The University of the State of New York

The State Education Department
State Review Officer
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No. 19-117

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 Cynthia Sheps, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondent, by John Henry Olthoff, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to the student for the 2018-19 school year. Respondents (the parents) cross-appeal from the portion of the IHO's decision that found that the student's unilateral placement at the International Institute for the Brain (iBrain) was not appropriate and that equities did not favor the parents. 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

According to the hearing record the student sustained a brain injury at birth resulting in hypoxic damage to the basal ganglia and thalamus (Parent Exs. C at p. 1; D at p. 1).[1] He has been

[1] The parties entered exhibits during both pendency hearings and during the impartial hearing. However, the IHO did not resume the numbering she had used from the first pendency hearing date, resulting in three exhibits entered into the hearing record as Parent Exhibits A-C, two exhibits entered into the hearing record as Parent Exhibits D-

diagnosed as having numerous medical conditions including acquired brain injury (seizure disorder), spastic quadriplegia cerebral palsy, dystonia, microcephaly, bilateral congenital dislocated hips, bilateral congenital foot deformities, scoliosis, global developmental delays, and a cortical visual impairment, among others (Parent Ex. C at pp. 1, 17). As a result of the student's multiple disabilities the student is g-tube dependent, non-verbal, and non-ambulatory (Parent Exs. C at p. 1; T at pp. 1, 15; U at pp. 1, 14). Additionally, due to these significant medical conditions, the student has severe impairments in cognitive abilities, language, memory, attention, reasoning, abstract thinking, judgment, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, information processing, and speech (Parent Exs. T at p. 15; U at p. 14).

For the student's 2016-17 and 2017-18 school years the student attended the International Academy of Hope (iHope), a nonpublic school for students with traumatic brain injury (TBI) (Tr. p. 511-12; Parent Exs. D at p. 1; G at p. 1; H at p.1).

Relevant to the 2018-19 school year, the CSE chairperson reported that she had a meeting in January 2018 with her leadership team to begin planning for the student's IEP for the 2018-19 school year (Tr. p. 179). The CSE chairperson further reported that in order to have parents and staff fully attend CSE meetings, the CSE made an effort to reach out to the student's school because there was a history of parents of students at the school not attending CSE meetings (Tr. pp. 179-80).

By meeting notice dated February 27, 2018, the district informed the parents that it scheduled a CSE meeting to take place on March 27, 2018 at 1:00 p.m. to review the results of the student's reevaluation, determine the student's continued eligibility for special education services, and to develop an IEP (Dist. Ex. 3 at p. 1).[2] On March 15, 2018 the district conducted a social history update and a level I vocational interview with the student's father (District Exs. 4; 6).

On March 27, 2018, an IHO issued a decision concerning a due process complaint notice filed by the parents regarding the 2017-18 school year (Parent Ex. B). In the March 2018 IHO decision, the IHO indicated that the district conceded that it failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year and ordered that the district fund the cost of the student's tuition and related services at iHope for the 2017-18 school year (id. at pp. 4, 7). The IHO also ordered that the student's IEP be modified to reflect the student's classification

F, and two exhibits entered into the hearing record as District Exhibits 1-3, 6. As a result, to avoid any confusion, reference to the exhibits entered during the first pendency hearing will be referred to using the date of the IHO's first pendency decision (October 17, 2018 Pendency Parent Exs. A-C; October 17, 2018 Pendency District Ex. 6). Reference to the exhibits entered during the second pendency hearing will be referred to using the date of the IHO's second pendency decision (December 11, 2018 Pendency Parent Exs. A-F; December 11, 2018 Pendency District Exs. 1-3). The remaining exhibits will be referred to without reference to any dates (Parent Exs. A-J; L-V; Dist. Exs. 1-18).

[2] It is unclear whether the March 2018 meeting took place as the district argues it did not take place but the parent testified he attended the meeting (Tr. pp. 218, 266, 522; Dist. Ex. 15 at pp. 11-12).

as a student with a TBI and the student's program as a 6:1+1 special class at a nonpublic school (id. at p. 7).

According to the district's computerized Special Education Student Information System (SESIS) log, on April 11, 2018, the district emailed the parents a meeting notice informing them of an April 17, 2018 meeting to reconvene to amend the student's IEP to reflect the March 2018 IHO Decision (Dist. Ex. 15 at p. 9).[3] The SESIS log also showed that on April 13, 2018, the parents responded via email to the district and requested an alternate time as they would not be available for the April 17, 2018 meeting (id. at p. 8). On April 17, 2018, the district emailed the parents asking if they could participate via telephone because the meeting was intended to implement the March 2018 IHO Decision (id. at p. 7). The district also indicated that if the parents could not participate, they would need to reschedule the meeting (id.).

By letter dated April 17, 2018, the parents notified the district that they were unable to attend the April 17, 2018 meeting scheduled for that day because the family was traveling out of the country (Parent Ex. N at p. 1). Further, the parent requested that the CSE reconvene a full committee meeting that included the district school physician as well as the student's providers from his then-current program at iHope (id.). The parents also indicated their availability to meet for a CSE meeting any day after 3:00 p.m. (id.). In addition, the parents indicated that they looked forward to addressing the issues outlined in the recent March 2018 IHO Decision as well as to developing an appropriate and timely IEP for the 2018-19 school year (id.). Lastly, the parents requested that the CSE consider a placement for the student in a nonpublic school and conduct the necessary evaluations for such consideration prior to the CSE convening (id. at p. 2).

By meeting notice dated April 17, 2018, the district rescheduled the CSE meeting to take place on April 26, 2018 at 3:00 p.m. to review the results of the student's reevaluation, determine the student's continued eligibility for special education services, and to develop an IEP (Dist. Ex. 7 at p. 1). According to the SESIS log, on April 26, 2018, the district called the student's mother regarding her attendance for the meeting that day and she advised that she was unaware of the meeting and needed to consult with the student's father and her attorney (Dist. Ex. 15 at p. 5). The district also left messages with the student's father regarding the April 26, 2018 meeting (id.).

On April 27, 2018, the district sent the parents a notice of meeting scheduling a CSE meeting for May 22, 2018 at 3:30 p.m. to review the results of the reevaluation, determine the student's continuing eligibility, and develop an IEP (Dist. Ex. 9).

On April 30, 2018, the district sent a prior written notice to the parents (Dist. Ex. 10 at p. 1). The April 2018 prior written notice indicated that the parents' request to reconvene the CSE meeting for the 2017-18 school year was denied because the meeting was already held on April 26, 2018 but the CSE would grant a "Parent Conference" to review the 2017-18 modified IEP that reflected the March 2018 IHO decision (Tr. pp. 197-98; Dist. Ex. 10 at p. 1). The CSE also granted the parents' request to convene a CSE meeting for the student's 2018-19 school year and proposed that a CSE convene on May 22, 2018 at 3:30 p.m. (Dist. Ex. 10 at p. 1). The prior written notice also granted the parents' request to have the district school physician participate in the May 2018

[3] It appears the district also considered amending the student's IEP without a meeting to reflect the changes ordered in the March 2018 IHO decision (Dist. Ex. 15 at pp. 8, 10-11).

CSE meeting; however, the CSE denied the parents' request that the physician participate in-person (id.). In addition, the CSE granted the parents' requests to include iHope staff in the meeting notice and to include a parent member at the CSE meeting (id. pp. 1-2). However, the CSE did not grant the parents' request to hold the CSE meeting at iHope (id. at p. 2).

By letter to the district dated May 18, 2018, the parents, through their attorneys, advised the district that the May 22, 2018 meeting should not take place because the parents wanted a "Full Committee Meeting" and the meeting notice failed to mandate a district physician "participat[ing] in person" and a parent member (Parent Ex. O at pp. 1-2). The parents further specified that all members needed to appear at the meeting in person and requested that the names of the parent member and school physician be provided in the meeting notice (id. at p. 2). Next, the parents indicated that they were rejecting the proposed "Parent Conference" and wanted a reconvene of the CSE meeting to discuss the 2017-18 IEP as well as to address the student's 2018-19 school year (id.). Further, the parents requested that the district accommodate the family when scheduling the CSE meeting by offering dates and times Monday through Friday after 3:00 p.m. with the exclusion of May 31, 2918 and June 1, 2018 (id.). The parents also requested that the district conduct "any evaluations necessary when considering a non-public school placement" and indicated that the district's Standard Operations Procedure Manual (SOPM) required a psychological assessment and assessment of the student's educational needs in such circumstances (id.). Finally, the parents requested a draft agenda of the IEP meeting in writing at least seven days prior to the CSE convening (id. at p. 3).

On May 22, 2018 a CSE convened to determine the student's continued eligibility for special education services and to recommend a program for 2018-19 school year (Dist. Ex. 12 at p. 22). The CSE was comprised of a special education teacher, a district psychologist who also served as the district representative, and the district physician by telephone (id. at p. 24). Neither the parents nor the student's providers from the private school attended the May 2018 CSE meeting (Dist. Exs. 12 at p. 24). The CSE called the parents and iHope during the CSE meeting; however, the parent indicated that he was not able to participate and the iHope representative did not answer the phone (Dist. Ex. 13 at pp. 1, 3). With respect to the information available to the CSE, the IEP and prior written notice indicated that the CSE considered an IEP for the 2018-19 school year (developed by iHope on March 22, 2018), a January 12, 2018 iHope quarterly progress report, a January 2018 classroom observation, a March 2018 social history, a March 15, 2018 level one vocational interview, and the student's 2017-18 IEP (Dist. Ex. 12 at p . 1; 14 at p. 2). Having found the student eligible for special education services as a student with multiple disabilities, the May 2018 CSE recommended that the student attend a 6:1+1 special class in a specialized school (Dist. Ex. 12 at pp. 18-19, 21-22).[4] The May 2018 CSE also recommended that the student receive related services including three 40-minute sessions of individual occupational therapy (OT) per week , five 40-minute sessions of individual speech-language therapy per week, five 40-minute sessions of individual physical therapy (PT) per week, two 40-minute sessions of individual vision education services per week, two 40-minute sessions of individual assistive technology (AT) services per week, and one 40-minute session per month of individual/group parent counseling and training (id. at pp. 18-19). The May 2018 CSE also recommended supplementary aids and

[4] There is also a reference to a "non-public school" but it appears that this was a typographical error (Dist. Ex. 12 at p. 18).

services/program modifications/accommodations including an individual transportation paraprofessional, a specified augmentative and alternative communication device with software and a wheelchair mount , ongoing training for the assistive technology, a 1:1 paraprofessional, and an "All Day" 1:1 nurse (id. at p. 19).[5]

In a prior written notice to the parents, dated June 17, 2018, the district summarized the May 2018 CSE's special education program recommendations and enclosed a school location letter identifying the particular district public school site to which the district assigned the student to attend for the 2018-19 school year (Dist. Ex. 14).

On June 18, 2018, the parents signed an enrollment contract with iBrain for the student's attendance for the 2018-19 school year (Parent Ex. J at pp. 1-6).

On June 21, 2018, the parents sent the district a letter indicating their intent to unilaterally place the student at iBrain for the 2018-19 school year and to seek public funding for the placement (Parent Ex. P at p. 1). The parents stated that the district did not provide an appropriate program or placement to address the student's educational needs and that they were still requesting that the district schedule an appropriate CSE meeting at a "mutually agreeable date and time to allow for all members of the [CSE] team to participate" (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated July 9, 2018, the parents alleged that the district failed to offer the student a FAPE for the 2018-19 school year (Parent Ex. A at pp. 1-3). Initially, the parents requested that pendency be determined to consist of prospective payment of tuition and expenses, including special transportation, at iBrain based on an unappealed IHO decision (id. at pp. 1-2).

Next, the parents argued that the district failed to develop an appropriate IEP for the student because the district "ignored" a written request for a reconvene of the March 27, 2018 CSE meeting and held the CSE meeting without the parents or "any of the mandated members present" (Parent Ex. A at p. 2). The parents alleged that the district significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the student (id.). More specifically, the parents alleged that the May 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 the district's CSE members "feigned interest" in the independent evaluative information and reports provided by the student's teachers and related service providers at iHope (id.).

With respect to the May 2018 IEP, the parents argued that the student would experience "substantial regression" due to the CSE's unsubstantiated reduction in the student's related services mandates and the student-to-teacher ratio of the recommended class (Parent Ex. A at p. 2). The parents further argued that the May 2019 IEP was not appropriate because it did not indicate the student's disability classification as TBI, did not adequately describe the student's then present

[5] The IEP references an AAC device (Dist. Ex. 12 at p. 19). As noted by district counsel during the hearing, an AAC device is an acronym for an augmentative and alternative communication device (see Tr. p. 380).

levels of performance or management needs, contained annual goals that were not measurable, and lacked an extended school day (id. at p. 3). Next, the parents contended that the district failed to offer an appropriate "program and placement" that would meet the student's "highly intensive management needs" or place the student in his least restrictive environment (LRE) (id.). The parents contended that the May 2018 CSEs program recommendation of a 6:1+1 special class was insufficient to address the student's needs because it was "too large" a ratio to ensure the constant "1:1 support" and "1:1 direct instruction" the student needed to make progress (id.). As relief, the parents requested direct funding of the student's program at iBrain for the 2018-19 extended school year along with transportation costs, including a 1:1 travel aide, and an order for the CSE to reconvene an annual review meeting for the student (id.).

B. Impartial Hearing Officer Decision

A hearing to determine the student's pendency placement was held on August 14, 2018 (Tr. pp. 1-34). The parents asserted that pendency lay in the unappealed IHO decision, dated March 27, 2018, which awarded the parents the cost of the student's tuition at iHope for the 2017-18 school year (see Tr. pp. 28-29; see Parent Exs. A at pp. 1-2; B at p. 8). Further, the parents asserted that the student was currently attending iBrain, which constituted a valid pendency placement because it was substantially similar to iHope (Tr. pp. 20, 28-29). The district argued that "there [wa]s no right to pendency when the Parent removed the student from the Student's pendency placement in order to unilaterally discontinue the services constituting his pendency placement," which the district asserted was at iHope (October 17, 2018 Pendency District Ex. 6 at p. 5). In the alternative, the district argued that iHope and iBrain were not substantially similar (id.).

By interim decision dated October 17, 2018, the IHO determined that iBrain was not the student's pendency placement because iBrain was not materially and substantively similar to iHope (Oct. 17, 2018 Interim IHO Decision at p. 4).[6] Initially, the IHO expressed concern that testimony from the director of special education at iBrain (the iBrain director) indicated iBrain would have a vision services teacher in September 2018 and social worker in August 2018; however, "in the [p]arent's [closing] brief, it is stated that '[u]pon information and belief, iBrain is, in fact, currently staffed with vision education teachers' " (id. at pp. 3-4; see October 17, 2018 Pendency Parent Ex. C at p. 7 n. 6). The IHO noted that the provision of vision services should not be "subject to guessing," particularly when the student was mandated to receive two hours of vision services weekly (id. at p. 4). In addition, the IHO found that testimony from the iBrain director regarding iBrain's teaching philosophy, physical structure, and student composition, lacked sufficient detail to make a meaningful comparison to iHope (Oct. 17, 2018 Interim IHO Decision at p. 4). The IHO also found that the iBrain director's testimony was "conclusory" rather than "factual" (id.). In addition, the IHO noted that the parents failed to disclose a lesson plan or IEP for the student's 2018-19 school year and appended an iHope IEP that was developed for the 2017-18 school year when submitting a brief to the IHO regarding the issue of pendency (id.).

Based on the foregoing, the IHO concluded that iBrain could not constitute the student's pendency placement and denied the parents' request for tuition at iBrain for the 2018-19 school

[6] The IHO cover sheet for the October 17, 2018 IHO interim decision on pendency was not paginated. To avoid confusion, page references to the October 2018 IHO interim decision on pendency rely on the same pagination referenced in the October 2018 IHO interim decision, which excludes the cover sheet.

year (Oct. 17, 2018 Interim IHO Decision at p. 4). Nevertheless, the IHO found that the student was entitled to special education transportation and ordered the district to "provide special transportation accommodations including "limited travel time of 60 minutes, a wheelchair-accessible vehicle, air conditioning, flexible pick-up/drop-off schedule, and a paraprofessional" (id.).

Following the issuance of the October 2018 interim decision, the parents requested that the IHO change the student's pendency placement to reflect that the student should receive the support of a nurse for transportation, indicating that it had been requested in the parents' due process complaint notice (December 11, 2018 Pendency District Ex. 3 at p. 1). The parties then participated in a prehearing conference on November 2, 2018 to schedule hearing dates for the parents' request to re-open the IHO's October 2018 decision on pendency (Tr. pp. 35-44).[7] During the prehearing conference, the IHO agreed to change the student's pendency transportation to include a nurse (Tr. pp. 38-39).

On November 26, 2018, the parties participated in a second prehearing conference to discuss re-opening the IHO's October 2018 interim decision on pendency (Tr. pp. 45-144). The IHO determined that the parents had provided a sufficient basis to reopen the October 2018 pendency decision and allowed the pendency hearing to go forward (Tr. pp. 55-56). In a second interim decision dated December 11, 2018, the IHO denied the parents' request for pendency at iBrain and reaffirmed the October 2018 interim decision on pendency (Dec. 11, 2018 Interim IHO Decision at p. 5).[8] Initially, the IHO found that testimony from the clinical director at iBrain should not be considered "new and material" because the parents' argument that the clinical director at iBrain was unavailable to testify during the August 14, 2018 pendency hearing was "unavailing" (id. at p. 2). Nevertheless, the IHO found that based on the testimony of the iBrain clinical director and documents admitted into evidence, the IHO remained "unconvinced" that iBrain's program was substantially similar to iHope's program and denied the parents' request for pendency at iBrain (id. at pp. 3, 5). However, identical to the October 2018 interim decision, the IHO found that the student was entitled to special education transportation and ordered the district to provide special transportation including "limited travel time of 60 minutes, a wheelchair-accessible vehicle, air conditioning, flexible pick-up/drop-off schedule, and a paraprofessional" (id. at p. 5).

On February 1, 2019, the IHO began conducting the impartial hearing on the merits of the parents' claims for the 2018-19 school year and concluded on June 26, 2019, after four days of proceedings in addition to the earlier pendency hearings (Tr. pp. 145-575). In a final decision dated October 16, 2019, the IHO found that the district denied the student a FAPE for the 2018-

[7] The IHO indicated that on or about October 18, 2018, the parents requested a re-opening of the October 2018 interim decision on pendency but were denied (Dec. 11, 2018 Interim Decision at p. 1). The IHO further indicated that on November 1, 2018, the parents made another request to re-open the IHO's October 2018 interim decision on pendency which was ultimately granted (see Tr. p. 36; Dec. 11, 2018 Interim IHO Decision at p. 1).

[8] The IHO cover sheet for the December 11, 2018 IHO interim decision on pendency was not paginated. To avoid confusion, page references to the December 2018 IHO interim decision on pendency rely on the same pagination referenced in the December 2018 IHO interim decision, which excludes the cover sheet.

19 school year, that iBrain was not an appropriate unilateral placement for the student, and that equitable considerations did not favor the parents (IHO Decision at pp. 4-26).[9]

Initially, the IHO found that the district denied the student a FAPE for the 2018-19 school year because the district failed to recommend a transportation nurse in the student's May 2018 IEP (IHO Decision at p. 16-17). The IHO found that the recommended transportation paraprofessional was "insufficient support" for the student because a paraprofessional is not qualified to administer medication and the student needed medication if a seizure event occurred during the student's commute (id.). The IHO found that the March 2018 CSE and the May 2018 CSE were both duly constituted (id. at pp. 8, 9). With respect to the May 2018 CSE meeting, the IHO determined that the CSE consisted of a special education teacher, a school physician who participated by telephone, and a district representative who also served as the school psychologist (id. at p. 9). The IHO noted that staff from iHope were not present but had attended the March 2018 CSE meeting (id.). Regarding the parents' participation during the May 2018 CSE meeting, the IHO found that the SESIS log indicated that there were multiple efforts by the May 2018 CSE to have the parents participate during the CSE meeting in person and by telephone (id. at pp. 8-9). The IHO further found that the parents "chose not to attend" the May 2018 CSE meeting for reasons the IHO did not find "legitimate" (id. at p. 9).

Next, the IHO found that once the May 2018 CSE determined a 6:1+1 special class placement in the district was appropriate for the student, it was not required to consider the appropriateness of placing the student at a nonpublic school and further found that the district was not required to schedule evaluations for the student in consideration of a nonpublic school placement (id. at p. 10). With respect to the student's classification, the IHO questioned whether TBI was an appropriate classification for the student as the classification does not include injuries caused by birth trauma, and then found that the multiple disabilities classification was a better one for the student when looking at the student's conditions in "total rather than in isolation" (id. at pp. 11-13). The IHO further noted that an incorrect disability classification does not result in a denial of FAPE absent evidence that the student's program was developed solely based on classification rather than on the student's needs and went on to note that the May 2018 IEP addressed the student's needs and was not developed based solely on the student's disability category classification (id. at pp. 12-13).[10]

Concerning the annual goals included in the May 2018 IEP, the IHO found that they were appropriate because they targeted the student's needs and provided sufficient information to guide a teacher in instructing the student (id. at pp. 14-15). With respect to the recommendation for related services, the IHO rejected the parents' argument that the student required 60-minute sessions and found that the parents did not provide any independent medical testimony or documentation to support the asserted need for 60-minute related services in the areas of OT, PT, speech-language therapy or vision services (id. at pp. 13-14). The IHO also found that although

[9] The pagination in the October 16, 2019 IHO decision restarts after "Page 2". In this decision, I will refer to the pages in the IHO Decision in consecutive order. The first page of the document is page number 1 and the last page of the document is page number 27.

[10] Although the IHO references a March 2018 IEP, it is clear from the context of the IHO Decision, and the absence of a March 2018 IEP from the hearing record, that the IHO is referring to the May 2018 IEP.

the student made progress with 60-minute sessions at iHope, there was no evidence that the student would have regressed with the May 2018 CSE's recommended 40-minute related services sessions and further found that the frequency and duration of related services was sufficient to allow the student to receive educational benefits given the student's distractibility, limited mobility, and discomfort associated with feeding (id. at p. 14). The IHO determined that the IEP recommended assistive technology and that the management needs in the May 2018 IEP "encapsulate[d] the needs as shown in the iHope IEP" and the iHope IEP did not need to be copied "word for word" (id. at p. 16). In addition, the IHO found that the May 2018 CSE's recommendation of a 6:1+1 special class program was appropriate because it provided for direct and individualized supports for the student (id. at pp. 15-16). The IHO also found that the reference to a "6:1+1 NYSED nonpublic school" in the student's IEP was a typographical error that did not amount to a denial of a FAPE (id. at p. 16).

With respect to the parents' unilateral placement of the student at iBrain, the IHO found that iBrain was not appropriate (IHO Decision at pp. 17-22). The IHO found that vision services were a critical component of the student's programming and that vision services were not provided at iBrain at the start of the school year (id. at p. 22). The IHO discounted testimony that vision services were made up, noting that some vision services were provided via skype (a form of delivery that the IHO questioned and no evidence was presented to support) and further noting that the iBrain witness was not forthcoming as to how many sessions of vision services and other related services the student missed (id. at pp. 21-22). The IHO also noted that iBrain chose to focus on related services more than academic instruction (id. at p. 22). With respect to equities, the IHO found that the parents and parents' counsel did not fully cooperate with the student's educational planning and failed to attend the May 2018 CSE meeting for "baseless reasons" (id. at. p. 25). Thus, the IHO denied the parents' request for tuition at iBrain for the 2018-19 school year (id. at p. 26). Nonetheless, the IHO awarded transportation costs to be paid at "a rate commensurate with prevailing DOE contractual rate for similar services" and related services "to be funded at Department prevailing rate for the frequency and duration of services as recommended in the March 2018 IEP upon proof of same being provided" (id.).[11]

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in finding that it failed to offer the student a FAPE for the 2018-19 school year because it did not recommend a transportation nurse in the student's May 2018 IEP. The district argues that the parents first raised the issue of a transportation nurse in their post-hearing memorandum. The district asserts that the issue was not raised in the parents' due process complaint notice and that the district did not open the door to the issue in its opening statement or during direct examination. Thus, the district argues that the IHO exceeded her authority by expanding the scope of the proceeding and argues that the IHO's finding should be annulled. Next, the district argues that the IHO properly found that the parents failed to meet their burden in proving that iBrain was an appropriate unilateral placement and that equities did

[11] A March 2018 IEP is not included in the hearing record. It appears that there was an iHope IEP developed in March 2018 (Dist. Ex. 12 at p. 1); however, in analyzing the award of related services, the IHO referred to a "March 2018 IEP developed by the CSE" (IHO Decision at pp. 22-23). Accordingly, it appears that the IHO intended to award related services in the frequencies and durations set forth in the district's May 2018 IEP.

not favor the parents; however, the district alleges that the IHO erred in ordering the district to reimburse the parents for transportation costs and related services.

In an answer with cross-appeal, the parents respond to the district's allegations and argue that the IHO correctly determined that the district denied the student a FAPE by not recommending a transportation nurse in the student's May 2018 IEP. The parents contend that the need for a 1:1 transportation nurse appeared on a form submitted by the student's physician to the CSE. The parents also argue that the IHO did not err in awarding special transportation and related services but contend that the student was entitled to full funding of his related services at iBrain instead of the related services set forth in the March 2018 IEP.

By way of cross-appeal, the parents assert that the IHO erred in excluding testimony regarding the implementation of the March 2018 IHO Decision and suggest that the district denied the student a FAPE by not implementing the March 2018 IHO's decision. The parents also argue that the IHO erred in failing to find that iBrain was the student's pendency placement and more specifically that the IHO erred in finding iHope and iBrain were not substantially similar. Next, the parents argue that the IHO erred in finding that the reasons the parents did not attend the May 2018 CSE meeting were not legitimate and that the May 2018 CSE was duly constituted. The parents argue that they did not waive their right to participate in the May 2018 CSE meeting and further assert that they did not want to attend the meeting because the committee would not be properly composed. The parents assert the prior written notice did not contain a district school physician "in person," a school social worker, a parent member, a school psychologist or the student's special education teachers or related services providers.

Next, the parents argue that the IHO erred in finding that the district did not have to conduct evaluations prior to the May 2018 CSE meeting, repeating their assertion that the district's SOPM requires the district to conduct evaluations prior to considering placement in a nonpublic school. The parents also assert that the IHO erred by failing to find that the change in the student's classification from TBI to multiple disabilities was improper. The parents argue that the IHO inexplicably inserted her own analysis in contravention of the facts. With respect to the student's related services, the parents argue that the IHO erred by finding that the district's recommendation for 40-minute sessions of related services was sufficient in duration and frequency for the student. The parents argue that the IHO disregarded evidence that the student required related services sessions of 60-minutes in duration at the recommended frequency to meet the student's needs and to prevent regression. The parents further argued that because the student's annual goals were developed at iHope with the expectation that they would be worked on in 60-minute sessions, the IHO erred in finding that the student could meet the annual goals given the shorter duration of the related services recommended by the CSE. Next, the parents argue that the IHO erred in finding that the IEP identified the student's highly intensive management needs and assert that the IEP did not include health and medical management needs and other "essential needs," such as two person transfers and the use of a bilateral foot orthoses. In addition, the parents argue that the IHO erred in finding that the district's proposed school location was appropriate. The parents asserted that the IHO erroneously found that the recommendation of a nonpublic school in the May 2018 IEP was a typographical error. The parents also alleged that the IHO ignored evidence during the impartial hearing indicating that the assigned public school would not have been able to implement the student's assistive technology services.

With respect to the student's unilateral placement, the parents argue that the IHO erred in finding that iBrain was not an appropriate unilateral placement for the student. The parents argue that the IHO ignored the student's progress at iBrain and evidence that iBrain provided "an educational program that is appropriate for students with brain injuries or brain-based disorders." The parents also argue that the IHO erred in finding that equities did not favor the parents. The parents argue they cooperated with the CSE and that the district did not act in good faith. Lastly, the parents argue that the IHO decision contains multiple errors of fact that should be reversed.[12]

The district, in an answer to the parents' cross-appeal responds to the parents' allegations and in a reply to the parents' answer reasserts the allegation the IHO's finding regarding the transportation nurse was outside of her jurisdiction because the issue was outside the scope of the proceeding. The district also asserts that pendency is not a proper subject of this appeal because the parents have already appealed the IHO's interim decision on pendency directly to district court and the district court denied the parents' request for relief.

The parents submit a verified reply to the petitioner's reply to the answer and cross-appeal.[13] In addition, the district submits a verified sur reply and the parents submit a reply to the district's sur reply. However, such pleadings are not authorized by State regulations and they will not be considered (see 8 NYCRR 279.6 [a reply to answer may only be accepted if it is filed in response to claims that were not addressed in the request for review, a procedural defense, or additional documentary evidence).

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,

[12] As the parents do not indicate how they were aggrieved by the statements made by the IHO and as they are not seeking relief related to these statements, the parents' appeal as it relates to these statements will not be addressed.

[13] The parents did not address the district's allegations regarding the status of the parents' appeal of the IHO's pendency determination to district court.

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]).[14]

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

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

VI. Discussion

A. Preliminary Matters

1. Scope of Impartial Hearing

The first issue to be addressed is the parties' dispute as to whether the IHO erred in determining that the student was denied a FAPE for the 2018-19 school year because the district did not recommend a transportation nurse in the student's May 2018 IEP. The district asserts that this issue was not raised in the parents' due process complaint notice and that the district did not open the door to this issue during the hearing. The parents contend that the IHO was correct to address this issue because it relates to the student's safety and appeared in the exhibits the parent submitted during the hearing.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR

[14] 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).

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

In the instant case, the IHO found that the district failed to offer the student a FAPE for the 2018-19 school year because the district failed to recommend a transportation nurse (IHO Decision at p. 10). However, the parents' due process complaint notice does not include any allegations related to the district's failure to recommend a transportation nurse (see Parent Ex. A at pp. 1-3).[15] In fact, as part of the proposed resolution to this matter, the parents' due process complaint notice requested transportation, "including a 1:1 travel aide" rather than a 1:1 nurse (id. at p. 3). Upon review of the hearing record, the district did not subsequently agree to add the lack of a transportation nurse as an issue and the parents did not attempt to amend the due process complaint notice to include it. Accordingly, this issue was raised for the first time on appeal and is outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]).

Nevertheless, as the IHO made a determination on this issue notwithstanding the fact that the parents' due process complaint notice did not include this claim, the next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education, (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

[15] The due process complaint notice did indicate that for the purposes of pendency, the student's transportation should include a nurse (Parent Ex. A at p. 2).

The first reference to a transportation nurse appeared during the November 2, 2018 prehearing conference when the IHO attempted to clarify what was currently happening with the student's transportation and counsel for the parents indicated that the student was traveling with a nurse (Tr. pp. 38-39; see December 11, 2018 Pendency District Ex. 3 at p. 1). Accordingly, the IHO changed the student's travel accommodations as ordered in the IHO's October 2018 interim decision from a "paraprofessional" to a "nurse" (Tr. p. 39). However, the issue of the district failing to recommend a transportation nurse in the student's May 2018 IEP was not introduced by the parents during the impartial hearing (Tr. pp. 1-575). Moreover, the first time the counsel for the parents raised the argument that the district failed to recommend a transportation nurse was in the parents' closing brief citing to a request for medical transportation accommodations form completed by the student's physician (Parent Ex. V at p. 18; see Parent Ex. U at p. 14). The only time counsel for the district referred to this issue was in reviewing all of the recommendations on the May 2018 IEP with the district supervisor of psychologists; counsel for the district questioned the witness as to the appropriateness of recommending "a paraprofessional for both transportation and during the school day" and the overall recommendation for special transportation (Tr. p. 289, 309). Overall, while the district did question its witness as to the appropriateness of the recommendation for transportation, those questions were part of summarizing the overall program recommendation and were not being used to show that the program was appropriate because of that specific recommendation to the extent it would open the door to that specific issue (see Tr. pp. 276-312; see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9). Additionally, although the request for medical transportation accommodations form completed by the student's physician indicates that the student required a "1:1 transportation nurse" along with other transportation accommodations (Parent Ex. U at p. 14), the district was not put on notice that this was an issue it needed to address and did not have the opportunity to present evidence explaining why a 1:1 paraprofessional may have met the student's transportation needs. Accordingly, the hearing record demonstrates that the district did not open the door to the parents' claim that it failed to recommend a transportation nurse for the student (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9). The recommendation of a transportation nurse was an issue that was not properly raised and is outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]").

2. Scope of Review

Given that the IHO erred in determining that the district failed to offer the student a FAPE as her finding regarding the lack of a transportation nurse in the student's May 2018 IEP was outside the scope of the impartial hearing, it is necessary to determine which of the parents' other claims are properly before me on appeal. Initially, the parents have not cross-appealed from the IHO's failure to address a number of claims raised in their due process complaint notice that the IHO did not address. In particular, the IHO did not address the parents' following claims: (1) that the May 2018 CSE "feigned interest" in the independent evaluative information; (2) that the CSE ignored a request to reconvene the March 27, 2018 CSE meeting; (3) that the present levels of performance in the May 22, 2018 IEP did not adequately describe the student; and, (4) that the annual goals included in the May 22, 2018 IEP were not measurable (compare Parent Ex. A at pp, 2-3, with IHO Decision at pp. 5-27).

The regulations governing practice before the Office of State Review require that "[a] respondent who wishes to seek review of an impartial hearing officer's decision may cross-appeal from all or a portion of the decision by setting forth the cross-appeal in an answer. A cross-appeal shall clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent" (8 NYCRR 279.4[f] [emphasis added]). Furthermore, the practice regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Accordingly, the claims set forth above have been abandoned and will not be further discussed below.

Furthermore, the parents have not cross-appealed from the IHO's finding that the annual goals in the May 2018 IEP were appropriate because they addressed the student's needs. As such, that determination has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. The Student's Pendency Placement

Next, I will address the parents request for reversal of the IHO's interim decision dated December 11, 2018 regarding the student's pendency placement and the district's assertion that the undersigned should refrain from rendering such a determination based on the procedural posture in this matter.[16]

In the December 2018 interim decision, the IHO denied the parents' request for pendency at iBrain because she found that the parents did not prove that the student's program at iBrain was substantially similar to the student's program at iHope (Dec. 2018 Interim IHO Decision at pp. 3, 5). The parents appealed the December 2018 interim decision to District Court for the Southern District of New York and on August 23, 2019, the court denied the parents' requested relief (Req. for Rev. ¶ 2 n. 2). Subsequently, the parents filed a motion for reconsideration that is currently pending before the court (id.). The district argues that the SRO does not have jurisdiction to rule

[16] 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]).

on pendency because the parents failed to appeal the December 2018 interim decision with this office.

To the extent that the parents are now appealing from the December 2018 interim decision, such an appeal is allowable under State regulation as pursuant to 8 NYCRR 279.10(d), a party may seek review of "any interim ruling, decision or refusal to decide an issue" in an appeal from the final decision of an IHO. However, in this instance, according to the district's answer to the cross-appeal, the parents appealed the December 2018 interim decision to district court and were denied relief on August 23, 2019. Although the district court decision may not necessarily foreclose the ability of an IHO or an SRO to address the student's pendency during this proceeding, it does call into question whether it would be proper to make such a decision at this point in the proceeding. As the subject matter of the case before the district court involves an appeal of the IHO's December 2018 interim decision on pendency, it would not be prudent to permit the same appeal to go forward in two different forums (see, e.g. Application of a Student with a Disability, Appeal No. 19-089). Thus, the parents have, in effect, selected judicial review as their preferred method of challenging the December 2018 interim decision and accordingly, I will not address the student's pendency placement at this point in the proceeding.

C. CSE Process

1. Mutually Agreeable CSE Meeting Time

Turning to the merits of the case, the parents argue that their opportunity to participate in the CSE process was impeded because the district failed to schedule meetings at "mutually agreeable dates and times" including when the CSE had notice the parents would be out of the country. The parents further argue that the IHO erred in finding that the parents' reasons for not attending the May 2018 CSE meeting were not "legitimate".

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 the use of "other methods" such as teleconferencing (34 CFR 300.322[a], [c]; 8 NYCRR 200.5[d][1]). 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]).

As discussed above, the district began planning for the student's CSE meeting for the 2018-19 school year as early as January 2018 due to a history of non-attendance by parents of students at iHope (Tr. pp. 179-80). As of April 6, 2018, the district had entered into an agreement with iHope as to a schedule for CSE meetings to ensure participation of iHope staff in CSE meetings for students attending iHope (see Dist. Ex. 16). According to the SESIS log, the district emailed the parents a meeting notice on April 11, 2018 informing them of the April 17, 2018 meeting to reconvene the CSE to amend the IEP to reflect the March 2018 IHO Decision (Dist. Ex. 15 at p.

9).[17] The parents responded two days later on April 13, 2018 requesting an alternate time as they would not be available for the April 17, 2018 CSE meeting (id. at p. 8). On April 17, 2018, after the parents sent a follow-up email, the district emailed the parents asking if they could participate via telephone because the meeting needed to move forward to implement the March 2018 IHO Decision (id. at pp. 7-8). The district also indicated that if the parents could not participate, they would need to reschedule the meeting for early the next week (id.). By letter dated April 17, 2018, the parents notified the district that they were unable to attend the April 17, 2018 meeting scheduled for that day because the family was traveling out of the country (Parent Ex. N at p. 1). The parents also indicated their availability to meet for a CSE meeting any time after 3:00 p.m. (id.). Based on the parents' request, the district rescheduled the CSE meeting and informed the parents by meeting notice dated April 17, 2018, that a CSE meeting would take place on April 26, 2018 at 3:00 p.m. to review the results of the student's reevaluation, determine the student's continued eligibility for special education services, and to develop an IEP (Dist. Ex. 7 at p. 1).

According to the SESIS log, on April 26, 2018, the district called the student's mother regarding her attendance for the meeting that day and she advised that she was unaware of the meeting and needed to consult with the student's father and her attorney (Dist. Ex. 15 at p. 5). The district also left a voicemail message with the student's father regarding the April 26, 2018 meeting (id.).

On April 30, 2018, the district sent the parents a prior written notice (Dist. Ex. 10 at p. 1). The April 2018 prior written notice indicated that the parents' request to reconvene the April 26, 2018 CSE meeting was denied because the meeting was already held but the CSE granted a "Parent Conference" to review the 2017-18 modified IEP that reflected the March 2018 IHO decision (Tr. pp. 197-98; Dist. Ex. 10 at p. 1).[18] The CSE also granted the parents' request to convene a CSE meeting for the student's 2018-19 school year and proposed that a CSE convene on May 22, 2018 at 3:30 p.m. (Dist. Ex. 10 at p. 1).

By letter dated May 18, 2018, the parents advised the district that the May 22, 2018 CSE meeting should not take place because the parents wanted a "Full Committee Meeting" and the

[17] The parents argue that the IHO erred in failing to rule on whether the district denied the student a FAPE because it did not implement the March 2018 IHO Decision. However, neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a], [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent enforcement power and granting an injunction requiring the district to implement a final SRO decision]). Additionally, the IDEA requires that a student's IEP be reviewed periodically, but not less frequently than annually, and revised as appropriate (20 U.S.C 1414 [d][4][A]; 34 CFR 300.324 [b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]), and, in examining a district's offer of a FAPE, each school year is treated separately (see J.R. v. New York City Dep't of Educ., 748 Fed Appx 382, 386 [2d Cir. Sept. 27, 2018]). Any requirement that the prior IHO's order amending the student's IEP continue in effect into the next school year would tend to circumvent the statutory process under which the CSE is the entity tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008][noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

[18] The district sent a notice of the May 22, 2018 meeting to the parents on April 27, 2018 (Dist. Ex. 9).

meeting notice failed to mandate a district physician "participat[ing] in person" and a parent member (Parent Ex. O at p. 1). The parents further specified that all members of the CSE needed to appear at the meeting in person and only those dates where a district school physician could attend in person should be proposed (id. at p. 2). Next, the parents indicated that they were rejecting the proposed "Parent Conference" and wanted a reconvene of the CSE meeting to discuss the IEP reflecting implementation of the prior IHO decision as well as to address the student's 2018-19 school year (id.). Further, the parents requested that the district accommodate the family when scheduling the CSE meeting by offering dates and times Monday through Friday after 3:00 p.m. with the exclusion of May 31, 2018 and June 1, 2018 (id.).

On May 22, 2018 a CSE convened to determine the student's continued eligibility for special education services and to recommend a program for the 2018-19 school year (Dist. Ex. 12 at p. 22). The CSE was comprised of a special education teacher, the district school psychologist who also served as the district representative, and the district physician via telephone (id. at p. 24). Despite attempts by the district to secure participation from the parents and student's providers from the private school neither attended the May 2018 CSE meeting (Dist. Exs. 12 at p. 24; 13 at pp. 1, 3; 15 at pp. 2-4).

With regard to the parents' claim that the CSE meetings had not been scheduled at a mutually convenient time, the evidence shows that the parents requested several times to reschedule the CSE meetings and the CSE acknowledged and accommodated their requests. First, when the parents requested that the April 17, 2018 CSE meeting be rescheduled due to the parents being out of the country, the CSE complied and rescheduled the meeting to April 26, 2018 (Parent Ex. N; Dist. Ex. 7 at p. 1). On the day of the April 26, 2018 CSE meeting, the district successfully reached the student's mother only to be told that she needed to consult with the student's father and her attorney (Dist. Ex. 15 at p. 5). The district also attempted to reach the student's father by telephone (id.) Thereafter, on April 26, 2018, the CSE informed the parents that they would schedule a CSE meeting for May 22, 2018 at 3:30 p.m. (Dist. Ex. 10 at p 1). Two business days prior to the May 22, 2018 meeting, the parents informed the district that they wanted to reschedule the meeting (Parent Ex. O).

Overall, while the parents did request that the May 22, 2018 CSE meeting be rescheduled, there was no indication that the parents could not attend the meeting, rather, the parents allege that they "did not wish to . . . participate in a CSE they knew would not be properly comprised because the [prior written notice] for the meeting contained no [district] school physician in person, no [district] social worker, no parent member, no school psychologist, and none of [the student's] special education teachers or related service providers" (Answer with Cross-Appeal ¶8). On the day of the May 22, 2018 meeting, the CSE spoke to the student's father who informed the CSE that "he understood that [the CSE] needed to move forward, however, he would like to state on the record he is not comfortable participating in a meeting if he is not present" (Dist. Ex. 15 at p. 2). The student's father testified that he told the district school psychologist that he could not participate in the meeting at the time she called and that he had sent a letter explaining that the parents "couldn't participate without the school (iHope) and the physician present" (Tr. pp. 551-52). He further testified that he thought "the meeting was likely not going to happen" (Tr. p. 552).

The CSE also attempted to reach the student's related services providers at iHope to no avail (Dist. Ex 12 at p. 24).[19]

In sum, throughout the process, the CSE reached out to the parents through email, letters, and by phone to confirm the CSE meetings (Dist. Ex. 15 at pp. 1-12). Moreover, the SESIS logs and evidence in the hearing record shows the district's compliance with the federal regulation described above requiring detailed records of the district's attempts to ensure the parent's attendance at the CSE meetings, including the May 22, 2018 CSE meeting. In light of the above, the hearing record supports the IHO's finding that there were multiple efforts by the May 2018 CSE to have the parents participate in the development of the student's IEP for the 2018-19 school year in person and by telephone. Accordingly, I find that the district prevails on the issue of scheduling the CSE meetings at a mutually agreeable time because it engaged in a good-faith effort to reconvene the CSE in compliance with the parents' requests.

2. CSE Composition

Next, the parents assert that the IHO erred in finding that the May 2018 CSE was duly constituted. The parents argue that the prior written notice was flawed because it did not identify the mandated CSE members.

State regulation requires, in pertinent part, that a CSE must be composed of the following persons: the parents or persons in parental relationship to the student; not less than one regular education teacher of the student whenever the student is or may be participating in the regular education environment;[20] not less than one special education teacher of the student, or, if appropriate, not less than one special education provider of the student; a school psychologist; a district representative who shall serve as the CSE chairperson; an individual who can interpret the instructional implications of evaluation results; a school physician if requested in writing 72 hours prior to the meeting; an additional parent member if requested in writing 72 hours prior to the meeting; other persons having knowledge or special expertise regarding the student, and if appropriate, the student (8 NYCRR 200.3[a][1]).

In the instant matter, the May 2018 CSE was comprised of the special education teacher, the district school psychologist who also served as the district representative, and the district physician who participated by telephone (Dist. Ex. 12 at p. 24; see Tr. pp. 271-74). As described above, the district made numerous efforts aligned with federal and State regulations to secure the participation of the student's parents and providers from iHope but neither attended the May 2018 CSE meeting (Dist. Exs. 12 at p. 24; 13 at pp. 1, 3; 15 at pp. 1-3). While the parents are 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]), State regulation provides CSE members with the ability to make other arrangements for CSE participation (see 8 NYCRR 200.5[d][7]["When conducting a

[19] On the morning of the May 22, 2018 CSE meeting, the district reached out via email to determine who was going to attend the meeting from iHope and received an email back from iHope indicating that the parents "intend[ed] to reschedule the meeting for a time when they c[ould] participate" (Dist. Ex 15 at p. 3).

[20] There was no indication by either party that they were considering a general education setting for this student in light of the number of special education needs to be addressed regardless of whether he attended a public or a private setting.

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"]; Application of the Dep't of Educ., Appeal No. 19-107). Thus, having the district physician participate via phone, absent a specific reason why the physician needed to attend the meeting in person, should have been sufficient to ensure the parents' ability to participate in the meeting and there is no need to overturn the IHO's finding that the May 2018 CSE was duly constituted on this basis.

With respect to the parents' argument that the May 2018 CSE meeting notice failed to include the names and titles of the student's related services providers from iHope, or the district school physician, district social worker, district school psychologist, and additional parent member who would be attending the CSE meeting, the parents correctly point out that the CSE meeting notice 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 meeting notice scheduling the May 22, 2018 did not include the names of the student's teachers or providers at iHope and did not include the names of a parent member or school physician (Dist. Ex. 9). Instead, the meeting notice indicates the parents could request the presence of a school physician and parent member and could invite other individuals who the parents determined had knowledge or special expertise about the student (id.). The meeting notice did include the names of the special education teacher and district representative; however, a different related service provide/special education teacher attended the meeting (compare Dist. Ex. 9 at p. 1, with Dist. Ex. 12 at p. 24).

Nevertheless, any procedural violation related to the composition of the May 2018 CSE would only result in a finding that the student did not receive a FAPE if the procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Initially, the parent has not set forth an argument as to how the district's failure to identify the CSE attendees in the meeting notice for the May 2018 CSE meeting impeded the student's right to a FAPE or significantly impeded the parent's opportunity to participate in the decision-making process. Additionally, the hearing record does not contain any evidence upon which to determine that a meeting notice deficiency warrants such a conclusion, especially when the individuals who would have provided the most pertinent information about the student—to wit, the parents and iHope staff—failed to attend the CSE meeting even though they had been contacted by the district on several different occasions. Accordingly, any error in the meeting notice did not result in a denial of FAPE to the student.

D. May 2018 IEP

1. Disability Classification

I will next address the parties' dispute over the disability classification of the student as a student with multiple disabilities. The parents argue that the IHO erred by not finding that the May 2018 CSE's decision to change the student's disability classification from TBI to multiple disabilities was improper, especially in light of the student's medical history and without any

clinical evaluation. The district argues that the IHO's determination that the student's disability classification as a student with multiple disabilities was proper and did not result in a denial of FAPE because the hearing record reflects that the program recommended by the May 2018 CSE addressed the student's needs and was not developed based solely on his disability classification.

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 (see 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]). 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.[21]

As discussed in more detail below, the student demonstrates complex educational needs related to academics, speech-language development, functional communication, fine and gross motor development, functional vision, feeding, and ADLs, as well as challenges related to attention and distractibility (Dist. Ex. 12 at pp. 1-9). He has been diagnosed as having, among other things, spastic quadriplegia cerebral palsy, microcephaly, bilateral congenital dislocated hips and foot deformities and a cortical visual impairment that have resulted in severe cognitive impairments, cortical "blindness" and orthopedic problems (Tr. pp. 282, 501-02, 506; Parent Ex. C at p. 2). In addition, the student is g-tube dependent, non-verbal, and non-ambulatory (Parent Exs. C at p. 1; T at pp. 1,15; U at pp. 1, 14; Dist. Ex. 12 at p. 1). Thus, the hearing record supports a finding that the student's complex needs constitute "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, and as such the student meets the criteria for classification as a student with multiple disabilities (Dist. Ex. 12 at pp. 1-9; see 8 NYCRR 200.1[zz][8]). The hearing record also demonstrates that the CSE reviewed sufficient evaluative information to determine the student's needs and developed a program based on the student's needs rather than solely on the student's disability classification. Therefore, the student's classification

[21] The disability category for each eligible student with a disability is necessary as part of the data collection 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). According to the Official Analysis of Comments to the revised IDEA regulations the United States Department of Education indicated that the multiple disability category "helps ensure that children with more than one disability are not counted more than once for the annual report of children served because State's do not have to decide among two or more disability categories in which to count a child with multiple disabilities" (Multiple Disabilities, 71 Fed. Reg. 46550 [August 14, 2006]).

as a student with multiple disabilities is appropriate, and as such the CSE's classification of the student neither denied the student of FAPE nor contributed to the denial of FAPE in any way.

2. Related Services

Next, the parents assert that the IHO erred in finding that the 40-minute related services sessions recommended in the May 2018 IEP were appropriate. The parent maintains that the IHO disregarded evidence that the student required related services for 60-minute sessions at the recommended frequency to meet the student's needs and to prevent regression. The district, on the other hand, contends that the IHO properly found that the recommended 40-minute sessions were sufficient to allow the student to receive educational benefit and that the student would not be able to sustain 60-minute sessions given his level of distractibility, limited mobility and inherent discomfort with the feeding tube. A review of the hearing record supports the IHO's determination.

While the student's needs are not directly in dispute, a brief discussion thereof provides context regarding the issue of whether the 40-minute related services sessions recommended in the May 2018 IEP were appropriate for the student.

As noted above, the CSE convened on May 22, 2018 to develop the student's IEP for the 2018-19 school year and considered the iHope March 22, 2018 recommended IEP, a January 12, 2018 quarterly progress report (iHope), a January 3, 2018 district classroom observation, a March 15, 2018 social history update, an April 20, 2018 Vineland Adaptive Behavior Scale-3, and a 2017-18 IEP (Tr. 323; Dist. Ex. 12 at p. 1).[22, 23]

Although the parents had previously challenged the adequacy of the student's present levels of performance in the due process complaint notice, the claim lacked specific objections to any inaccuracies or omissions in the present levels of performance and the parents abandoned the claim on appeal. Accordingly, the following discussion of the student's related services begins with a review of the student's present levels of performance as identified in the May 2018 IEP. The May 2018 IEP indicated that the student had made academic gains over the past year but noted that the student required a modified environment that reduced visual and sound distractions, in combination with individual and small group instruction to allow the student to thrive academically (Dist. Ex. 12 at p. 2).[24] The IEP described the student as highly distractible and noted that it was

[22] It is not clear from the student's 2018-19 district IEP if the 2017-18 IEP considered by the CSE was developed by the district or iHope (Dist. Ex. 12 at p. 1). There was no district IEP for the 2017-18 school year entered into evidence.

[23] The March 22, 2018 iHope IEP considered by the May 2018 CSE was not entered into the hearing record. The iBrain clinical director testified that prior to the student's official iBrain IEP of November 19, 2018 the student's programming was based on the recommendations from the past iHope program and "we went along based on what their mandates were" (Tr. pp. 84-85, 116; December 11, 2018 Pendency Parent Ex. D). The iBrain clinical director testified that when the student started at iBrain in July 2018 the recommended IEP created by iHope "probably back in March" was the program that was being followed and then in November 2018 the new iBrain IEP was created (Tr. p. 131). However, the clinical director testified that there was no IEP meeting, but rather a collection of reports put together by providers, and the IEP is not finalized until after the annual meeting so "these are proposed IEPs that we've created" (Tr. pp. 131-132).

[25] The March 2018 iHope IEP, recommended for the student for the 2018-19 school year, is not in evidence and

challenging for the student to attend to academic tasks in a large group setting (id.). The accuracy of the student's academic performance was reportedly higher when prompted to "look before pointing" and directed to visually select an answer before pointing to it on a communication device or while choosing between multiple items (id. at pp. 2-3). Further, the May 2018 IEP noted that the student's significant distractibility required that he receive instruction in specialized settings, constant praise, and frequent redirection (id. at p. 3) The IEP indicated that the student was especially sensitive to sound, that it was difficult for him to remain engaged in a task if he noticed movement or sound in the room, and that the temporary use of a screen to remove distractors increased the student's ability to remain engaged and participate in activities (id.). According to the IEP, the student did his best academic work when shielded from visual distractors (id.) The May 2018 IEP noted that although the student had potential to learn and excel, his progress was dictated by his physical health and well-being (id. at p. 2).

With respect to literacy, the IEP stated that the student was working on identifying sight words and matching them to corresponding pictures as well as answering reading comprehension questions (Dist. Ex. 12 at p. 2). According to the IEP, the student was working on identifying pictures of common objects in his everyday environment and answering "wh" questions related to a text read aloud (id.) Although the student was noted to have made progress regarding his literacy goals, the May 2018 IEP indicated that the student would benefit from continuing to work on reading comprehension tasks given texts and questions of increasing difficulty (id.). In mathematics, the May 2018 IEP indicated the student was working on completing simple addition and subtraction problems as well as solving functional mathematics problems using money management skills (id.). According to the IEP, the student was working on solving addition problems up to +4 and solving -1 subtraction problems (id.) The student was also working on determining if he had enough money to make a purchase and identifying the correct bill or combination of bills needed to do so (id.) The IEP indicated that the student was making consistent progress in relation to the mathematics goals but would benefit from continuing to work on addition and subtraction skills, as well as money management skills, with tasks of increasing difficulty (id.). The May 2018 IEP noted the student needed an environment which offered highly individualized attention and support, via small class size and continual adult supervision via a 1:1 paraprofessional throughout the day (id. at p. 5). In addition, the IEP noted that the student required direct instruction, multisensory supports, sensory breaks during instruction, repeated directions, and a small class size in order have successful social and academic interactions with his peers in a small group setting (id.).

With respect to speech-language development, the IEP stated that secondary to his diagnosis of cerebral palsy the student presented with challenges in the area of information processing, attention, expressive and receptive language skills, pragmatics, and swallowing; however it noted that the student was determined and exhibited a desire to interact with those familiar to him in his environment (Dist. Ex. 12 at p. 3). Although the student was non-verbal he sought attention by vocalizing or making eye contact, and used a combination of vocalizations, body language, and facial gestures to indicate pleasure and displeasure (id.). The IEP indicated that the student also used a Tobii DynaVox T-15 communication system to make choices, express

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therefore the frequency and duration of the recommended related services cannot be directly compared to the 2017-18 IEP nor can the rationale for the frequency and duration of related services be considered.

opinions, express basic wants/needs, and to participate in academic and social settings (id.). According to the IEP, the student benefited from repetition/redirection, increased processing time, intensive aided language stimulation, programming of his AAC device, as well as a quiet work environment (id.). The May 2018 IEP indicated that the student understood that pictures represent objects, people, places, and situations and although the student responded well with routines and rote conversation his understanding of general conversations and unfamiliar directions remained unclear (id.). The student demonstrated strengths in receptive language, but he required significant support from his environment (routines, simple directions, repetition of stimuli) and was challenged by abstract language (id.). The IEP stated that the student's receptive language strength was evidenced by his ability to respond to greetings with familiar speakers and routines, demonstration of an understanding of everyday objects, his ability to make choices, and to have basic wants/needs met (id.). Skills that remained challenging included comprehending abstract or unfamiliar vocabulary to develop the ability to use a communication device for a variety of language functions and to create novel messages across all contexts (id.). The IEP noted that the student benefited from models, verbal/visual cues, and navigational support to demonstrate comprehension of language in the environment and on his communication system (id.). According to the IEP, the ability to communicate about a variety of topics and use diverse language functions also remained challenging for the student; he used few language functions consistently and spontaneously to request rewarding and familiar items (id.). The May 2018 IEP stated that the student struggled to incorporate high frequency core words on his device, which would give him the ability to create novel messages and enhance the substance of his language output and therefore the student's speech therapy needed to target learning high frequency core words and expanding his vocabulary (id.).

The May 2018 IEP indicated that the student used a range of assistive technology devices including a Tobii DynaVox T-15 with word power 20, keyguard, finger splint, power wheel chair, manual wheelchair (both wheel chairs have the student's communication device mounted with a Mount'n Mover mount), switch technology to independently control and participate in everyday tasks, switch accessible books and games, writing technology, audio books, and a tablet to watch videos (Dist. Ex. 12 at p. 3).

The IEP noted that due to the nature of the student's disorder, and in particular his physical disabilities, it was challenging for the student to imitate, plan, and produce the precise and specific movements of the jaw, lips and tongue that are necessary for speech, feeding and saliva management (Dist. Ex. 12 at p. 4). The IEP indicated that the student benefited from oral motor massages, and stimulation to increase awareness, coordination, and mobility of oral motor muscles to aid in secretion management (id.).

The student had been diagnosed with a cortical visual impairment and the May 2018 IEP indicated that the student's increase in functional vision would support his ability to gather both quality and quantity of information about people, environments, and materials (Dist. Ex. 12 at p. 4). The student's visual impairment impacted his ability to attend, remember what he saw, and perceive what he saw (Parent Ex. D at p. 6). The student reportedly needed specialized strategies to perceive and construct meaning from what he saw and to deeply internalize and construct meaning from this in order to remember it and attend to it in the future (id.).

With respect to the student's social skills, the May 2018 IEP indicated that the student was social and hard-working and looked for interaction with adults and peers (Dist. Ex. 12 at p. 5). In addition, the student expressed his feelings through vocalizations and facial expression as well as by using his communication device (Dist. Ex. 12 at p. 5). The IEP described the student as having great social skills and noted that he paid attention to his surroundings and enjoyed playing switch-adapted computer games and animated videos (id.). Although the student was motivated to communicate with others, he benefited from a small group setting that allowed him to practice appropriate and reciprocal conversational skills and increase his functional communication skills (id.).

The IEP indicated that the student had been diagnosed with multiple medical conductions including, among other things, a seizure disorder, spastic quadriplegia cerebral palsy, and congenital orthopedic deformities of his lower extremities that impacted his motor abilities and resulted in the student being non-ambulatory (see Dist. Ex. 12 at pp. 1, 5-6). According to the IEP, the student needed close monitoring due to allergies and the risk of aspiration and venting to relieve GI discomfort (id. at p. 6). The student also required repositioning several times during the day to prevent skin breakdown, sores, and to maintain skin integrity; equipment to aid in positional changes; and hand splints and ankle-foot orthotics during weight bearing activities (id.). The IEP stated that the student's participation in some activities was impeded by his difficulties with ambulation and movement that decreased efficacy and efficiency, added to the effort of his movement, and reduced the safety of the student during activities, which in turn decreased his independence (Dist. Ex. 12 at p. 6). The IEP noted that the student had difficulty with self-regulation and required increased time and verbal affirmations to calm down when upset (id. at p. 8). With respect to gross motor skills, the student was able to move from prone to supine and supine to prone with close supervision (id.). In addition, he was able to tolerate prone, supine, and side-lying positioning over a therapeutic ball; however, required minimal to moderate assistance to transition between positions and maximum assistance to tolerate lying prone on a wedge or therapy ball (id. at p. 8). The student was able to independently position himself in prone prop and hold the position for 10-15 seconds, commando crawl up to five feet with moderate assistance, and be positioned in tall kneeling with maximum assistance (id.). The May 2018 IEP indicated that the student's determination and motivation had led him to make great progress during the 2017-18 school year towards his established motor goals, especially with respect to his writing, power-mobility, and switch-based skills (id.). In addition, the student had "improved considerably" in activities requiring fine motor skills (id.). The May 2018 IEP identified the student's strengths that had contributed to his success and participation in therapy, including his strong will and tenacity, good problem-solving skills, willingness to learn, strong retention skills, and strong bond with his family to carry over strategies to the home setting (id.).

According to the May 2018 IEP, the student used a power wheelchair or a manual tilt in space wheelchair as his primary means of mobility; he was unable to propel his manual wheelchair without assistance (Dist. Ex. 12 at p. 9). The student required minimum to moderate assistance to safely negotiate the power wheelchair and maximum assistance for all transfers to maintain balance and to perform all activities of daily living (ADLs) (id.). The student had limitations in his positioning due to multiple orthopedic impairments and fluctuating tone (id.). The May 2018 IEP stated that the student learned best in a multisensory learning environment that included a variety of sensory strategies in order for the student to access information most effectively (id.).

The student's participation was observed to improve with structured routines, intermittent sensory breaks, limited auditory distractions and use of proprioceptive, vestibular, visual and auditory inputs (id.). According to the IEP, the student benefited from changes in position throughout his school day to prevent skin break down and contractures, as well as from the use of hand splints to place his had in an improved alignment/functional position during activities (id.). The IEP indicated that the student could continue to benefit from OT to address self-care, academics, play (by improving functional reaching and grasping), visual attention, self-regulation, use of assistive technology and head and neck control (id.).

Specifically, as it relates to the student's related services, the May 2018 IEP recommended four OT goals, three PT goals, four speech-language goals, two vision education goals, and one assistive technology goal, all with accompanying short-term objectives (Dist. Ex. 12 at pp. 13-17). The OT goals focused on developing the student's participation in play/leisure activities, increasing independence with mobility at school and in the community, increasing participation in writing activities within the school, and improving participation in tabletop activities using both upper extremities to reach toward and grasp medium size objects (id. at pp. 13, 16-17). For PT goals, the May 2018 IEP recommended that the student learn to maintain an upright bench sitting position for up to five minutes, tolerate upright sitting on a bench with minimum trunk and pelvis support, and improve sitting tolerance while riding an adaptive tricycle with supportive belts and harness (id. at pp. 13, 16). In relation to speech-language goals the May 2018 IEP recommended the student increase his communication skills using multimodal means of communication to comment, request, ask questions, initiate/terminate conversations, engage in appropriate reciprocal conversations and expand phrase length, across academic and therapeutic contexts when provided with aided language: demonstrate understanding of core language by correctly selecting the corresponding vocabulary for the presented concepts; enhance social pragmatic skills in social activities across all academic contexts; and improve awareness of oral motor skills, for improved secretion management (id. at pp. 14-15). To address the student's vision needs, the May 2018 IEP recommended goals that focused on the student visually identifying familiar landmarks in the school while traveling in his wheelchair and visually locating at least three specific items used for specific activities (id. at p. 14). Lastly, for assistive technology, the May 2018 IEP recommended that the student be able to physically access books from a digital bookshelf with wait time and verbal cuing (id. at p. 17).

To address the student's related service needs the district recommended three individual sessions of OT a week for 40 minutes per session, five individual sessions of PT a week for 40 minutes per session, five individual sessions of speech-language therapy a week for 40 minutes per session, two individual assistive technology services sessions a week for 40 minutes per session, one individual/group session of parent counseling and training a month for 40 minutes per session, and two individual sessions of vision education services a week for 40 minutes per session (Dist. Ex. 12 at pp. 18-19).

The iHope proposed 2017-18 IEP, developed on February 17, 2017, identified the related services recommended for the student for the 2017-18 school year for PT, OT, speech-language therapy, vision education services, and parent training and counseling (Parent Ex. D at pp. 1, 21-32). The iHope IEP recommended that the student receive five individual sessions of PT a week for 60-minutes per session, three individual sessions of OT a week for 60 minutes per session, four individual sessions of speech-language therapy a week and one group session of speech-language

therapy a week, all at 60-minutes per session, two individual sessions of vision education services a week for 60-minutes per session, two individual sessions of assistive technology programming services a week for 60-minutes per session, and one group session of parent counseling and training a month for 60-minutes per session (id. at p. 32). The stated bases in the iHope IEP for recommending 60-minute sessions of therapy were the severity of the student's brain injury, concerns regarding the student's risk of regression without 60-minute sessions, the nature of the therapy goals, and the student's need for two-person transfers, transition time, intermittent rest breaks, and ample processing time (id. at pp. 21-29). In the absence of the iHope March 22, 2018 IEP it is presumed, but not specified in the hearing record, that the above recommended related services for the 2017-18 school year were operational at the time of the May 2018 CSE meeting.[25]

The iBrain director of special education testified that at the time of the hearing—the 2018-19 school year—the student was receiving PT five sessions per week for 60 minutes per session, speech-language therapy five sessions per week for 60-minutes per session, technology services twice weekly, vision services two sessions per week, parent training and counseling one session per month and OT three times a week for 60-minutes per session (Tr. pp. 21, 440, 449). The primary difference between the recommendations for related services between the district and those recommended at iHope in the 2017-18 school year and those provided at the unilateral placement in the 2018-19 school year was the duration of therapy sessions. Notably, the district recommended 40-minute therapy sessions and the nonpublic school placements provided 60-minute sessions, as the related services frequencies were consistent throughout the recommendations (Tr. pp 21, 440; compare Dist. Ex. 12 at p. 18, with Parent Ex. D at p. 32).

During the impartial hearing, the iBrain director of special education described how iBrain determined that 60-minute therapy sessions would be appropriate for the student (Tr. p. 470). She testified that first iBrain looked at the recommendations made by providers who had previously worked with the student "extensively" and noted that most of the iBrain providers knew the student (id.). Further, she testified that when the iHope recommendations were implemented it was "immediately clear why this recommendation was needed, given [the student's] extensive medical needs, his needs for extended transfer time and transition time and processing" (id.). In addition, the clinical director at iBrain testified that the staff at iBrain "review[ed] the information from the March document" "from the recommendations from the therapists" and made some determinations about what they felt the student's goals should be (Tr. p. 132).[26] She stated that many of the goals were kept and, although some were edited, iBrain definitely kept the same recommendations to be consistent with the iHope plan (id.). The clinical director further testified, "[W]e just made a couple of …edits and it's pretty much what would've been happening at iHope because it's the same . . . kind of proposed IEP" (Tr. pp. 132-33).

The director of special education at iBrain opined that the student required related services in 60-minute increments because he needed additional time for transitioning in and out of the

[25] The March 2018 iHope IEP, recommended for the student for the 2018-19 school year, is not in evidence and therefore the frequency and duration of the recommended related services cannot be directly compared to the 2017-18 IEP nor can the rationale for the frequency and duration of related services be considered.

[26] It appears that the clinical director at iBrain is referencing the March 2018 iHope IEP.

wheelchair (especially given some of his medical needs) and for positioning (so that he could participate in activities comfortably) (Tr. pp. 421-422). She noted this took a "significant" amount of time (Tr. pp., 421-422). The director of special education also stated that the student required rest breaks or brief breaks to vent his G-tube, repetition and increased time for processing requests and things that were said to him, and to respond (Tr. p. 422).[27] With respect to 60-minute therapy sessions, the iBrain director of special education confirmed that it took time for the student to transition to and from therapy an as well as in and out of his wheelchair on to whatever area was going to be used for therapy (Tr. p. 492-93). In response to questioning about the amount of actual therapy time provided out of the 60-minute therapy session, the iBrain director indicated that therapy started when the providers came in to see the student because they immediately began assessing the student's positioning and body alignment to determine if adjustments needed to be made (Tr. p. 493). She stated that sometimes the adjustments began immediately (id.). In addition, she indicated that the 60-minute session also included time at the conclusion of therapy when the providers made sure that the student had any equipment he needed such as braces or orthotics on and positioned correctly (id). From her prospective the student received 60-minutes of therapy services (id). When pressed to estimate the amount of time the student spent working on his goals during that 60-minute session the special education director replied 45 to 50 minutes leaving about 10 minutes of transition time (Tr. pp. 493-94).

Consistent with the testimony of the director of special education, the clinical director at iBrain testified that prior to November 2018, the student's program at iBrain was based on recommendations from the past iHope program (Tr. pp. 85, 116). She indicated that iBrain followed the iHope mandates and its own proposed mandates because it believed the 60-minute services were necessary and appropriate for the student across all disciplines (Tr. pp. 116, 133).[28]

In contrast to the parents' position regarding the 60-minute related services sessions the district supervisor of psychologists—who was not in attendance at the May 2018 CSE meeting—testified for the district with respect to the recommended related services (Tr. pp. 250, 257, 271).[29] The district supervisor of psychologists testified as to the appropriateness of the district's recommendation for related services to be delivered in 40-minute increments (Tr. p. 294). Consistent with the May 2018 IEP the supervisor noted the student's significant distractibility and

[27] The iBrain director of special education testified that the student received the services on a push in and pull out basis indicating that at times therapy services were presented in the classroom (pushing in to the classroom during academic activities) and at other times the providers pulled the student out of the classroom to be with him one-on-one (Tr. pp. 421-422). The director of special education reported that iBrain offered individual treatment rooms so the providers could use of both options which helped to make sure the student solidified his skills but also generalized them to other environments (Tr. p. 422).

[28] The iBrain IEP was not created until November 19, 2018 when it was considered a proposed IEP based on a collection of reports put together by the providers and finalized only after the annual meeting (Tr. pp. 132, 135). However; no meeting with the parent or providers formally took place to adopt the recommendations (Tr. pp. 134-36).

[29] The district supervisor of psychologists testified on behalf of the district because the school psychologist who attended the May 2018 CSE and acted as district representative and school psychologist no longer worked for the district (Tr. pp. 271-72). She testified that she knew the student from her review of the student's cases, reports, and information, and met the student recently when the student's parent brought the student in for assessment testing (Tr. p. 256).

testified that the 40-minute session gave the student time to benefit from the intervention with some opportunity for repetition but did not extend past the student's ability to attend (Tr. p. 294; compare Dist. Ex. 12 at pp. 3, 5, with Tr. p. 294). The supervisor also indicated that the student's paraprofessional was present at the therapy sessions providing support that enabled the student to respond to the stimuli being presented for him to be able to function appropriately, or respond as best as possible with the supports available (Tr. pp. 294-95). The supervisor noted that the student was very medically involved, and it was necessary to understand his physical limitations and the 40-minute session was appropriate without going beyond the student's ability to benefit from the intervention (Tr. pp. 295-96). Based on the supervisor's review of the evaluations and assessments and available material she indicated that 60-minute sessions were not appropriate for the student, that he was already distractible "so what little bit of information and ability to respond, I think that, …you've lost the student is not ---shows no benefit at that point." (Tr. pp. 295-96). The district supervisor of psychologists questioned the student's ability to sustain 60 minutes of instruction or intervention because of his physical complications, opining that 60 minutes was overwhelming with respect to what the student could sustain and to show benefit the student needed "a little bit in increments" (Tr. pp. 347-48). Further, the supervisor indicated that, earlier in the student's academic history the student was receiving 30-minute therapy sessions, but she did not see the justification and rationale that 60-minute sessions would benefit the student (Tr. p. 350). She again opined that the student's physical ability would not allow him to sustain 60-minute sessions but he was increasing in age and had shown some growth so the district moved to 40-minute sessions to see if the student could sustain that duration (Tr. pp. 350-51). Although the May 2018 CSE considered a January 2018 progress report and a March 2018 recommended IEP from iHope, neither the parent nor the student's providers attended the CSE meeting to discuss the student's needs or advocated with the members of the CSE regarding the need for 60-minute therapy sessions (Dist. Ex. 12 at p. 24; 13 at p. 1).

Based on the foregoing, the student demonstrated significant needs related to cognitive abilities, communication, social development, and motor skills such that related services were required to address the student's needs. Additionally, the student was described as highly distractible and required frequent repositioning due to discomfort and significant motor impairment. From the above it appears that while staff at iHope and iBrain attempted to balance these needs by providing the student with 60-minute sessions of related services with breaks, the district attempted to balance these needs by providing related services at the same frequencies but of shorter duration. It should also be noted that although the reduction in duration of the related services would result in the student being in related services sessions for less total time during the school day, the student would still receive special education services for the whole school day as the student was recommended for 25 periods per week of a 6:1+1 special class, along with the services of both a 1:1 paraprofessional and a 1:1 nurse (Dist. Ex. 12 at pp. 18-19). Based on the above, and in particular due to the student's distractibility and limited attention to tasks, the hearing record supports a conclusion that the 40-minute sessions as recommended in the student's May 2018 IEP were appropriate for the student. Thus, there is insufficient basis to disturb the IHO's findings that the May 2018 CSE related services recommendation for 40-minute sessions was appropriate in light of the student's needs.

3. Management Needs

Next, the parents assert that the IHO erred in finding that the May 2018 IEP identified the student's highly intensive management needs and that it encapsulated the student's needs that were presented in the iHope IEP. [30] The parents also argue that the May 2018 IEP contained very few of the student's management needs and that it failed to include health and medical management needs or essential needs such as two-person transfers for all mobility activities and the use of bilateral foot orthoses.

Management needs are defined by State regulation 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]).

As discussed above, the student demonstrated significant needs related to severe impairments in cognitive abilities, language, memory, attention, reasoning, abstract thinking, judgement, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, information processing and speech (Parent Exs. T at p. 15; U at p. 14). The student required a modified environment with reduced visual and sound distractions in combination with individual and small group instruction because of the student's distractibility, and need for verbal prompting, praise, and redirection (Dist. Ex. 12 at pp. 2-3). The May 2018 IEP noted that the student needed highly individualized attention and support via a small class size and continual adult supervision by way of a 1:1 paraprofessional throughout the day (id. at p. 5). Further, the May 2018 IEP indicated the student required direct instruction, multisensory supports, sensory breaks during instruction, and repeated directions (id.). Regarding the student's communication needs the May 2018 IEP indicated the student's need for a communication system and adaptive equipment, switch technology, repetition and redirection, increased processing time, and programming of the AAC device (id. at p. 3). Due to the student's medical needs, including allergies, risk of aspiration, and gastric discomfort, the student required close monitoring, repositioning several times during the day, equipment to aide in positional changes, as well as hand splints and ankle-foot orthotics during weight bearing activities (id. at pp. 5-6). In addition, the IEP noted that the student required supervision during movement and transition, a power wheelchair or manual tilt wheelchair for mobility, and maximum assistance for all transfers (id. at pp. 8-9).

To address the student's need for a modified environment and support to manage the student's distractibility, the management needs recommended in the May 2018 IEP included limited visual/auditory distractions and shields from visual and/or sound distractors, continual 1:1 adult support for repetition of directions, continual 1:1 adult support for prompting for participation and access to education the environment, and direct instruction for all new concepts (Dist. Ex. 12 at p. 9). The May 2018 IEP also recommended a multisensory approach for academic tasks and, to support the student's communications needs, the management needs recommended the incorporation of the student's AAC device in the classroom and other therapeutic settings to

[30] The iHope IEP referred to is presumed to be the March 2018 iHope IEP, which is not in evidence.

enhance communication (id.). Regarding the student's visual needs, the IEP recommended that objects be presented on a black background (id.). Due to the student's many motor issues and orthopedic needs the IEP recommended the provision of bilateral hand splints, frequent position changes, assistance for power mobility, upper extremity active motion exercises, additional time for transitions, additional time to complete fine motor/gross motor tasks as well as ADLs, and use of an alternative pencil (id.). With respect to ADL needs the May 2018-19 IEP recommended the student receive assistance with clothing management, toileting and toilet hygiene, personal grooming (hand washing, hair brushing, tooth brushing, etc.) and provision of adaptive feeding equipment (id.). The present levels of performance identified the student's need for maximum assistance for all transfers, to maintain balance and perform all ADL's (id.). Although not specified in the management needs, the IEP does provide support for the student's medical needs by mandating a 1:1 nurse with the student daily, across all classroom environments and a 1:1 paraprofessional to provide support for the student's repositioning and motor needs (id. at p. 19). The May 2018 IEP also specified the student's specific AAC device, software, and wheelchair mount to be used across all environments and provided for ongoing training for assistive technology in addition to assistive technology services two sessions per week (Dist. Ex. 18-19).[31]

Based upon the foregoing, the hearing record supports the IHO's finding that the May 2018 IEP identified the student's highly intensive management needs. In sum, the May 2018 IEP identified the student's individual needs and level of support the student required throughout the educational day with appropriate environmental modifications and resources to enable the student to benefit from instruction. Therefore, I decline to overturn the IHO's finding with respect to the student's management needs, and find that the parents' argument to the contrary is without merit.

E. Relief

On appeal, the district argues that the IHO erred in ordering it to reimburse the parents for transportation costs and related services. Having found that the IHO erred in finding a denial of a FAPE, the parents are not entitled to any relief, including their request for tuition reimbursement at iBrain, transportation, and related services for the student (see Fry v. Napoleon Community Schools, 137 S. Ct. 743, 747 [2017] ["Any decision by a hearing officer on a request for substantive relief 'shall' be 'based on a determination of whether the child received a free appropriate public education'"] citing 20 U.S.C. § 1415[f][3][E][i]).

VII. Conclusion

Having determined that the IHO erred in finding that the district failed to offer the student a FAPE for the 2018-19 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether the student's unilateral placement at iBrain was appropriate or whether equitable considerations support the parents' claim. I have considered the parties' remaining contentions and find them to be without merit.

[31] Although the March 2018 iHope IEP was not entered into evidence the parent testified that the March 2018 CSE looked at the iHope IEP "intensely" and stated that "when I got the final IEP back from the DOE a lot of the language was draft -- drafted directly from that" (Tr. 522).

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated October 16, 2019, is modified, by reversing those portions which found that the district failed to offer the student a FAPE for the 2018-19 school year and awarded relief to the parents.

Dated: **Albany, New York**
January 13, 2020

CAROL H. HAUGE
STATE REVIEW OFFICER