The University of the State of New York

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

No. 20-036

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

Appearances:
Brain Injury Rights Group, attorneys for petitioners, by Karl J. Ashanti, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the International Institute for the Brain (iBrain) for the 2018-19 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student

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

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

III. Facts and Procedural History

The parties' familiarity with the facts and procedural history of the case and the IHO's decision is presumed and will not be recited in detail here. During the 2017-18 school year, the student attended the International Academy of Hope (iHope) (Tr. p. 504; see Parent Ex. D). The CSE convened on June 18, 2018 to formulate the student's IEP for the 2018-19 school year (see generally Dist. Ex. 1 at pp. 1-14). The parents cited a number of substantive and procedural errors committed by the district in developing the June 2018 IEP, disagreed with the recommendations contained in the June 2018 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2018-19 school year and, as a result, notified the district of their intent to unilaterally place the student at iBrain (Parent Ex. O at pp. 1-2). In a due process complaint notice, dated June 9, 2018, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (see Parent Ex. A at pp. 1-4). As relief, in pertinent part, they sought direct payment of tuition at iBrain for the 2018-19

school year and transportation costs (id. at 5). The student attended iBrain during the 2018-19 school year (Tr. pp. 408-09, 435; see Parent Ex. C)

An impartial hearing convened on February 15, 2019 and concluded on July 11, 2019 after six days of proceedings (Tr. pp. 1-939). In a decision dated January 8, 2020, the IHO determined that the district failed to offer the student a FAPE for the 2018-19 school year, specifically finding that the district's recommendation in the June 2018 IEP for a 6:1+1 special class placement and related services program beginning in September 2018 was inappropriate (IHO Decision at p. 9).[1] The IHO further determined that the June 2018 CSE should have recommended that the student receive 12-month services in a 12:1+4 special class placement designed for students who primarily require habilitation and treatment, including training in daily living skills and development of communication skills, sensory stimulation and therapeutic interventions (id. at pp. 9-10). Additionally, the IHO determined that iBrain was not an appropriate unilateral placement because it lacked all the components of the student's required programming (i.e. vision education services) when the student began at the school in July 2018 (id. at p. 13). Moreover, the IHO found the related services outlined in the iBrain program to be excessive given the student's young age and documented tendency for fatigue, and further found the speech goals of the iBrain program to be physically dangerous to the student (id. at pp. 13-16). Finally, the IHO determined that equitable considerations did not weigh in favor of the parents' request for an award of tuition reimbursement (id. at pp. 16-19). The IHO determined that the student was removed from her previous placement and placed at iBrain without "good cause," the tuition costs at iBrain were unreasonable, and iBrain charged hourly rates for related service providers who were salaried employees (id. at pp. 17-18). Additionally, the IHO found that the parents had not fully cooperated with the student's educational placement and the tactics employed by them and their counsel were designed to circumvent the IEP process in hopes of achieving the funding of the tuition of the academic program promoted by iBrain (id. at pp. 18-19). The IHO denied tuition reimbursement, transportation costs, and related services costs for iBrain for the 2018-19 school year (id. at p. 19).

IV. Appeal for State-Level Review

The parents present the following issues on appeal that must be resolved in order to render a decision in this matter:

1. The conduct of the IHO regarding the timeliness of the IHO's decision and evidentiary issues.

2. Whether the IHO erred in failing to find that the district denied the student a FAPE for the 2018-19 school year grounds additional to those relied upon by the IHO is his decision

3. Whether the IHO erred in determining that iBrain was an inappropriate placement.

[1] The IHO Decision is incorrectly paginated, starting with the cover page as page 1, and the appearance pages as pages 2 and 3. The body of the decision starting with the introduction section begins the pagination over as page 1 and continues through the end of the decision to the exhibit list on page 21. To ease confusion, the Office of State Review has repaginated the decision beginning with the cover sheet as page 1 and continuing consecutively through the end of the decision on page 24.

The parents contend that the IHO erred by questioning the adequacy and appropriateness of the goals, instruction and related services that iBrain provided to the student, and making findings about specific interventions to be used with students who have a traumatic brain injury (TBI), for which she lacked the requisite expertise. They also contend that the IHO erred by finding that iBrain set a feeding goal for the student that posed a potential safety risk for her and rendered iBrain an inappropriate placement. They further assert that the IHO erred in finding that the parents' placement of the student at iBrain was not appropriate because the program was never vetted by any State or credentialing agency, thereby inappropriately holding iBrain to federal and regulatory requirements.

4. Whether the IHO erred in determining that equitable considerations did not favor the parents' request for direct tuition payment to iBrain.

The parents assert that contrary to the IHO's determination that they did not cooperate with the student's educational planning, they did attempt to cooperate, and that it was the district that failed to cooperate with the parents' requests. The parents further assert that the IHO erred by "using their financial situation against them" by erroneously stating they had not paid any amount towards the student's tuition and determining that the costs of the tuition and related services at iBrain were unreasonable and not subject to full reimbursement.

5. Whether the IHO applied an incorrect standard when making the student's pendency determination.

V. Applicable Standards

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

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

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

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

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

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

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

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

VI. Discussion

A. Conduct of Impartial Hearing

1. Timeliness of the IHO's Decision

The parents argue that because "no extensions of the compliance deadline had been requested by either party" between the parties' submissions of their post-hearing briefs on August 19, 2019 and the January 8, 2020 record close date, the IHO decision was months out of compliance with the impartial hearing timeline. The parents further contend that the IHO erred in failing to grant the parents' motion for summary judgment concluding that the student had not been offered a FAPE, which would have permitted the appeal to have been determined in February 2019.

With respect to the timeline for the impartial hearing, the IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). However, extensions may only be granted consistent with regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). Pursuant to State regulation, an

[2] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

In this matter, the hearing record reveals that after the IHO's appointment in July 2018 and the parties' submissions of their post-hearing briefs on August 19, 2019, forms were completed by the IHO for two 30-day extensions of the compliance date for issuing a decision, each dated December 29, 2019. One of the forms showed an extension requested/granted date of November 10, 2019 and reflected a new decision date of December 10, 2019, and the other showed an extension requested/granted date of December 10, 2019 and reflected a new decision date of January 9, 2020.[3] The extensions indicated that each was requested by "[b]oth [p]arties" and that the reason for the extensions were "Extensive testimony/issues." [4]

It is not entirely clear why the IHO's final decision was not issued for over four months after the parties submitted their post-hearing briefs, why the record does not contain forms documenting extensions of the compliance date between August 19, 2019 and November 10, 2019, or why the two forms in the record are both dated December 29, 2019 and were not made a part of the record as IHO exhibits. The IHO decision contained a parenthetical stating that parent exhibits S and T were "sent 12/29/19 via email to Evidence Unit" but the email does not appear as part of the record and the IHO decision did not provide an explanation for this or for why the record-close date of January 8, 2020 was the same date as the IHO decision. While an IHO determines when the record is closed, guidance from the Office of Special Education explains that "[a] record is closed when all post-hearing submissions are received by the IHO. Once a record is closed, there may be no further extensions to the hearing timelines. . . . [and] the decision must be rendered and mailed no later than 14 days from the date the IHO closes the record ("Requirements Related to Special Education Impartial Hearings" Office of Special Educ. [Sept. 2017], available at http://www.p12.nysed.gov/specialed/publications/2017-memos/documents/requirements-impartial-hearings-september-2017.pdf; see 8 NYCRR 200.5 [j][5][iii]).

Upon review of the hearing record, there is no evidence that the parents voiced any objection to extensions to the compliance date beyond the timeframe set forth in federal regulation (see generally Tr. pp. 1-939; Parent Exs. A-F, C-R, S-T; Dist. Exs. 1-21; IHO Exs. I-III). Given the actual record close date and the IHO's decision issuance date of January 8, 2020, the decision was issued within the 14 day timeline. Even assuming for the sake of argument, that the IHO had issued the decision late, a delayed decision in this instance would not warrant overturning the IHO's findings. Courts have found that as long as the student's substantive right to a FAPE is not compromised because of the late decision, an untimely administrative decision, by itself, does not deny the student a FAPE (Jusino, 2016 WL 9649880, at *6 citing J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000] ["Case law's emphasis on substantial vindication of substantive rights and ensuring a fair opportunity to participate is equally present in resolving disputes arising out of the decision deadline date. With respect to the 45–day deadline, "relief is warranted only if... [a] forty-five-day rule violation affected [the student's] right to a free appropriate public education"];

[3] These forms were not made part of the hearing record as IHO exhibits.

[4] The record is unclear on this point as the parents contend that neither party requested any extensions of the compliance date while the district argues that "both parties consistently requested and granted" extensions to the compliance dates.

see A.M. ex rel. J.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660, 689 n.15 [E.D.N.Y. 2012] aff'd, 513 F. App'x 95 [2d Cir. 2013] [same]. According to the courts, the substance of an administrative decision is not flawed just because it is issued late (J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *14 [S.D.N.Y. Mar. 31, 2015], aff'd 643 F. App'x 31 [2d Cir. 2016] [noting that "(t)he untimeliness of the SRO's decision does not suggest a flaw in its logic and reasoning, however. Moreover, Plaintiffs have cited no authority supporting their assertion that an SRO decision is entitled to no deference when issued outside the '30–day statutory timeline.'"] citing M.L., 2014 WL 1301957, at *13 ["Although the Court agrees with Plaintiffs that the State Review Office's routine delays in issuing decisions is problematic, it has found no authority in IDEA cases that allows it to declare the SRO's decision a nullity"]). The parents do not allege any basis for relief on this purported violation because they do not indicate how, if at all, the claimed issuance of the decision past the deadline affected the student's right to a FAPE. However, the IHO is cautioned to comply with the federal and State regulations in the future and to ensure that the hearing record includes documentation setting forth all the extensions to the timeline.

2. Evidentiary Issues

The parents contend that the IHO erred by allowing the district to present "rebuttal witnesses" because although the witnesses were ostensibly testifying for the sole purpose of rebutting the parents' evidence regarding the student's unilateral placement, the witnesses actually sought to present testimony concerning whether the district offered the student a FAPE for the 2018-19 school year. The parents further contend that it was an abuse of discretion for the IHO to allow rebuttal evidence where there is a detriment to the opposing party because of the order in which the evidence is introduced. The parents also contend that they were prejudiced by the district's untimely witness and document disclosures, that, in effect, precluded them from presenting certain witness testimony related to whether the district offered the student at FAPE.

The IDEA provides parents involved in a complaint with the "opportunity for an impartial due process hearing" (20 U.S.C. § 1415[f]). Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice]). State regulation sets forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). However, any party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). Further, State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" or issue a subpoena if necessary (8 NYCRR 200.5[j][3][xii][c]; see 8 NYCRR 200.5[j][3][iv]).

Courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions

resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. Apr. 9, 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

Given the broad discretion afforded to IHOs with respect to their conduct of impartial hearings, a review of the record does not support that the IHO's determinations as to the order of witness testimony or the admission of certain evidence deprived the parents of their due process rights. Moreover, to the extent the parents argue that they were prejudiced by the IHO's various rulings on witness testimony and the admission of documentary evidence specifically related to whether the student was offered a FAPE by the district, the IHO ultimately ruled in the parents' favor on the FAPE issue by determining that the district had denied the student a FAPE for the 2018-19 school year.

B. June 2018 IEP – Denial of FAPE

In her decision, the IHO found that the June 2018 IEP did not offer the student a FAPE for the 2018-19 school year. Although this ruling is favorable to the parents, on appeal they contend that there were additional grounds upon which the IHO should have found a denial of FAPE. Specifically, while the parents agree with the IHO that the district failed to offer the student a FAPE for the 2018-19 school year, they assert that the IHO's determination was "based on an incorrect rationale" and have proceeded to provide several alternative bases upon which the IHO should have found the denial of a FAPE. However, the IDEA and State Regulations provide that only a party who has been "aggrieved" by the decision of an IHO may appeal an IHO's decision to an SRO (20 U.S.C. § 1415[g][1]; 8 NYCRR 200.5[k][l]; see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9—*10 [S.D.N.Y. Nov. 27, 2012 see also Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]). Here, the IHO's decision resolved the issue of the district's denial of FAPE to the student entirely in the parents' favor (IHO Decision at pp. 7-10). Therefore, the parents were not entitled to appeal this portion of the IHO's decision (see D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 588 [S.D.N.Y. 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues. Accordingly, as the parents are not aggrieved by the IHO's finding that the district denied the student a FAPE, a determination that the district does not cross-appeal, this finding will not be further addressed in this decision and is now final and binding on the parties (see Req. for Rev. at pp. 2-6; Answer ¶ 21).

C. Unilateral Placement – iBrain

As the district has not appealed the IHO's determination that it failed to offer the student a FAPE for the 2018-19 school year, I turn next to the issue of whether iBrain was an appropriate unilateral placement.

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

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. Student Needs

While the student's needs are not directly in dispute in this matter, a discussion thereof provides further illumination of the following issue; namely, whether the student's unilateral placement at iBrain was appropriate.

According to the iBrain special education director, development of the student's December 2018 iBrain IEP began in spring 2018 by the student's previous providers; was revised and updated by the student's then-current providers; and included her needs, relevant factors relating to her needs, and her present levels of performance (Tr. pp. 205, 211-12, 268-70; see Parent Ex. C at pp. 1-20).[5] The special education director stated that iBrain conducted assessments "about the beginning of the year" for the student and tracked her progress (Tr. pp. 308-09).

The iBrain IEP stated that the student was non-verbal and non-ambulatory and had received the diagnoses of TBI accompanied by spastic quadriplegic cerebral palsy, cortical visual impairment (CVI), seizure disorder, and hypoxic-ischemic encephalopathy (HIE) (Parent Ex. C at p. 1; see Tr. pp. 404-05). The student required a tracheostomy to assist in respiration and suctioning due to decreased secretion management; was NPO (nothing by mouth); received all means of nutrition, hydration, and medication through a gastric tube (g-tube); and reportedly had a history of cardiac arrest, constipation, and reflux (Parent Ex. C at pp. 1, 6-7). According to the iBrain IEP the student required physical support for all activities of daily living (ADL); was able to communicate using facial expressions, eye gaze to look at objects, head turning, body movement and some vocalizations; and her rate of progress was dictated by her physical health and well-being (id. at pp. 1-2). Reportedly, the student's participation in some school day activities was impeded due to difficulties with cognition, attention, vision, and physical functions (id. at p. 12). According to the iBrain IEP, the student learned best in a multisensory learning environment that included a variety of sensory strategies including tactile, kinesthetic, auditory, proprioceptive, and vestibular inputs and her participation had been observed to improve with structured routines, intermittent sensory breaks, and limited auditory distractions in her environment (id. at p. 17). The iBrain IEP stated that the student required highly specialized programming; intensive intervention, equipment and supports; a small structured 6:1+1 class environment to minimize sensory distractions; one-to-one assistance; an adapted environment; multisensory supports; and individualized and direct instruction (id. at pp. 9-10).

With respect to speech and language functioning, the iBrain IEP stated that the student presented with challenges in the areas of attentiveness, verbal expression, memory, auditory comprehension, problem solving, and oral motor and feeding abilities (Parent Ex. C at p. 3). The student's primary mode of communication was through her high-tech eye-gaze augmentative and alternative communication (AAC) device used for identifying pictures, communicating, and playing exploratory games in the classroom context (id. at pp. 2, 5). Receptive and expressive language skills assessments using the Dynamic AAC Goals Grid 2 (DAGG-2) found the student to be primarily an emergent communicator with scattered skills within the emergent transitional ability level for "Understanding" and "Expression" (id. at pp. 3-4). The iBrain IEP stated that the

[5] The district's June 2018 IEP contains descriptions of the student's needs and present levels of functioning that are similar to those detailed in the December 2018 iBrain IEP (compare District Ex. 1 at pp. 1-3, with Parent Ex. C at pp. 1-20).

student benefitted from a consistent communication system across a variety of environments so that she could fluently participate in academic tasks and communicate her understanding of concepts (id. at p. 2). The student's oral motor mechanism was assessed through clinical observation and the Oral Motor Assessment and Treatment: Ages and Stages, which revealed the student presented with a restricted verbal repertoire, difficulty executing oral motor movements for functional speech production, and minimal volitional swallowing ability requiring tracheal and oral suctioning by her nurse (id. at p. 6).

Regarding the student's vision needs, the iBrain IEP indicated that the student had been assessed using a "CVI Range" which measured the "presence and severity of ten visual characteristics associated with [CVI]" (Parent Ex. C at p. 8). The student displayed a moderate delay in the CVI characteristics of color, movement, novelty, and light-gazing/non-purposeful-gaze (id.). Reportedly the student required movement as needed to attract visual attention and was able to discriminate between familiar and novel items (id.). The student was able to make eye contact and did her best when looking at items against a black background and utilizing auditory cues (id.). The iBrain IEP stated that the student displayed a significant delay in the CVI characteristics of latency, visual fields, distance and visually guided reach (id.). The iBrain IEP noted that the student benefitted from visually modified materials to continue work on beginning academic skills as well as materials presented with auditory and tactile supports to ensure understanding (id. at p. 2). In sum the iBrain IEP stated that vision was a main sensory area which the student should utilize for learning as her visual processing skills improved (id. at p. 9).

The iBrain IEP stated that the student was very social, enjoyed social interaction with her brother and peers, slightly turned her head toward familiar voices, and smiled/vocalized when she was happy or excited (Parent Ex. C at pp. 9-11). The student required adult support in order to facilitate her participation in activities with others and needed highly structured social activities in a small group setting (id. at p. 11).

With respect to the student's physical development the iBrain IEP stated that the student presented with intensive management needs requiring a high degree of individualized attention and intervention; abnormal muscle tone in her bilateral upper extremities, lower extremities, and trunk; and difficulty sustaining her head position in midline and body/trunk alignment (Parent Ex. C at pp. 14, 17). The iBrain IEP also noted that the student's movement difficulties decreased the efficacy and efficiency of her participation, added to the effort of her activities, and reduced her independence throughout the school day (id. at p. 12).

2. Appropriateness of iBrain as a Unilateral Placement

The special education director described iBrain as a "very intensive, individualized program" for students with brain-based disabilities or disorders such as acquired or traumatic brain injuries (Tr. pp. 13, 206). The special education director explained that iBrain provided one-to-one direct instruction with a teacher for half an hour a day as well as paired and smaller group instruction which occurred throughout the rest of the day when the teacher was not otherwise occupied by one-to-one instruction (Tr. p. 14). In addition the special education director explained that iBrain offered a full range of related services provided via a push-in and a pull-out model so that all of the therapists spent some of their time pushing into the classroom, which she stated, helped to ensure that services and skills were being transferred into multiple environments (Tr. p.

13). The special education director stated that all individual programs, goals, and accommodations/modifications were created around each student's unique and complex needs (Tr. p. 209).

The special education director stated that the student had been at iBrain "since we opened on July 9th of 2018" (Tr. p. 210). During the 2018-19 school year the student was in a 6:1+1 classroom and received five 60-minute sessions per week of individual physical therapy (PT), five 60-minute sessions per week of occupational therapy (OT), five 60-minute sessions per week of speech-language therapy, three 60-minute sessions per week of vision education services[6], and one 60-minute session per month of parent counseling and training (Tr. pp. 14-15, 78, 213, 216, 227-30, 232; Parent Ex. C at p. 35). iBrain developed an IEP for the student for the 2018-19 school year that provided extensive information about the student's present levels of academic achievement, communication, oral-motor and feeding, vision, social/emotional, and physical skills as well as her management needs (Parent Ex. C at pp. 1-20). Additionally, the iBrain IEP provided annual goals and short-term objectives to address her identified needs (id. at pp. 22-30).

Further, iBrain provided for the student a 1:1 paraprofessional and a 1:1 private duty nurse all day, every day (Tr. pp. 14, 212, 233-34; Parent Ex. C at p. 35). The special education director explained that the same nurse traveled with the student on the bus with accommodations for limited travel time and "AC" because of medical concerns related to overheating and a lift bus for a wheelchair (Tr. pp. 14-16, 234, 360). The special education teacher stated that having a 1:1 nurse was a precondition for the student's participation in the school environment, as it would not be safe for her to go to school without one (Tr. pp. 346, 374).

The hearing record shows that iBrain developed an individualized healthcare plan for the student, which the special education described as "goals for maintaining her health" (Tr. pp. 225; see Parent Ex. C at pp. 31-34). The healthcare plan identified the responsibilities of the nurse and paraprofessional in addressing the student's needs including her tracheostomy care (maintain open airway, observe for infection), risks from seizure activity (observe for aspiration or injury), mobility (maintain skin integrity, provide access to classes), diet (observe food allergies, maintain adequate intake), and impaired verbal communication (use of adaptive device, use of motor/social/expression skills) (Parent Ex. C at pp. 31-34).

According to the special education director, iBrain used a "direct instruction model" which was a teaching methodology that entailed "one-to-one instruction with a teacher and specific instructional methodologies that . . . reinforce positive responses and eliminate inaccurate responses so that they're not misremembered and mischaracterized by the student as a correct response" due to the student's executive functioning deficits (Tr. pp. 220, 350). The special education director explained that the use of direct instruction for academic matters was "really important" for students with brain injuries as it included what types of materials to present and how to redirect students in a way to minimize the chance they would remember inaccurate answers (Tr. pp. 218, 220-21). The special education director stated that 30 minutes of direct instruction time was appropriate for the student, because that time was used to work on individual goals which

[6] As discussed below in further detail, iBrain staff explained that vision education services did not begin in July 2018; however, at the time of their testimony in December 2018 and February 2019, iBrain staff indicated that all of the student's services were "being fulfilled" including vision education services (Tr. pp. 64-66, 215-16).

were challenging and mentally taxing; therefore those goals were not implemented during a full hour of one-to-one direct instruction (Tr. pp. 354-55). Additionally, the special education director explained that the 30 minutes of direct instruction was not the only academic instruction the student received, since her class also had read alouds, math centers, music and movement time, and paired or small group activities to work on basic concepts (Tr. pp.270-75, 282-83; see Parent Ex. F).[7] The special education director stated that in regard to the group instruction, in about half of instances the teacher was leading the instruction and in the other cases the teacher provided and directed the activity and the paraprofessional carried out the instructions and activities (Tr. pp. 336-37).

Further, the clinical director of iBrain explained that "[a]cademic programming [was] infused throughout the whole curriculum [and] throughout the whole related service profile" (Tr. p. 81; see Parent Ex. F1 at p. 1). The clinical director continued that all iBrain staff had copies of all the student's goals, including academic goals, and that the student's 1:1 paraprofessional continued to work on those goals throughout the day (Tr. p. 88). Additionally, iBrain staff explained that morning meetings were a time for academic instruction as the teacher asked the student a question and spent time individually with the student, and that at times the therapist pushed into the classroom to help the student access a device so as to respond to the teacher and participate with her class (Tr. pp. 89-90, 238-39). Also, the clinical director explained that because of the push-in model for related services, the student received an instructional lesson from her teacher in conjunction with the speech therapist twice per week, "quite frequently" during her OT sessions, and about one out of three times per week in conjunction with vision therapy (Tr. pp. 80-84). The special education director testified that she believed this left a "pretty substantial" amount of time that the student remained in the classroom where she could be "sitting" with the ball from PT, practicing reaching things within the classroom, or for OT it could be using her speech device to participate in a classroom activity (Tr. pp. 22-23). The special education director explained that push-in related services sessions were not group sessions, but times when the therapist was working only with the student to facilitate the development of skills that transition into the classroom (Tr. p. 368). She also confirmed that there was a "great deal of communication" between the student's teacher and the therapists: the teacher met regularly with the therapists and sometimes observed sessions, the therapists pushed into the classroom, and they had meetings in which the student's entire team met to discuss her progress (Tr. p. 216).

With respect to how iBrain met other needs of the student, the special education director discussed the danger of skin breakdown from remaining in one position for too long and the importance of getting the student out of her wheelchair (Tr. pp. 282-83). She explained that they had mats in the classroom and music and movement were times they liked to make sure students were out of their chairs (Tr. p. 283). In addition, regarding the lighting preferences included in the student's iBrain IEP, the special education director stated that iBrain had areas which had less access to lighting and that within the classroom they had the ability to adjust the lighting and the ability to move students to other areas or adjust overhead lighting (Tr. p. 334; see Parent Ex. C at p. 18).

[7] The hearing record contains two parent exhibits labeled "F"; one entered during the pendency portion and one entered during the merits portion of the impartial hearing. For the purposes of this decision and to differentiate the two exhibits, the exhibit F entered during the pendency hearing will be designated "Parent Ex. F1".

The October 2018 iBrain progress report shows that academically the student was working on identifying and matching for color using her AAC device or eye-gaze, identifying objects and photographs related to her school activities or personally meaningful words, choosing a preferred book through multimodal means (eye-gaze, reaching, vocalizations, AAC device), indicating to continue reading a book through multimodal means (hitting a switch, using her device), and saying a repeated line by activating a voice output switch or using her AAC device (Parent Ex. H at pp. 1-2).

In the area of speech-language therapy the October 2018 progress report showed that the student working toward locating and identifying target core word vocabulary; initiating and engaging in reciprocal conversation; requesting a preferred activity, object, or item via eye gaze; and demonstrating improved volitional swallowing ability (Parent Ex. H at pp. 2-4).

Regarding OT, the October 2018 progress report indicated that the student was working on maintaining grasp of an adapted hairbrush, sitting safely on adaptive toilet, activating voice output switch to indicate grooming preferences, initiating movement to assist in pushing arms through jacket, grasping and placing pieces in a puzzle, using a wobble switch connected to voice output, participating in activities by visually attending to peers and responding to peers, and participating in music activities by initiating movement (Parent Ex. H at pp. 4-6).

In the area of PT the student was working toward sitting with hips and knees in "90-90 degrees" for 20 minutes, maintaining short sitting on a bench or wooden classroom chair, maintaining straddle sitting on a bolster, sitting in her MacClaren stroller, holding her head in the midline, and walking in a gait trainer (Parent Ex. H at pp. 6-7).

Referencing the October 2018 progress report, the special education director stated that the student was making progress on an annual goal involving choosing a book out of a field of two, which she noted incorporated use of the student's device as well as her vision, and that the goal was to reach 80 percent and she was already at 60 percent of the time in October 2018 (Tr. p. 246; see Parent Ex. H at p. 2). In addition, the special education director noted that the student had been working on oral sensory activities to improve muscle strength and awareness and that she had shown improvement in the consistency of her swallowing ability (Tr. pp. 248-49; see Parent Ex. H at p. 4). In addition, the student had shown increased literacy awareness as well as increased ability to use her switch device consistently to communicate (Tr. p. 249; see Parent Ex. H at p. 5). The special education director stated that the student had "advanced tremendously" and that she expected her success to continue (Tr. p. 250).

Turning to the parents' specific allegations on appeal, the parents assert that the IHO erred by mischaracterizing the amount of direct instruction the student received, and by suggesting that the use of the direct instruction approach for all students was not appropriate due to the varying needs of students with TBI. As detailed above, the hearing record provides a rationale for why iBrain used a direct instruction approach with the student, as well as evidence that the student received direct instruction throughout the school day, and not only in the daily 30-minute 1:1 special education teacher sessions (Tr. pp. 218, 220-21, 270-75, 282-83, 350, 354-55). To the extent the parents argue that the IHO erred in stating that iBrain gave "little consideration" to the student's level of fatigue and medical condition when providing her related services, the special education director indicated that the student benefitted from "extended" therapy sessions due to

her need for rest breaks during the sessions, the "slow process" of transferring and positioning the student due to her tracheostomy and other medical equipment, and the extensive wait time she required to respond and answer (Tr. pp. 230-32). Therefore, a review of the hearing record supports a finding that iBrain identified the student's extensive cognitive, academic, communication, physical and health needs, and provided instruction and related services that were specially designed to meet those unique needs.

Next, the parents argue that the IHO erred by concluding the student's iBrain IEP lacked baseline measures of the student's skills, and that some of the goals put the student "at risk for a medical incident." With respect to the arguments pertaining to the quality of the iBrain IEP and the annual goals outlined within, I note that a "private placement need not provide . . . an IEP for the disabled student" (Frank G., 459 F.3d at 364). Accordingly, because private unilateral schools such as iBrain need not follow the procedures of the IDEA in developing an IEP that includes annual goals for each student with a disability and, in any event, Second Circuit courts "are often 'reluctant to find a denial of a FAPE based on failures in IEPs to identify goals or methods of measuring progress'" (J.L. v City Sch. Dist. of City of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013], citing P.K. v. New York City Dep't of Educ., 819 F.Supp.2d 90, 109 [E.D.N.Y.2011]), even if there was a requirement that the unilateral placement develop annual goals for the student, I would not—under these circumstances—hold that the parents' unilateral placement was substantively deficient (Gagliardo, 489 F.3d at 112 [explaining that 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement"]). Although the annual goals for the student included in the iBrain IEP may have been arguably less than perfect in some aspects, a review of those goals shows that they largely addressed the student's identified needs, which are not in dispute (compare Parent Ex. C at pp. 2-20, with Parent Ex. C at pp. 22-30).

The parents contend that the IHO erred in concluding that the student was "at risk for a medical incident" based on a speech-language annual goal designed to improve her volitional swallowing ability, and testimony from the district's supervisor of speech discussing concerns regarding the safety of the iBrain goal in light of the student's NPO status, the timing of the goal activity following lunch, and the student's history of reflux (Tr. pp. 823, 846-58, see Parent Ex. C at p. 26). However, the iBrain IEP acknowledged the student's NPO status and indicated that the student had received an informal bedside swallowing evaluation at a hospital on February 12, 2018, which revealed a limited swallow reflex and minimal movement in all stages of the swallow (Parent Ex. C at p. 7). Therefore, according to the iBrain IEP, the speech-language pathologist who conducted the bedside swallowing evaluation was unable to conduct an instrumental swallow study, but did approve the student for taste trials in which an oral motor and feeding plan had been implemented (id.). The feeding plan consisted of "exposure to various tastes and temperatures in the attempt to stimulate a greater response to trigger a swallow" (id.). The iBrain IEP also included the directive that nothing should be provided to the student orally (including sensory or taste tests) outside of speech therapy sessions (id. at p. 18). The iBrain IEP further indicated that "based on professional observation, collaboration with [the] team, and professional clinical opinion, [the student] has shown improvement with her oral motor mechanism and toleration" adding that the 60 minute speech therapy sessions allowed enough time for components of the session such as breaks, tactile oral and physical support, collaboration, and "a safe pace for consuming foods/liquids" (id. at p. 7). The student's October 2018 progress report revealed that she had shown

improvement in the consistency of her volitional swallowing ability (Tr. pp. 248-49; see Parent Ex. H at p. 4).

While acknowledging the concerns expressed by the district's supervisor of speech regarding this issue, the hearing record shows that iBrain relied on evaluative information provided by an outside speech-language pathologist, as well as the professional judgement of staff familiar with the student's medical condition, needs and limitations when determining the appropriateness of her annual goals. Moreover, while a student's progress is not dispositive of the appropriateness of a unilateral placement, a finding of some progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]). Here, the student's recorded progress in swallowing ability weigh in favor of a finding that iBrain provided appropriate speech-language services to the student.

Further, the parents argue on appeal that the IHO erred in concluding that iBrain was not appropriate because "it lacked all components of Student's programming when it opened its doors in July 2018." On this point, the clinical director testified that iBrain did not have a vision teacher throughout the summer session and that the school did not "acquire" a vision teacher until mid-September 2018 (Tr. pp. 64-66; see Parent Ex. F1 at p. 2). The special education director stated that the student's vision services had been in place since October 2018 (Tr. pp. 214-15).[8] Although the student did not receive vision services during the summer and early fall of 2018 provided by a vision therapist, the special education director indicated that vision services were blended into the student's entire program and stated that iBrain implemented all of the suggestions (e.g. goals, best way to work with the student, materials used, how to place them, use of movement, background colors) that had been provided by the student's vision teacher who worked with the student during the prior school year, so that the iBrain staff could help the student to functionally use her vision throughout the school day (Tr. pp. 30-33). Moreover, while the district's director of vision services noted potential concerns regarding regression with the gap in services, I note that the director of vision services never met or assessed the student and had not spoken to her doctors, teachers or providers (Tr. pp. 784, 805, 812-814).

Accordingly, to the extent the IHO determined that iBrain was an inappropriate unilateral placement because it did not offer sufficient related services to meet the student's vision needs, it is well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens, 2010 WL 1005165, at *9). Nevertheless, a review of the evidence in the hearing record demonstrates that iBrain did address the student's vision needs. As discussed above, although the student did not receive services provided by a vision therapist for a period of time at the beginning of the 2018-19 school

[8] iBrain staff indicated that at the time of their testimony at the impartial hearing (December 2018 and February 2019) all of the student's services were "being fulfilled" including vision education services (Tr. pp. 64-65, 216).

year, iBrain otherwise endeavored to meet the student's unique vision needs through her specially designed instructional and related services programming and, in considering the totality of the circumstances, I decline to find that iBrain was not an appropriate placement due to the lack of vision education services during that time period.

Lastly, the parents contend that the IHO erred in finding that iBrain was not appropriate because "[i]t has not been vetted by any state or regional credentialing agency," erroneously holding iBrain to federal and state regulatory requirements. As noted earlier here and by the IHO in her decision, a parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14; see IHO Decision at p. 11).

Therefore, in light of the discussion above and contrary to the IHO's determination, the hearing record supports a finding that iBrain provided instruction specially designed to meet the unique needs of the student and was an appropriate placement for her during the 2018-19 school year. Accordingly, the parents are entitled to reimbursement by the district for the cost of tuition and related services at iBrain for the 2018-19 school year.

D. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to

assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Turning to the parties' disagreement over equitable considerations in this case, and having considered the various factor relied upon by the IHO, I find that the hearing record does not support the IHO's finding that equitable considerations weigh against the parent and support a reduction in the amount of relief awarded.

1. Parent Cooperation

The IHO found that the parents and parents' counsel did not fully cooperate with the student's educational planning and noted that the parents failed to attend three IEP meetings that were scheduled at the parents' desired times, withheld consent for iHope educators to participate, and did not schedule appointments to visit either of two potential nonpublic school placements.

The parents argue that they made the student available for all requested evaluations and assessments and provided the district with a ten-day notice of their intent to unilaterally place the student at iBrain (Req. for Rev. p. 7). The parents contend however, that the district failed to cooperate with the parents' requests for: the names of the mandated CSE team members, and the student's special education teacher and related service providers to be placed in the meeting notices; a CSE meeting reconvene to allow the school physician to participate; and "evaluations before the meeting" (Req. for Rev. pp. 7-8). The parents further argue that the IHO erred by referencing the parents' failure to attend "the June 14th IEP meeting" as an example of non-cooperation when no IEP meeting was held on June 14, 2018, rather it was rescheduled and held on June 18, 2018 (Req. for Rev. p. 8).

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

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

attendance at the meeting]). Parents also may request the attendance of a school physician in writing 72-hours prior to the CSE meeting (8 NYCRR 200.3[a][1][vii]). As to whether State regulations allow the parents to compel the attendance by the physician in person, I note that the regulations do provide the CSE members with the ability to make other arrangements for CSE participation (see 8 NYCRR 200.5[d][7]["When conducting a meeting of the committee on special education, the school district and the parent may agree to use alternative means of participation, such as videoconferences or conference telephone calls"]).

A review of the hearing record reveals four CSE meeting notices dated March 22, 2018, May 3, 2018, June 14, 2018, and June 18, 2018 (Dist. Exs. 3-6). The parent testified that she received the notice for the meeting scheduled for March 22, 2018, which she did not attend and which ultimately did not occur, but that she had concerns and "wanted [the student's] special education teacher to attend the meeting, and [she] wanted a doctor to attend the meeting" preferably the student's own doctor, although she was told that it had to be the district's doctor, and preferably in person (Tr. pp. 435-39). With respect to the meeting scheduled for May 3, 2018, the district's computerized Special Education Student Information System (SESIS) log shows an email from the student's mother dated May 1, 2018 stating that she would not be able to attend but would "follow-up within the week to find a mutually agreeable date and time so that [she could] be present" (Tr. pp. 441-42; Dist. Ex. 17 at p. 14). By letter dated May 3, 2018, the parent requested a full CSE meeting and participation of a district school physician, among a number of other requests (Parent Ex. M). Next, the parent testified that according to the SESIS log, on May 11, 2018, she followed up via email about rescheduling the student's CSE meeting, proposing specific times of day and days of the week that she would be available to meet: Tuesdays and Thursdays between 10:00 a.m. and 1:00 p.m., and indicating that she had another child to care for and that her partner may not be available at other times (Tr. pp. 443-45; Dist. Ex. 15; 17 at p. 13). The record shows that by letter dated June 12, 2018, the parents requested that the CSE meeting scheduled for June 14, 2018 be rescheduled (Parent Ex. N). The parent testified that she received the notice of the June 14, 2018 meeting and that the student's teacher, physical therapist, occupational therapist and speech therapist were included on the meeting notice, but the notice still did not include a doctor and she was not able to attend the meeting due to scheduling conflicts which may have involved the parents or the student's teacher's unavailability but that the parent "offered to come on other days, but the [] DOE chose to have the meeting when we were not available" (Tr. pp. 445-47; Dist. Ex. 5 at p. 2). The parent also testified that the student's teacher was not going to be available for the meeting on June 18, 2018 (Tr. pp. 447-49). The CSE meeting took place on June 18, 2018 without the parents' participation or attendance (Dist. Exs. 1; 2).

The CSE chairperson testified that efforts were made beginning in January 2018 when a planning meeting for the CSE process for the 2018-19 school year was conducted with the student's school, at which time it was discussed that iHope would work with the district to: ensure full participation at the meetings by parents and school personnel; schedule meetings during the day rather than in the afternoons or evening; and communicate with the parents to ensure that they would be available, however acknowledged that the meeting did not include the parents' counsel (Tr. pp. 571-74, 614-615). The record also reflects the district's attempts regarding the rescheduling of cancelled meetings in the district's SESIS log including the district's agreement to schedule the meeting at the parents' requested days and times, to have a physician at the CSE meeting, and—although the parents' request for the meeting to take place at iHope was not granted—to include the student's teachers and providers by conference call (Tr. pp. 574-92; Dist.

Ex. 17 at pp. 8-14). However, the CSE chairperson acknowledged that the June 18, 2018 meeting notice showed that the attendance of the physician as well as the parent was "to be determined" (Tr. p. 596; see Tr. p. 451). The CSE chairperson also acknowledged a mistake on the prior written notice for the June 14, 2018 meeting stating that the CSE would be holding the student's meeting on June 11, 2018, however noted that the date was correct as stated on the CSE meeting notice and also that the district responded to an email from the parents to correct the error (Tr. pp. 592-93, 682-83; Dist. Exs. 5; 8; 14; 17 at pp. 12-13).

With respect to the classroom observation of the student conducted on January 25, 2018, the CSE chairperson testified that the parent gave consent for the observation and also acknowledged that the report was not completed until March 22, 2018, the first scheduled date of the student's CSE meeting, so that the CSE would not have had the benefit of the classroom observation report had it met on that date (Tr. pp. 633-39; Dist. Ex. 11). The prior written notice dated June 19, 2018 reveal that the classroom observation was considered at the June 18, 2018 CSE meeting (Dist. Ex. 9 at p. 2). The CSE chairperson also testified with respect to the social history update, that it was required to be completed and the district communicated with the parent via email on June 18 and 20, 2018 but that the parent did not respond; however the parent testified that although she did not specifically recall, she "believe[d] that [she] did" the social history update (Dist. Ex. 17 at pp. 4-5; Tr. pp. 530, 606-08, 670-71). The CSE chairperson testified with respect to CSE requests, reports, and school/parent participation and the parent testified that she completed the nursing form, bus package and medical accommodation package, but did not receive the school location letter (Tr. pp. 530-32; 600-06, 641-47, 651-52, 654-60, 688, 754-62, 768-70). There was also testimony with respect to CBST placement attempts including CBST notes, and placement responses; the parents did not visit the placements (Tr. pp. 515, 724-27, 734; Dist. Exs. 18; 19). The parents, by letter dated June 21, 2018, provided notice to the district of their intention to unilaterally place the student at iBrain for the 2018-19 school year (Parent Ex. O).

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

2. Excessive Costs and Services

The IHO found that iBrain tuition was not reasonable because the student received "just 8.5 hours of academics" per week and her related services exceeded the amount recommended in the June 2018 IEP. The IHO also found that given the "student's complicating medical conditions and her propensity for fatigue," it was debatable whether an extended school day program was appropriate for her. Further the IHO found that iBrain's contract requirements regarding related services appeared to be "double dipping"—charging hourly rates for related services that were provided by full-time salaried employees during the school day.

The parents contend that the IHO erred by relying on the fact that the student's related services "exceed the amount recommended in the June 2018 IEP" to find iBrain not appropriate when the IHO had already invalidated that IEP by ruling that it denied the student a FAPE (Req. for Rev. p.8).

On June 5, 2018 the parents executed an enrollment contract with iBrain for the 2018-19 school year explaining tuition and fees (Parent Ex. I at pp. 1-6). The iBrain enrollment contract states that full tuition shall consist of: base tuition, described as $148,000 for the school year including the cost of an individual health paraprofessional, a school nurse and academic programming; as well as supplemental tuition, described as the cost of related services, a transportation paraprofessional, and/or individual nursing services, billed at a rate of $90 per hour (id. at pp. 1-2).

Further, while the district raised the question of the costs of the program and services at iBrain in its post-hearing brief, the district's arguments in this regard were focused on the appropriateness of the separate billing practices employed by iBrain and how such practices called into question the appropriateness of iBrain as a unilateral placement for the student (Dist. Ex. 21 at pp. 15-16). The district failed to argue or present any rebuttal evidence that the actual costs of the services provided by iBrain were excessive, i.e., by reference to actual evidence of lower-cost programs and/or services that were comparable to and available in the same geographic area. The district also did not attempt to show if similar services to those being provided to the student at iBrain could be provided at significantly lower cost by the district somewhere in its public schools. Further, the evidence does not support a finding that the student received services at iBrain that far exceeded the level that the student required in order to receive a FAPE such that a reduction of the amounts charged for each of the segregable costs would be warranted.

Thus, due to a lack of evidence in the record with respect to comparative costs for services, I decline to find that the equities weigh against the parents in this regard.

E. Pendency

The parents argue that the IHO "erroneously" held the parents to a standard of having to prove that the educational program the student received at iBrain for the 2018-19 school year became identical, as opposed to substantially similar, to the educational program she received at iHope for the 2017-18 school year (which the IHO found it was) and also required the parents to pinpoint the precise date when that identicality was achieved. (Req. for Rev. at p. 10). The parents also argue that the district has withheld pendency-related funds for the first few months of the 2018-19 school year when the parents were entitled to such funds as of the beginning of the school year. (id.)

As this decision orders full tuition reimbursement for the 2018-19 school year, it is unnecessary to address pendency because the parents will receive all the relief to which they are entitled for the school year.

VII. Conclusion

Based on the foregoing, I find that the parents have met their burden to demonstrate that their unilateral placement of the student at iBrain for the 2018-19 school year was appropriate

(Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370; see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Having determined that the evidence in the hearing record demonstrates that iBrain was an appropriate unilateral placement for the student for the 2018-19 school year, and equitable considerations do not preclude an award of tuition reimbursement to the parents, that portion of the IHO's decision denying tuition reimbursement to the parents must be reversed.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated January 08, 2020 is modified by reversing that portion which determined that the parents failed to establish that iBrain was an appropriate placement for the student's 2018-19 school year and denied the parents' request for direct payment or reimbursement of the costs of the student's tuition and related services at iBrain for the 2018-19 school year, as well as transportation costs and,

IT IS FURTHER ORDERED that the district shall reimburse the parents for the costs of the student's tuition and related services at iBrain, upon proof of payment, as well as transportation costs,[9] for the 2018-19 school year; and

IT IS FURTHER ORDERED that the district shall directly pay any outstanding balance due for the cost of the student's tuition and related services at iBrain for the 2018-19 school year.[10]

Dated: **Albany, New York**
March 30, 2020

CAROL H. HAUGE
STATE REVIEW OFFICER

[9] State law requires districts to provide "suitable transportation up to a distance of fifty miles to and from a nonpublic school which a child with a handicapping condition attends if such child has been so identified by the local committee on special education and such child attends such school for the purpose of receiving services or programs similar to special educational programs recommended for such child by the local committee on special education (Educ. Law §4402[4][d])." The parents' entitlement to reimbursement for transportation costs if awarded tuition reimbursement is not contested on this appeal.

[10] The parents entitlement to direct parent of the tuition and related services to iBrain by the district if the parents prevailed on their claim that iBrain was an appropriate unilateral placement for the student for the 2018-19 school year is not contested on this appeal.