other providers from iHOPE attended the meeting by telephone (Tr. pp. 634-36; see Dist. Exs. 8; 9). The March 2018 IEP reflects input from iHOPE providers as to the student's present levels of educational performance and specific parent concerns raised at the March 2018 CSE meeting (Dist. Ex. 8 at pp. 1-3, 15). The district's CSE school psychologist stated that the entire IEP was discussed at the March 2018 CSE meeting, and that all of the annual goals were discussed (Tr. pp. 348, 375-76). She further testified that the meeting lasted between two and one half and three hours and that at the close of the meeting, none of the participants stated that they felt there had not been an adequate opportunity to participate (Tr. pp. 384-85).

The IHO correctly noted that predetermination does not lie as long as district personnel are willing to listen to the parents and the parents have the opportunity to make objections and suggestions. The evidence shows that the parents were afforded those opportunities to make suggestions and objections (Dirocco, 2013 WL 25959, at *18, quoting M.M., 583 F. Supp. 2d at 506). In light of the above, I decline to overturn the IHO's finding that the March 2018 IEP was not predetermined. However, the hearing record shows that the parents requested that the CSE reconvene again, and we now turn to the parents' claims concerning that issue next.

3. Reconvene of the CSE

The parents assert the IHO erred in failing to find a denial of FAPE arising from the CSE's failure to reconvene the March 2018 CSE meeting after the parent requested the attendance of a district school physician, among other requests and conditions. In the district's view, the IHO correctly determined that there was not a denial of FAPE in this instance because, among other reasons, the parents unilaterally cancelled the scheduled June 11, 2018 CSE reconvene the Friday before the Monday meeting was to occur. The district asserts that the parents based their refusal to attend the meeting on "contrived" arguments concerning the meeting notice failing to name the district physician and additional parent member who would attend, and their insistence that the physician attend in person without giving a valid reason or citing a regulation requiring that condition. The district further contends that the district should not be faulted for failing to conduct another CSE meeting, because there was a properly scheduled and noticed CSE meeting that would have occurred but for the parents' refusal to attend.

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

Furthermore, as to the scheduling of a CSE meeting and the requirements regarding a parent's participation, federal and State regulations require school districts to take steps to ensure parent participation in CSE meetings, including: notifying the parent prior to the meeting, scheduling the meeting at a mutually agreed upon time and place, and "[i]f neither parent can attend an [CSE] meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls" (34 CFR 300.322[a], [c]; 8 NYCRR 200.5[d][1][iii]). A district may conduct a CSE meeting without a parent in attendance if it is

unable to convince the parents that they should attend; however, in such instances, the district is required to maintain detailed records of its attempts to ensure the parents' involvement and its attempts to arrange a mutually agreed upon time and place for the meeting (34 CFR 300.322[d]; 8 NYCRR 200.5[d][3], [4]).

In this case, I decline to reverse the IHO's findings with respect to reconvening the CSE with the parents a second time, and as further described below, I find ample support in the evidence for her conclusion that regardless of the minor defects within the meeting notice and prior written notice, the parents could have attended the June 11, 2018 CSE meeting and were not impeded by these minor errors; instead, they simply decided not to attend (IHO Decision at pp. 7-10).

After the annual review was conducted and the March 2018 IEP was developed for the 2018-19 school year, in a letter to the CSE dated April 27, 2018, the parents stated that they "wanted to follow up on reconvening [the student's] IEP meeting" to develop "an appropriate and timely IEP for the 2018-19 school year" (Parent Ex. N at p. 3). In their letter, the parents requested that a district school physician participate in person, requested that the district include a group of iHOPE teachers and related service providers on any CSE meeting notice with the notices sent to iHOPE, stated that they were "available to schedule the meeting at any time on Mondays," requested that the meeting take place at iHOPE, requested that the CSE consider placing the student in a non-public school and conduct "the necessary" evaluations for such consideration prior to scheduling the CSE meeting, requested "a few proposed dates and times in writing," requested that the scheduling of the meeting not be conducted by telephone, stated that after a meeting was scheduled at a "mutually agreeable date and time" they would provide the most recent student progress reports, and requested that the meeting be recorded (Parent Ex. N at pp. 1-4).

The hearing record suggests that the district scheduled another CSE meeting with the parents by telephone, setting a meeting date of Monday, May 18, 2018 (see Parent Ex. O at p. 1).

The parents' attorney sent a letter to the district on behalf of his clients dated May 11, 2018 and noted that it was a request for a reconvene of CSE meetings for both the 2017-18 and 2018-19 school years; and additionally, the purpose of the letter was to follow-up on the parent's written request dated April 27, 2018 (Parent Ex. O at pp. 1-2). The attorney noted that the parents had received a call from the CSE about a proposed CSE meeting date on May 18, 2018; stated that no prior written or meeting notice had been sent to the parents and stated that due to the lack of proper written notice the meeting could not proceed (Parent Ex. O at p. 1). The letter of the parents' attorney went on to remind the CSE of the contents of the April 27, 2018 parent letter and which attendees comprise a full CSE meeting specifically reiterating that the school physician participate in person; and requested a draft agenda "at least seven (7) days prior" to the CSE meeting as well as a translator be present at the CSE meeting (id. at pp. 1-2).[13]

In a prior written notice, dated May 21, 2018, the district referenced the parents' request to reschedule the CSE meeting, and indicated that the request to reschedule the meeting had been

[13] Although the parents were the ones who requested that the CSE reconvene, the parents' counsel requested a draft agenda from the district.

granted, the request to hold the meeting at "any time on Mondays" had been granted, and the parents' request for "physician participation" had been granted, but that the parent's request for the meeting to take place at iHOPE was not granted (Dist. Ex. 13 at pp. 1-2) [14] The notice also indicated that although the parents' attorney had emailed the CSE requesting three alternative dates, in order to "ensure appropriate and timely services for the 2018-2019 school year, we must proceed with scheduling" and stated that the "CSE will be holding [the student's] meeting on June 11th at 9 AM" (id. at p. 1). The notice also stated that the CSE had an appropriate location that was physically accessible and could facilitate a conference call for the meeting and could not agree to hold the meeting at iHOPE without further information (id. at pp. 1-2).

In a written bi-lingual meeting notice to the parents dated May 21, 2018, the CSE indicated a meeting date of June 11, 2018 (a Monday), and included the names and titles of the proposed committee's special education teacher/related services provider, district representative, school psychologist, student parent, additional special education teacher, physical therapist, speech language therapist, vision teacher, assistive technology provider, and noted the specific [district] physician and additional parent member who would be on the committee were to be determined ("TBD") (Tr. pp. 309-10; Dist. Ex. 11 at pp. 1-5; see Parent Ex. O).

The parents' attorney sent a letter dated June 8, 2018—the Friday before the Monday June 11, 2018 meeting was to occur—to the CSE declaring that the re-scheduled CSE meeting "cannot proceed" because the meeting notice did not "include" three "mandated" members of the CSE, an additional parent member, a district school physician and a social worker, and further because the prior written notice did not indicate a district school physician would "participate in person or at all" (Parent Ex. P at pp. 1-2). The letter also requested a different date for an annual review meeting for the 2018-19 school year (id.).

According to the SESIS "events" log kept by the CSE for the student, on Saturday June 9, 2018 a district bilingual social worker contacted the parents by telephone to urge them to attend the June 11, 2018 CSE meeting (Dist. Ex. 14 at p. 1). According to the log, the student's mother said the time was "fine with her" but she needed to discuss it with her husband (id.; Tr. p. 243).

According to the district supervisor of school psychologists, the parents and their attorney did not attend the June 11, 2018 CSE meeting (Tr. pp. 243-44). Shortly thereafter the district sent out another prior written notice and a school placement letter recommending that the March 19, 2018 IEP be implemented in a particular district school (Tr. pp. 244-45; Dist. Ex. 10).

The parents correctly point out that CSE meeting notices should include the names of the proposed CSE members (see 34 CFR §300.322[b][1][i]; 8 NYCRR 200.5[c][2][i] [(the notice shall) inform the parent(s) of the purpose, date, time, and location of the meeting and the name and title of those persons who will be in attendance at the meeting]). The parents are also correct that they may request the attendance of a school physician in writing 72-hours prior to the CSE meeting (8 NYCRR 200.3[a][1][vii]). As to whether the State regulations allow the parents to

[14] In this letter, the CSE mistakenly noted that the parents had not attended either the March 19, 2018 or the March 26, 2018 CSE meetings; and that neither meeting had taken place (Dist. Ex. 13 at p. 1). The supervisor of school psychologists testified that the notation that the March 19, 2018 meeting did not take place, and that the parents had not attended, was an error (Tr. at pp. 238-39).

compel the attendance by the physician in person, I note that the regulations do provide the CSE members with the ability to make other arrangements for CSE participation (see 8 NYCRR 200.5[d][7]["When conducting a meeting of the committee on special education, the school district and the parent may agree to use alternative means of participation, such as videoconferences or conference telephone calls"]).

Although the district's attempts to reconvene the CSE for another meeting were not conducted in perfect adherence to all procedures, the parents' contention in their due process complaint notice and on appeal that the parents' request to reconvene the CSE was "denied or ignored" is simply not supported by the hearing record (see Parent Mem. of Law at pp. 11-2; Parent Ex. A at p. 2). Rather, the CSE first complied with a parental request to move the date of the initial CSE meeting from March 26, 2018 to March 19, 2018, and an annual review CSE meeting with the required participants was conducted and an IEP developed on that date for the 2018-19 school year (Tr. pp. 230-31). With respect to the later request to reconvene the CSE again, the hearing record shows that the district acceded to the parents' demand for the meeting to take place on a Monday, and that it include an additional parent member and a school physician. The CSE attempted to schedule a reconvene for Monday, May 18, 2018 by telephone, but was rebuffed by the parents. Thereafter, the district attempted to schedule a CSE meeting again for the student on Monday, June 11, 2018 in writing, only to have the parents' counsel declare the meeting could not proceed on the eve of the meeting itself. Throughout the process the CSE and the district reached out to the parents through email, telephonically, via letters, and also reached the parents by phone to confirm the meeting time and location on the Saturday before the proposed Monday meeting. The hearing record therefore supports the IHO's finding that the failure to conduct the another CSE meeting did not result in a denial of FAPE for the 2018-19 school year. Rather, it appears that the district engaged in a good-faith effort to reconvene the CSE in compliance with the parents' requests. This is unlike a case in which the CSE has not yet conducted a required annual review or reevaluation meeting, has not yet completed an IEP, or in which the parent has not already participated in the development of the IEP (see, e.g., Application of a Student with a Disability, Appeal No. 19-076). In this case, there was no further purpose for conducting the June 11, 2018 CSE meeting other than to satisfy the parents' request to conduct a second meeting, and under those circumstances, I find that the district was sufficiently responsive in granting that request and scheduling a CSE meeting in accord with most of the parents demands. In these circumstances, the district was not required to engage in extensive efforts thereafter to continue to encourage the parents to attend, when they had already been provided ample opportunity to participate in the development of the student's completed IEP.

4. Disability Classification

I will next address the parties dispute over the IHO's determination that the district properly found the student eligible for special education as a student with multiple disabilities.

Generally, with respect to disputes regarding a student's particular disability category or classification, federal and State regulations require districts to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA, as well as to gather information that will enable the student to be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]). Courts have given considerably less weight

on identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed though special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). "Indeed, '[t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education'" Heather S. v. State of Wisconsin, 125 F.3d 1045, 1055 (7th Cir.1997).

CSEs are not supposed to rely on the disability category to determine the needs, goals, accommodations, and special education services in a student's IEP. That is the purpose of the evaluation and annual review process, and this is why an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Once a student has been found eligible for special education, the present levels of performance sections of the IEP for each student is where the focus should be placed, not the label that is used when a student meets the criteria for one or more of the disability categories.

"Traumatic brain injury" is defined as an acquired injury to the brain caused by an external physical force or by certain medical conditions such as stroke, encephalitis, aneurysm, anoxia or brain tumors with resulting impairments that adversely affect educational performance. The term includes open or closed head injuries or brain injuries from certain medical conditions resulting in mild, moderate or severe impairments in one or more areas, including cognition, language, memory, attention, reasoning, abstract thinking, judgement, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, information processing, and speech. The term does not include injuries that are congenital or caused by birth trauma (see 8 NYCRR 200.1[zz][12]).

"Multiple disabilities" means concomitant impairments (such as intellectual disability-blindness, intellectual disability-orthopedic impairment, etc.), the combination of which cause such severe educational needs that they cannot be accommodated in a special education program solely for one of the impairments. The term does not include deaf-blindness (see 8 NYCRR 200.1 [zz][8]). As the IHO explained, the parents and the district can continue to disagree on the Student's classification without it amounting to a denial of a FAPE (IHO Decision at p. 16). At this juncture, when the student's eligibility for special education is not in dispute, the significance of the disability category label is more relevant to the LEA and State reporting requirements than it is to determine an appropriate IEP for the individual student.[15]

[15] The disability category for each eligible student's with a disability is necessary as part of the data collection

Suffice it to say that the more detailed discussion of the student's educational needs below illustrates why the educational classification of multiple disabilities was appropriate for the student. Upon review of the student's complex educational needs detailed below, including cognitive, academic, attention, communication, vision, speech, gross motor, mobility, fine motor, social, oral motor, feeding, and ADL needs, in conjunction with the student's diagnoses of hydrocephalus, cortical visual impairment, and cerebral palsy, the hearing record supports a finding that the student's needs qualify as "concomitant impairments" "the combination of which cause such severe educational needs that they cannot be accommodated in a special education program solely for one of the impairments" (Dist. Exs. 3 at pp. 1-2; 8 at pp. 1-3; see 8 NYCRR 200.1[zz][8]). Thus, I find the student's educational classification of multiple disabilities to be appropriate, and that the CSE's classification of the student neither denied the student a FAPE nor contribute to a denial of FAPE in any way.

5. 12:1+4 Placement and Management Needs

Next, the parents claim that the IHO's determination that a 12:1+4 special class placement was appropriate for the student was erroneous and that the student required a 6:1+1 class due to her "highly intensive management needs." The district asserts that the IHO correctly determined that the 12:1+4 placement was an appropriate placement for the student for the 2018-19 school year.

State regulations indicate that the maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction (see 8 NYCRR 200.6[h][4][ii][a]).

State regulation also provides that the maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students. In addition to the teacher, the staff/student ratio shall be one staff person to

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requirements imposed by Congress and the United States Department of Education upon the State, which require annual reports of [t]he number and percentage of children with disabilities, by race, ethnicity, limited English proficiency status, gender, and disability category, who fall in over a dozen other subcategories (20 U.S.C. § 1418[a]; 34 CFR 300.641). Although it does not bind the CSE in its responsibility to provide individualized services in accordance with the student's unique needs, for reporting requirement purposes

> [i]f a child with a disability has more than one disability, the SEA must report that child in accordance with the following procedure:
>
> (1) If a child has only two disabilities and those disabilities are deafness and blindness, and the child is not reported as having a developmental delay, that child must be reported under the category “deaf-blindness.”
>
> (2) A child who has more than one disability and is not reported as having deaf-blindness or as having a developmental delay must be reported under the category "multiple disabilities"

(34 CFR § 300.641[d]). LEAs must, in turn, annually submit this information to the State though its SEDCAR system (see, e.g., Verification Reports: School Age Students by Disability and Race/Ethnicity" available at http://www.p12.nysed.gov/sedcar/forms/vr/1819/pdf/vr3.pdf; see also Special Education Data Collection, Analysis & Reporting available at http://www.p12.nysed.gov/sedcar/data.htm).

three students. The additional staff may be teachers, supplementary school personnel and/or related service providers (see 8 NYCRR 200.6[h][4][iii]).

Management needs, in turn, are defined by State regulations as "the nature of and degree to which environmental modifications and human material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social and physical development (8 NYCRR 200.1[ww][3][i][d]).

Here, a discussion of the student's educational needs overall and her management needs in particular is necessary to determine if the level of support provided to the student in a 12:1+4 classroom was appropriate to address her needs overall, including her demonstrably intensive management needs.

According to the student's March 19, 2018 IEP, the CSE considered a February 21, 2017 psychoeducational evaluation report; a January 25, 2018 classroom observation report,[16] a February 6, 2018 social history update; and a March 13, 2018 recommended IEP from iHOPE for the 2018-19 school year (Dist. Ex. 8 at p. 1; see Dist. Exs. 2; 3; 4).[17]

The December 2017 observation of the student was conducted by a district school psychologist during an occupational therapy session at iHOPE (Tr. pp. 341-43; Dist. Ex. 2 at p. 1). According to her January 25, 2018 observation report, when the psychologist entered the classroom the student was seated in her wheelchair with an adult staff member to her right and an occupational therapist directly in front of her (Dist. Ex. 2 at p. 1). The psychologist noted that throughout the observation the student demonstrated "repetitive range of movements with her hands" and impressed as "internally distracted" and required refocusing and redirection (Dist. Ex. 2 at p. 1). The student made several attempts to bite herself, sometimes coupled with hitting herself in the head, and the psychologist noted that this appeared to happen when the student was frustrated and agitated (Dist. Ex. 2 at p. 1). The student also hummed the same melody throughout the session (Dist. Ex. 2 at p. 1). According to the psychologist, when asked by the occupational therapist to point to a specific color using her dynamic display communication device, the student first pointed to the occupational therapist instead, then hit herself on the forehead and bit her own hand (Dist. Ex. 2 at p. 1). Subsequently, with hand over hand assistance, the student was able to identify the color on the board (Dist. Ex. 2 at p. 1). The student "was noted to drool quite a bit throughout the session" and required the paraprofessional to wipe her mouth (Dist. Ex. 2 at p. 1). When the student was asked to point to the color again, she vocalized and approximated the name of the color (Dist. Ex. 2 at pp. 1-2). The psychologist reported that the next activity involved matching colors, putting putty in a toy pig's mouth, and pushing down on the pig multiple times

[16] While the classroom observation is dated December 20, 2017, the report is dated January 25, 2018 (Dist. Ex. 2 at pp. 1-2). The IEP incorrectly lists the date of the observation (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 8 at p. 1). Sections of the observation were incorporated in to the March 2018 IEP (compare Dist. Ex. 2 at pp. 1-2, with Dist. Ex. 8 at p. 1).

[17] Although the February 2017 psychoeducational evaluation is not a part of the hearing record, the March 2018 IEP references some of the evaluation results; notably, that the scored in the low range on measures of adaptive behavior, communication, daily living skills, and socialization (Dist. Ex. 8 at p. 1).

(Dist. Ex. 2 at pp. 1-2). She noted that the student responded with a close approximation of "'yea'" when the occupational therapist asked her if she thought she was going to win the game (Dist. Ex. 2 at pp. 1-2). According to the psychologist, the student required hand over hand assistance when navigating between colors on the board and bit herself when frustrated (Dist. Ex. 2 at p. 2). The psychologist commented that the student appeared to "become tired as evidenced by her posturing and slowing down her responses" (Dist. Ex. 2 at p. 2). The student continued with the matching activity but had difficulty pushing down on the pig four times, as required, and needed hand over hand assistance to complete the task (Dist. Ex. 2 at p. 2). However, the psychologist noted that it was "clear that [the student] made the effort" (Dist. Ex. 2 at p. 2). Next, the occupational therapist turned off the student's communication device and asked the student to turn it back on, which she did and then approximated "'all done'" and "did a high five" (Dist. Ex. 2 at p. 2). With step-by-step directions and assistance, the student was able to take off her goggles and put them in her zipped case (Dist. Ex. 2 at p. 2). The psychologist indicated that the occupational therapist then asked the student to brush her hair ten times each in the front, back, and sides (Dist. Ex. 2 at p. 2). The psychologist opined that the student was "clearly familiar" with the procedure but noted that it was a difficult task for the student and that she "went through the motions," but required hand over hand assistance to brush her hair (Dist. Ex. 2 at p. 2). The psychologist recalled that the occupational therapist reported the student had made improvements with regard to hair brushing "and self-injurious behaviors" and stated that the student was a hard worker (Dist. Ex. 2 at p. 2). According to the psychologist, during the observation, the student demonstrated a low frustration tolerance, which resulted in self-injurious behaviors; the behaviors were consistent throughout the OT session (Dist. Ex. 2 at p. 2). The student responded to verbal and physical redirection and was observed to speak using simple one to two-word sentences (Dist. Ex. 2 at p. 2). The psychologist noted that the student's speech intelligibility was compromised, and she lacked verbal acuity (Dist. Ex. 2 at p. 2). However, she also noted that the student was able to vocalize words that were clear approximations of the words she was communicating (Dist. Ex. 2 at p. 2). Based on her observation, the psychologist concluded that the student presented with severely compromised social communication skills and that she had a tendency to engage in repetitive behaviors including self-injury and humming (Dist. Ex. 2 at p. 2). She also noted that the student was able to understand simple statements and followed one-step directions (Dist. Ex. 2 at p. 2).

On February 6, 2018, a district social worker conducted an updated social history in anticipation of the student's annual review (Dist. Ex. 3 at p. 1). As part of the update an interview was conducted in Spanish with both of the student's parents (Dist. Ex. 3 at p. 1). The resultant report highlighted background information on the student, the parents' view of the student's current program, the student's medical history, the student's family history, and a discussion of the parents' due process rights (Dist. Ex. 3 at p. 1).

The social worker indicated that the student was classified as a student with multiple disabilities and attended a 12:1+4 special class at iHOPE where she received speech-language, occupational, and physical therapies as well as vision education services (Dist. Ex. 3 at p. 1).[18] In addition, the student was provided with health and transportation paraprofessionals (Dist. Ex. 3 at p. 1). Additional background information recorded by the social worker indicated that the student had cerebral palsy, global developmental delays, and a visual impairment (Dist. Ex. 3 at p. 1). Due

[18] The student attended a 6:1+1 special class for the 2017-18 school year (Tr. p. 148; Dist. Ex. 4 at p. 43).

to hydrocephaly the student also had a shunt (Dist. Ex. 3 at p. 1). The student was non-verbal and non-ambulatory and was dependent on adults for all activities of daily living (Dist. Ex. 3 at p. 1).

According to the social worker, both parents reported that they were satisfied with the student's then-current academic program and stated that they felt the student had made "a great deal of progress" at iHOPE (Dist. Ex. 3 at p. 1). As noted by the district social worker, the parents opined that the student had made more progress at iHOPE than she did in all of the previous schools she attended (Dist. Ex. 3 at p. 1) The parents reported that through the use of an augmentative and alternative communication (AAC) device the student was able to identify letters of the alphabet, numbers, and colors (Dist. Ex. 3 at p. 1).

The social worker noted that a February 2017 social history and the student's July 2017 IEP reflected concerns regarding the student's behavior including her tendency to engage in self-injurious behaviors, hit others, throw food on the floor, and refuse to follow school rules (Dist. Ex. 3 at p. 1). The social worker reported that both parents felt that the descriptions of the student's behavior were inaccurate (Dist. Ex. 3 at p. 1). The parents explained that due to problems with her hips the student became uncomfortable when she had to sit for extended periods of time, and when uncomfortable the student became irritable and would moan and make other noises (Dist. Ex. 3 at p. 1). However, the parents denied that the student ever hit anyone or threw food on the floor (Dist. Ex. 3 at p. 1). The social worker reported that the parents were pleased that, in order to address the student's pain, the school was placing the student in a prone stander (Dist. Ex. 3 at pp. 1-2). In addition, they indicated that the physical therapist made it a point to adjust the student's seating position within her wheelchair throughout the day to relieve the student's pain (Dist. Ex. 3 at p. 2).

With regard to the student's medical history, the social worker noted that the student had a long and complicated medical history that included premature birth, a brain hemorrhage that resulted in brain damage, and an eventual diagnosis of cerebral palsy (Dist. Ex. 3 at p. 2). According to parent report, when the student was 15 days-old she experienced poor circulation on the right side of her body and had to have three fingers amputated, as well as the tips of two other fingers (Dist. Ex. 3 at p. 2). Still, the parents indicated that the student had better developed muscle tone on the right side her of body (Dist. Ex. 3 at p. 2). The social worker stated that due to poor circulation the student had to have surgery on both hips and that she returned to the hospital every two weeks for follow-up and physical therapy (Dist. Ex. 3 at p. 2). The student did not have any dietary restrictions; however, her intake of meat and dairy products was limited due to chronic constipation (Dist. Ex. 3 at p. 2). The social worker noted in the report that she had provided the parents with a physical examination report form to be completed by the student's physician and returned to the CSE (Dist. Ex. 3 at p. 2). The social worker commented that the student was seen by a general pediatrician, a neurologist, and an endocrinologist (Dist. Ex. 3 at p. 2).

The social worker reported that she discussed due process and parental rights with the student's parents and that they were provided with the opportunity to ask questions about the evaluation process (Dist. Ex. 3 at p. 2). She noted that the parents were provided with a Spanish language copy of the Family Guide to Special Education for School Age Children (Dist. Ex. 3 at p. 2).

The IEP developed by the district at the March 2018 CSE meeting summarized the student's abilities and needs as described in the March 2018 iHOPE IEP and reported by her iHOPE teachers and therapists at the CSE meeting (compare Dist. Ex. 4 at pp. 1-23, with Dist. Ex. 8 at pp. 1-3).[19]

With respect to the student's academic achievement, functional performance, and learning characteristics, the IEP indicated that the student was able to approximate spoken English, understand simple statements, and followed one-step directions (Dist. Ex. 8 at p. 1; see Dist. Ex. 2 at pp. 1-2). The IEP noted that the student had made progress toward her academic goals throughout the past year and in class she greeted classmates, communicated her feelings, and used her "high-tech communication system" to answer questions about the day of the week, weather, and attendance (compare Dist. Ex. 8 at p. 1, with Dist. Ex. 4 at p. 2). The student was able to raise her hand or use her communication device to volunteer for tasks during morning and afternoon meetings (compare Dist. Ex. 8 at p. 1, with Dist. Ex. 4 at p. 2). With respect to literacy skills, the student was able to identify approximately 14 sight words in context, decode consonant vowel consonant (CVC) words, and identify words by their initial letter (compare Dist. Ex. 8 at p. 1, with Dist. Ex. 4 at p. 2). In addition, the student was able to answer factual "wh" questions and was working on appropriate text orientation and reading repeated lines of words from text (compare Dist. Ex. 8 at p. 1, with Dist. Ex. 4 at p. 2). With respect to mathematics, the student was able to rote count to ten and identify numbers one to fifteen, and "about to count" to ten using one-to-one correspondence (compare Dist. Ex. 8 at p. 1, with Dist. Ex. 4 at p. 2). She was also able to classify objects by size, and extend "ABAB" and "AAB" patterns (compare Dist. Ex. 8 at p. 1, with Dist. Ex. 4 at p. 3).

According to the March 2018 IEP, the student presented with significant delays in the areas of attention, verbal expression, reasoning skills, age appropriate pragmatic skills, auditory comprehension and/or discrimination as well as feeding and oral motor skills (compare Dist. Ex. 8 at pp. 1-2, with Dist. Ex. 4 at p. 3). The student demonstrated an understanding of photographs, picture symbols, and AAC device icons that represented objects, common actions, people, and situations (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 4 at p. 4). The student responded to greetings with verbal output (hi/bye-bye) or with her device when initiated by others (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 4 at p. 4). The IEP noted that within routines, the student followed simple directions and because she tended "to respond before hearing the entire question," the student inconsistently responded to yes/no questions (Dist. Ex. 8 at p. 2). The student was able to identify basic body parts (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 4 at p. 5). According to the March 2018 IEP, the student displayed pleasure through smiling, vocalizing, laughing and asking for "more" while expressing displeasure by "banging, yelling, throwing and/or biting" (Dist. Ex. 8 at p. 2; see Dist. Ex. 4 at p. 1).

With respect to "visual education," the March 2018 IEP indicated that the student presented with "significant delays in the areas of response to light, visual fixation, visual pursuit, visual perception, and social gaze" (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 4 at p. 12). The student preferred toys to faces and visually fixated on a toy but lost track when the toy was moved;

[19] The student's special education teacher, speech-language therapist, occupational and physical therapists, vision education teacher, and assistive technology teacher participated in the March 2018 CSE meeting by telephone (Dist. Ex. 9 at p. 1; see Dist. Ex. 4 at p. 44).

however, she was unable to fixate on faces of people when slightly moving or still (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 4 at p. 11).

The March 2018 IEP indicated that the student's parents were pleased with her progress, while iHOPE staff reported that the student required frequent repetition of information and reminders of questions and directions presented to her (Dist. Ex. 8 at p. 2).

The March 2018 IEP indicated that according to iHOPE staff the student had a "ready smile," loved to sing to others and be sung to, enjoyed interacting with adults, made eye contact and showed affection to preferred adults, and was increasingly able to wait her turn; however, she also banged on her teeth or head with her fist when frustrated, banged on or threw materials, and vocally complained or engaged in aggressive behavior such as grabbing, pinching or biting (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 4 at p. 14). In addition, the student was generally able to be calmed with verbal reminders, positive behavioral reinforcements, and self-soothed by singing, humming, and engaging in self-stimulatory behaviors such as tapping her fingers against her mouth and chin (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 4 at pp. 3, 14). The student demonstrated an increased interest in her peers and social interactions (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 4 at p. 14) and reportedly took her mother's hand to guide her to the television and requested shows that she wanted to watch (Dist. Ex. 8 at p. 2). According to the March 2018 IEP, iHOPE staff reported that the student would benefit from learning how to protest using language with her communication device (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 4 at p. 15).

With respect to the student's physical development, the March 2018 IEP reflected that the student's medical history was updated and reviewed as per the February 2018 social history update (Dist. Ex. 8 at p. 2; see also Dist. Ex. 3 at pp. 1-3). The IEP noted that due to the student's oral motor delays she presented with speech sound disorder, feeding challenges, an atypical biting pattern related to grading, and weakness in her lips, tongue, and jaw (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 4 at p. 8). The student reportedly pocketed food, tolerated thin liquids, consumed pureed texture, as well as a variety of solids (compare Dist. Ex. 8 at pp. 2-3, with Dist. Ex. 4 at p. 8). The IEP indicated that the student required monitoring during mealtimes to watch for appropriate bite size, clearing, and pacing (compare Dist. Ex. 8 at pp. 2-3, with Dist. Ex. 4 at p. 24).

With respect to PT, the March 2018 IEP stated that the student used a manual tilt-in-space wheelchair for functional mobility, was "maximally dependent in all domains of mobility" and was unable to propel her wheelchair by herself (compare Dist. Ex. 8 at p. 3, with Dist. Ex. 4 at p. 15). The student required a two-person assist for all transfers (compare Dist. Ex. 8 at p. 3, with Dist. Ex. 4 at p. 4). According to the IEP, the student demonstrated some behavior issues during therapy in that she frustrated quickly and did not like to be touched for too long (compare Dist. Ex. 8 at p. 3, with Dist. Ex. 4 at p. 21). With respect to OT, the IEP noted that the student's fine motor skills were impacted by amputations on her right hand resulting in her handling objects with difficulty and requiring modifications to complete tasks (compare Dist. Ex. 8 at p. 2, with Dist. Ex. 4 at pp. 19-20). The student reached with her right hand smoothly, utilizing a variety of grasp patterns; but reached with her left hand with increased effort and decreased accuracy (compare Dist. Ex. 8 at p. 3, with Dist. Ex. 4 at p. 19). The student demonstrated difficulty manipulating small, flat objects (compare Dist. Ex. 8 at p. 3, with Dist. Ex. 4 at p. 20). The IEP stated that the student continued to require PT and OT to address her motor needs including decreased strength,

coordination, gross motor abilities, functional reaching skills, ADLs, executive cognitive functioning skills, and postural stability (Dist. Ex. 8 at p. 3).

As discussed above, the parents argue that the student requires a 6:1+1 special class which is defined by regulation as the class size and student-teacher ratio that is most appropriate for students with "highly intensive management needs." In support of their argument, the parents rely on the testimony of district witnesses at the impartial hearing who variously characterized the student's management needs as "intensive" and "highly intensive" (see Tr. pp. 266-72, 407, 467-69), and the iHOPE March 2018 IEP which similarly described the student as "presenting with highly intensive management needs requiring a high degree of individualized attention and intervention to maintain her physical well-being throughout the day" (Dist. Ex. 4 at 23).[20] However, the parents' reductive framing of the special class placement issue urges an exclusive focus on management needs that does not resolve the question of whether the recommended 12:1+4 special class was appropriate for the student in light of the full constellation of her educational needs and multiple diagnoses. Rather, the salient issue is whether a 12:1+4 special class offers appropriate support to address, as discussed above in detail, the student's demonstrated significant global developmental delays, visual impairment, social/emotional weaknesses, and physical/motor needs particularly when viewed in conjunction with the other elements of the student's special education programing as recommended in the March 2018 IEP.

To address the student's needs, the March 2018 CSE recommended a 12-month program, consisting of a 12:1+4 special class in a specialized school with three 30-minute sessions per week of individual OT; five 30-minute sessions per week of individual PT; four 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of group speech-language therapy; two 30-minute sessions per week of individual vision education services; and one 60-minute session per month of group parent counseling and training (Dist. Ex. 8 at pp. 1, 11-12). In addition, the CSE recommended a 1:1 full-time health paraprofessional for the student at school as well as a 1:1 full-time transportation paraprofessional; daily group service for support of the student's use of her assistive technology device; and adaptive seating (id. at p. 11). The CSE recommended alternate assessment and specialized transportation including a lift bus and limited travel time (id. at pp. 13-14).

With respect to management needs, the March 2018 CSE recommended repetition; verbal cues to remain on task; visual aids; minimal distractions; positive behavior supports including verbal praise and tangible rewards; communication device; and extended response time to address the student's needs (compare Dist. Ex. 8 at p. 3, with Dist. Ex. 4 at p. 24).

With respect to the student's needs relating to special factors, the IEP indicated that the student required a particular device to address her communication needs, and, in addition required an assistive technology device and/or service and that the device be used in the student's home as well (Dist. Ex. 8 at pp. 3-4).

[20] The district's March 2018 IEP also characterized the student's management needs as "highly intensive" and noted that "she require[d] a[] high degree of individualized attention and intervention throughout the school day" (Dist. Ex. 8 at p. 15).

The March 2018 CSE adopted the annual goals and corresponding short-term objectives and/or benchmarks from the March 2018 iHOPE IEP (compare Dist. Ex. 8 at pp. 4-10, with Dist. Ex. 4 at pp. 27-27). The goals targeted the student's needs with respect to literacy, mathematics, vision, speech-language development, communication, eating, drinking, oral motor skills, fine motor skills, gross motor skills, mobility, toileting, ADLs, class participation, and assistive technology (Dist. Ex. 8 at pp. 4-9). The district's recommended IEP also included two additional annual goals related to the health paraprofessional monitoring the student and consulting with the school nurse, therapists, and special education teacher regarding the student's health issues and ADL needs (id. at pp. 10). The goals included a variety of measurability criteria as well as methods to measure progress such as teacher made materials, switch devices, discrete trials with reinforcement, session notes, clinical observation, writing samples, data and AAC device (id. at pp. 4-10).

The district school psychologist relied upon, in part, by the parents to establish that the student's management needs were "highly intensive" also testified that the 12:1+4 class was appropriate for the student based on her level of need and " the cluster of different areas [for which] she require[d] a multidisciplinary approach" (Tr. at pp. 351-53, 454-58). The school psychologist also testified that "the [12:1+4 class] [wa]s staffed with four paraprofessionals that [we]re trained to work . . . collaboratively not only with the teacher, but with the related service providers" to both generalize the skills being taught and to provide repetition of those skills, noting that the student "would need a lot of repetition" (id.).

The unit teacher from the assigned specialized school reviewed the student's March 2018 IEP and testified that her needs identified therein could be addressed at the assigned school (Tr. p 455). Specifically, the unit teacher testified that the student "presents as a student very similar to the students that we service . . . many of our students are nonverbal, and . . . nonambulatory . . . [and] use AAC devices" (Tr. p 56). She affirmed that the assigned school enrolled students with multiple disabilities including those with cerebral palsy, visual impairment and the need for adaptive seating (Tr. p 452). Although she agreed that the student's management needs were "highly intensive" (Tr. at 469), she also testified that the 12:1+4 special class program could address the student's needs for repetition, verbal cues to remain on task, visual aids, a room with minimal distractions, positive behavior support and extended response times, and that the school staff were "very adept at adapting our curriculum" to meet the needs of students with deficits similar to that of the student (Tr. p. 456). In addition, she described the availability of related services providers at the school to implement the related services as mandated by the March 2018 IEP (Tr. p. 447). The unit teacher also explained that the 12:1+4 class program focused on ADL learning periods, small group and one-to-one instruction and working on IEP goals (Tr. pp. 453-454). She testified that the 12:1+4 class program utilized a curriculum created specifically for students with disabilities that could be further adapted by the classroom teachers to allow for the use of tactile objects, less words or a lower level text as needed (Tr. at 447-448). She stated that the paraprofessionals in a 12:1+4 special class assisted with ADLs, including dressing, feeding and toileting, helped the students access the curriculum, and also aided students with transitions and navigating around the classroom and building (Tr. at 46). The unit teacher stated that she had observed students enrolled at the assigned school with needs similar to the student make progress in the curriculum, and she believed that the student similarly would obtain educational benefit if enrolled in a 12:1+4 special class in a specialized school (id.).

In the present case, the student is non-verbal, non-ambulatory, and dependent on adults for all activities of daily living (Dist. Ex. 4 at p. 1, 23). Among the recommended annual goals for the student are goals targeting her ability to improve jaw stabilization for eating and drinking, increase oral motor awareness for secretion management and expansion of speech sound production, develop a functional communication system, perform wheelchair transfers with assistance, and improve self-care skills (tooth brushing, dressing, and feeding) to increase functional independence (Dist. Ex. 8 at pp – 4-10). The parents' oversimplified argument that the student should be placed in a 6:1+1 special class due to "highly intensive" needs overlooks that the highly intensive needs they speak of stem from the fact that the student has severe multiple disabilities, has needs for programming in the areas habilitation and treatment, needs a staff/student ratio of at least one staff person to three students, and requires services from additional staff that are teachers, supplementary school personnel, and related service providers. Thus the 12:1+4 special class ratio for students with severe multiple disabilities, called for in State regulation, is precisely the type of programing that will address this student's unique needs (see NYCRR 200.6 [h][4][iii]), notwithstanding the fact that at times the professionals working with, observing, and evaluating the student may happen to describe those needs with a moniker of "highly intensive." It is no mistake that the adult-to-student ratio required in a 6:1+1 special class and a 12:1 +4 special class is the same ratio, albeit with a greater variety in the type of school personnel typically found working with a student in the 12:1+4 special class setting—very type of providers that this student requires and are not found in the definition of a 6:1+1 special class.

Based upon the foregoing, the hearing record supports the IHO's finding that the recommended 12-month 12:1+4 special class placement in a specialized school—in conjunction with the services of a full-time 1:1 health paraprofessional, an additional 1:1 paraprofessional for transportation, an AAC device, resources to address the student's management needs, and related services of OT, PT, speech-language therapy and vision education services—was appropriate and reasonably calculated to enable the student to receive educational benefits and make appropriate progress in light of her circumstances for the 2018-19 school year. Therefore, I decline to overturn the IHO's finding with respect to the recommended special class placement, and find that the parents' argument to the contrary is without merit.

6. Related Services

Next, the parents assert the IHO erroneously found that the related services recommended in the March 2018 IEP were appropriate. A review of the hearing record supports the IHO's finding.

According to the March 2018 IEP, the March 2018 CSE recommended three 30-minute sessions per week of individual OT; five 30-minute sessions per week of individual PT; four 30-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of group speech-language therapy; two 30-minute sessions per week of individual vision education services; and one 60-minute session per month of group parent counseling and training (Dist. Ex. 8 at p. 11). The iHOPE March 2018 IEP recommendations included 60-minute related service sessions for all of the student's related services (Dist. Ex. 4 at p. 41).

The district psychologist, who conducted the January 2018 classroom observation of the student at iHOPE during an OT session, testified that she "critically documented" that the student

became tired during the session; and she was unable to recall how long the session was, but she did not believe it was 60-minutes in duration (Tr. pp. 342-44; Dist. Ex. 2 at pp. 1-2). In addition, the psychologist testified that the 30-minute duration recommendation for OT was sufficient for the student given her level of functioning and sustainability (Tr. p. 356). The psychologist reported that the student tired quickly during the session that she observed, and exhibited frustration (Tr. pp. 342-44, 356, 417-18; see Dist. Ex. 2 at pp. 1-2). The psychologist testified that she had worked with "this population for a long time," and knew "that when they're fatigued, that's it. They shut down. And it's exhausting for them" (Tr. p. 344). In addition, the psychologist noted that "the amount of mental energy that's required to do some of the activities that we take for granted for these kids, they're overwhelming" (Tr. p. 344). During the observation, described above, the psychologist noted that even with hand over hand assistance, the student became "tired as evidenced by her posturing and [the] slowing down "of her responses Dist. Ex. 2 at p. 2). Further, the psychologist noted that three 30-minute sessions of OT were sufficient when considering the student's attention, and the benefit she would derive "without this being an uncomfortable experience for her" (Tr. pp. 356-57). She further noted that some of the tasks being done during therapy could be reinforced and generalized in the classroom setting (Tr. pp. 356-57). The psychologist testified that there was a discussion at the March 2018 CSE meeting regarding 30-minute related service sessions and 60-minute related service sessions, and that she did not recall the specific discussions; but opined "60 minutes would be exhaustive" and based on her observation and her review of the student's "historical data" 30-minute sessions were appropriate (Tr. pp. 363-64, 415-17).

The iBRAIN special education director testified that all of the student's related services were 60-minutes in duration because the student required "a lot of time" to transition safely from her wheelchair (Tr. p. 534). The director noted that for most of the student's services, including speech, she was taken out of her wheelchair for part of the one-hour session (Tr. p. 534; see Tr. pp. 602-04). The director explained that taking the student in and out of her wheelchair required a two-person transfer as well as time to get the student safely positioned (Tr. p. 535). In addition, removing and putting on the student's "ankle foot orthoses" took time (Tr. p. 535). The director also reported that it also took time for the student to respond to questions because she had to process the question and motor plan to activate her communication device (Tr. p. 535). In addition, the director indicated that the student's therapy sessions were 60-minutes long because it was important for students with a severe disability to get additional repetitions and practices in while working with the therapist's assistance (Tr. pp. 536-37). However, as noted by the IHO in her decision (IHO Decision at p. 15), the iBRAIN IEP for the 2018-19 school year described the student during her physical therapy sessions as demonstrating "behavior issues" and "get[ting] frustrated very quickly . . . does not like to be touched too long" (Parent Ex. E at 21).

The district school psychologist testified that during her observation of the student at iHOPE, the student was not removed from her wheelchair during therapy (Tr. p. 357). The district school psychologist recalled that there was a discussion at the March 2018 CSE meeting regarding the student's need to transition into and out of various related services and when therapy began (Tr. p. 421). She testified that therapy began "the moment therapy actually begins, and not while the child is transitioning" (Tr. p. 421). In contrast, the iBRAIN special education director testified that the student's 60-minute therapy sessions included transition time including transitioning the

student from her wheelchair to a therapy mat or wherever she was going to be receiving therapy (Tr. p. 602).

Based on the forgoing, there is insufficient evidence to support the conclusion that the student required 60-minute therapy sessions in order to receive a FAPE and, therefore, no basis in the hearing record to disturb the IHO's findings that the March 2018 CSE related services recommendation for 30-minute sessions was appropriate in light of the student's needs and her documented endurance and frustration issues during therapy sessions. Accordingly, I decline to reverse the IHO's finding with respect to the related services recommended in the March 2018 IEP.

7. Special Transportation

In their answer and cross appeal, the parents assert that the CSE improperly delegated its legal responsibilities to develop and recommend appropriate transportation related services to "non-CSE entities" and asserts, without indication as to how the delegation resulted in any deprivation of educational benefits to the student in this matter, that this constituted a denial of FAPE.

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]).

To the extent that the parents' claim amounts to an argument that the district's adherence to policy is a systemic violation, as described above, I note again that an impartial hearing under the IDEA is limited to issues relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the student.

In any event, the March 2018 IEP details the student's recommended special transportation provisions that contained sufficient specificity to address the student's special transportation requirements in light of her unique needs. For example, the IEP recommended a full-time 1:1 paraprofessional for transportation purposes in addition to the 1:1 health paraprofessional recommended for the student during school (Dist. Ex. 8 at p.11). Elsewhere on the IEP the CSE recommended special transportation for the student in the form of adult supervision (the paraprofessional); vehicle and/or equipment needs (a lift bus); and other accommodations (limited travel time, not more than 90 minutes, 2 seats-large, and a wheelchair-regular size) (id. at pp. 13-14). There is no defect alleged by the parent with respect to the special transportation services described in the student's IEP that requires a finding a denial of a FAPE to the student. Accordingly, I decline to find that the IHO erred in failing to find a violation with respect to the CSE's special transportation recommendation.

VII. Conclusion

As set forth above, 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 (Carter, 510 U.S. 7 [1993]; Burlington, 471 U.S. at 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). Here, a review of the impartial hearing record, the IHO's decision, and the parties' arguments on appeal supports a finding that the IHO correctly determined that the March 2018 IEP offered the student a FAPE for the 2018-19 school year. As there is no finding that that the services offered by the district were inadequate or inappropriate, there is no basis upon which the IHO could predicate relief in favor of the parent. Accordingly, I find the district is not required to reimburse the parents for the expenditures for private educational services obtained by the parents. Therefore, the district's appeal of the IHO's order which directed the district to fund the student's transportation costs and to fund "related services" at the district's "prevailing rate for the frequency and duration of services as recommended in the March 2018 IEP" is sustained and the IHO's decision is modified by reversing that portion that awarded relief.

I have considered the parties' remaining contentions, including the parents' claim that the unilateral placement at iBRAIN was appropriate and equitable considerations favored reimbursement and find that I need not reach them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated September 21, 2019, is modified by reversing that portion which ordered that transportation costs to be paid by the district; and

IT IS FURTHER ORDERED that the IHO's decision dated September 21, 2019, is modified by reversing that portion which ordered related services are to be funded by the district as recommended in the March 2018 IEP.

Dated: **Albany, New York**
December 4, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER