The University of the State of New York

The State Education Department
State Review Officer
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No. 20-070

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by Peter G. Albert, Esq. and John Henry Olthoff, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, Esq.

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has been the subject of a prior State-level administrative appeal of an interim decision rendered by an IHO regarding the student's pendency placement after the parents rejected the district's offer of a public school placement and unilaterally placed him at iBrain for the 2018-19 school year (see Application of the New York City Dep't of Educ., Appeal No. 18-133). The United States District Court for the Southern District of New York also addressed the student's stay-put placement during the pendency of the present proceedings (N. v New York City Dep't of

Educ., 2019 WL 3531959 [S.D.N.Y. Aug. 2, 2019], reconsideration denied, 2019 WL 5865245 [S.D.N.Y. Nov. 7, 2019]). The current State-level appeal relates to an appeal from the IHO's final decision in the same proceeding.[1]

At the time the parents began the instant due process proceeding on July 9, 2018, the student was eight years old and eligible to receive special education and related services as a student with a traumatic brain injury (Parent Ex A at p. 1; Dist. Ex. 4 at p. 1).[2] The student exhibits global developmental impairments which adversely affect his educational abilities and performance (see Parent Exs. I; X). The student is nonverbal and non-ambulatory and has management needs which require a high degree of individualized attention and intervention (see Parent Exs. I; X at p. 2).

By way of background, for the 2017-18 school year, the parents unilaterally placed the student at the International Academy of Hope (iHope), a nonpublic school, where he had been attending since the 2015-16 school year (see Parent Exs. B at p. 4; H). A IEP developed by a CSE for the 2017-18 school year was the subject of a prior impartial hearing, which resulted in an IHO decision dated March 6, 2018 that found that the district conceded it failed to offer the student a FAPE for the 2017-18 school year, that iHope was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' request for relief (Parent Ex. B at p. 11). The IHO in that matter ordered that the district fund the costs of the student's attendance at iHope, as well the costs of the student's related services, for the 2017-18 school year (id. at p. 12). The IHO also ordered that the CSE reconvene and develop an IEP for the student with a specified program and services (id.).

Prior to developing an IEP for the student for the 2018-19 school year, the district conducted a psychoeducational evaluation, a classroom observation, and a social history update (Dist. Exs. 6-8). On February 14, 2018, the CSE sent the parents a notice scheduling a CSE meeting for April 30, 2018 (Dist. Ex. 11). According to the district's CSE chairperson, staff at iHope—the school the student attended at the time—had requested the date of the CSE to be changed, and the CSE sent out a notice on February 27, 2018 scheduling a CSE meeting for March 20, 2018 (see Tr. pp. 129, 145-53; Dist. Exs. 12; 18).

The CSE began to conduct a CSE meeting on March 20, 2018 with the student's mother present; however, the student's mother expressed her disagreement with the CSE's

[1] In addition, proceedings relating to the student's 2019-20 school year are ongoing, including two appeals related to the student's stay-put placement during the pendency of those proceedings, which are currently pending before another SRO under appeal numbers 20-067 and 20-090. The parents also pursued two separate civil actions in district court related to the student's pendency placement during the proceedings relating to the 2019-20 school year, one in the Southern District of New York (20-cv-03912 [filed May 2, 2020]) and one in the Eastern District of New York (20-cv-2009 [filed May 1, 2020]), the latter one which was transferred to the United States District Court for the Southern District of New York as related to the former (N.v. New York City Dep't of Educ., 2020 WL 2542118 [E.D.N.Y. May 19, 2020]).

[2] The student's eligibility for special education and related services as a student with a traumatic brain injury is not in dispute in this proceeding (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

recommendation for 30-minute long related service sessions, and no final IEP was developed from this CSE meeting (Tr. pp. 431-33; see Req. for Rev. ¶ 7; Answer ¶ 8).[3]

By letter dated April 20, 2018, the parents asked the district to reconvene a CSE to develop a program for the student and asked for "a few proposed dates and times in writing" (Dist. Ex. 16). The parents requested a "[f]ull [c]ommittee [m]eeing," including staff from iHope and a district physician "in person," and that the meeting be held at iHope and recorded, and stated that they were available to schedule the meeting at any time (id. at pp. 2-3). With the letter, the parents also provided a copy of the March 2018 IHO decision from the proceedings relating to the 2017-18 school year (id. at p. 2).

On April 27, 2018, the district sent a new meeting notice for a May 11, 2018 CSE meeting at 10:00 a.m. (Dist. Ex. 13). An April 30, 2018 prior written notice stated that the parents' request to reconvene to reflect the March 2018 IHO decision concerning the student's 2017-18 school year was granted and the CSE "propos[ed]" that this meeting be held on May 11, 2018 at 9:00 a.m. and that the meeting to develop an IEP for the student's 2018-19 school year be held the same day at 10:00 a.m. (Dist. Ex. 14 at p. 1). The prior written notice also indicated that the meeting would not be held at iHope without further information from the parents regarding that request, and that a school physician would participate as requested, but not in person (id. at pp. 1-2). On May 3, 2018, the district sent an email to the parents attaching the April 2018 prior written notice (Dist. Ex. 15).

On May 4, 2018, counsel for the parents sent an email to the district attaching the parents' April 20, 2018 letter, the March 2018 IHO decision regarding the 2017-18 school year, and a new letter stating that the scheduled May 11, 2018 CSE meetings should not proceed because the district scheduled a date rather than offering several options, the parents were not available on that scheduled date, the meeting notice did not include a parent member or a school physician, and the notice did not specify that the school physician would participate in the meeting in person (Dist. Ex. 16).

The CSE proceeded to meet without the parents in May 2018 and developed an IEP for the student for the 2018-19 school year (see Tr. pp. 205-06; Dist. Ex. 4 at pp. 14, 16).[4] According to the IEP, the May 2018 CSE recommended a 12-month specialized school program that included a "l2:1+(3:1)" special class placement with five 30-minute sessions per week of individual occupational therapy (OT), five 30-minute sessions per week of individual physical therapy (PT),

[3] During the impartial hearing there was a factual dispute as to whether a CSE meeting occurred on March 20, 2018. There is no documentation in the hearing record reflecting that a CSE meeting occurred on that date, such as an IEP, a CSE attendance sheet, meeting minutes, a prior written notice, or an event log, and the CSE chairperson testified during the impartial hearing that the CSE meeting scheduled for March 20, 2018 did not go forward (see Tr. pp. 150, 183, 185, 222-23). On the other hand, the student's mother testified that she, her husband, and her attorney attended a CSE meeting on that date (Tr. pp. 431, 476, 485-87). Despite the factual dispute during the impartial hearing, on appeal, it appears that the parties are now in agreement that the meeting did occur (see Req. for Rev. ¶ 7; Answer ¶ 8).

[4] Although the meeting was scheduled for May 11, 2019 (see Dist. Ex. 13), both the IEP and the prior written notice indicate that the meeting occurred on May 10, 2019 (Dist. Exs. 4 at p. 14; 5 at p. 2). The CSE chairperson testified that it was her "understanding" that the meeting occurred on May 11, 2019 (Tr. pp. 205-06).

four 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group, one hour per month of parent counseling and training, transportation paraprofessional services, and an assistive technology eye-gaze device (Dist. Ex. 4 at pp. 11-12, 14).

In early June 2018 the parents enrolled the student at iBrain for the 2018-19 school year (Parent Ex. J). By letter dated June 21, 2018, the parents informed the district that it had not properly responded to the parents' request for a full committee meeting with a district school physician at a mutually agreeable date and time, nor had it offered the student a program or placement that could appropriately address his educational needs for the 2018-19 school year (Parent Ex. P). The parents provided the district with notice of their intent to unilaterally place the student at iBrain for the 2018-19 school year and seek public funding for that placement (id.). The letter indicated that the parents "remain[ed] willing and ready to entertain an appropriate [district] program and an appropriate public or approved non-public school placement once an IEP has been conducted" (id.). The student began attending the 12-month program at iBrain on July 9, 2018 (Parent Ex. X at p. 2).

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). The parents argued that the March 2018 CSE "feigned interest in the independent evaluations and reports" provided to the district prior to the meeting (id. at p. 2). In addition, the parents alleged that the district failed to conduct the May 2018 CSE meeting with a "[f]ull [c]ommittee" in accordance with the parents' request and failed to conduct the CSE meeting at a mutually agreeable time with the required members including the parents (id.).

The parents further contended that the May 2018 IEP "was not the product of any individualized assessment of all [of the student's] needs and w[ould] not confer any meaningful educational benefit for [the] 2018-2019 [school year]" (Parent Ex. A at p. 2). The parents asserted that the May 2018 IEP inadequately described the student's present levels of performance and management needs and contained immeasurable goals (id. at p. 3). The parents alleged that the recommendations set forth in the May 2018 IEP were inappropriate and would cause substantial regression because the proposed 12:1+(3:1) special class was too large given the student's need for "constant 1:1 support and monitoring" to remain safe and also because the student required 1:1 direct instruction to make progress (id. at pp. 2-3). The parents also objected to the May 2018 CSE's "unsubstantiated reduction" to the student's related services (id. at p. 2). The parents alleged that the district failed to offer the student programming in the least restrictive environment (LRE), the district's programming was inappropriate because it did not address the student's highly intensive management needs, and the IEP lacked "extended school day" services (id. at p. 3).

As relief, the parents sought the costs of the student's tuition at iBrain for the 2018-19 school year and transportation costs including a 1:1 "travel aide" (Parent Ex. A at p. 3). The parents

also requested that the district be required to reconvene the CSE to conduct an annual review meeting for the student (id.).[5]

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on October 9, 2018 and addressed the student's pendency placement that day (Tr. pp. 1-81). In an interim decision dated October 9, 2018, an IHO (IHO 1) found that iHope was the student's pendency placement (IHO Ex. I at pp. 4-11). Therefore, IHO 1 ordered the district to fund the student's pendency placement at iHope (id. at p. 11).[6] At some point thereafter, IHO 1 recused himself (IHO Decision at p. 3).[7]

Another IHO (hereafter "the IHO") was assigned to the matter and three additional days of hearing took place between May 15, 2019 and August 22, 2019 (Tr. pp. 82-495; IHO Decision at p. 3). The IHO rendered a decision on the merits dated February 24, 2020 (IHO Decision at pp. 3-26). Initially, the IHO described the procedural history of the matter up to the date of his decision about which he was aware and noted that his final decision rendered any issue regarding pendency "moot" (id. at p. 4). The IHO then found that the district "declined to present or defend a 'Prong 1' case" and, therefore, failed to meet its burden to show that it offered the student a FAPE for the 2018-19 school year (id. at pp. 7, 20). The IHO went on to find that iBrain was an appropriate unilateral placement for the student but that equitable considerations did not weigh in favor of an award of the costs of the student's tuition at iBrain, related services, and transportation (id. at pp. 20-26).

The IHO determined that the "gravamen of this case" was whether the parents' request for relief should be denied on the basis of equitable considerations (IHO Decision at p. 20). After thoroughly reviewing the evidence and testimony in the hearing record, the IHO stated that "[i]t [wa]s apparent th[at] . . . request[s] for doctors and group cancellation[s] were part of an orchestrated campaign to stymie the [district's] effort to create IEPs for the students that had been attending iHope but were now disenrolling from iHope and enrolling in mass at the iBrain school" (id. at pp. 23, 25). Further, the IHO stated that he "did not credit the [student's mother's] testimony regarding her 'cooperation' with the [district]" (id. at pp. 20, 25). The IHO found that the parents had no valid reasons for failing to attend several CSE meetings and noted testimony from the

[5] The parents also sought an interim decision directing the district to pay for iBrain as the student's pendency placement (Parent Ex. A at pp. 1-2).

[6] The parents appealed from IHO 1's interim decision on pendency, but, by decision dated December 21, 2018, an SRO dismissed the appeal on procedural grounds (see Application of a Student with a Disability, Appeal No. 18-133). Subsequently, the parents commenced a civil action in federal district court seeking review of IHO 1's interim decision on pendency (19-cv-02933 [filed Apr. 2, 2019]). The district court rendered a decision denying the parents' request for pendency at iBrain (New York City Dep't of Educ., 2019 WL 3531959) and also denied the parents' motion for reconsideration (New York City Dep't of Educ., 2019 WL 5865245). The parents appealed the district court's decision, and the matter remains pending with the United States Court of Appeals for the Second Circuit (see No. 19-4068 [filed Dec. 9, 2019]; see also Req. for Rev. ¶ 17).

[7] The IHO's decision on the merits in this matter was not paginated. For the purpose of this decision, citations to the IHO decision will be to the consecutive pages with the cover page for the decision identified as page "1" (see generally IHO Decision at pp. 1-28).

student's mother that she was not working at the time and that she attended regular doctors' appointments for the student (id. at pp. 24-25). In addition, the IHO noted inconsistent testimony from the student's mother regarding her discussions with an attorney about the contract for the student's attendance at iBrain (id. at p. 24). The IHO also determined that the record evidenced numerous efforts by the district to garner the parents' cooperation, conduct a CSE meeting, and produce an IEP for the student's 2018-19 school year (id. at p. 25).

The IHO briefly addressed the parents' two main reasons for rejecting the student's IEP—i.e., that a doctor was not going to physically attend the May 2018 CSE meeting and the CSE's recommendation for 30-minute related service sessions—and found neither of these bases persuasive because the district had a reason for the doctor's participation by telephone and the district's supervising school psychologist testified that 30-minute related service sessions were appropriate for the student, which testimony the IHO credited (IHO Decision at pp. 25-26).

Based on the foregoing, the IHO denied the parents' requested relief on equitable grounds and ordered the district to evaluate the student for any suspected disabilities not evaluated in the previous two years and to hold a CSE to consider the new evaluation reports and produce an IEP for the 2020-21 school year (IHO Decision at p. 26).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in not ordering the district to fund the costs of the student's attendance at iBrain for the 2018-19 school year. First, the parents allege that IHO 1 erred in his pendency determination and request a finding that iBrain is the student's pendency placement during the present proceeding because it is substantially similar to the program the student received at iHope during the 2017-18 school year.

The parents also assert that the IHO erred in failing to more explicitly state his determination that iBrain was an appropriate unilateral placement for the student during the 2018-19 school year, and the parents request an unequivocal determination of the appropriateness of iBrain for the student.

Finally, the parents contend that the IHO erred in denying tuition reimbursement based on equitable considerations for several reasons. First, the parents contend that a district is precluded from even arguing that the balance of equities are in its favor when it has failed to provide a FAPE or concedes that it has not provided a FAPE to a student with disabilities. Next, the parents contend that equitable considerations should weigh in favor of the parents' requested relief because the parents cooperated with the district and the CSE, consented to evaluations, attended one CSE meeting held on March 20, 2018, and provided the required 10-day notice of their intention to unilaterally place the student at public expense. They contend that the IHO erred in relying on non-record evidence and "gossip" about the actions of parents' counsel and fact patterns of other cases involving different students. Further, the parents assert that the district failed to act in good faith because, when the parents requested that the district reconvene a CSE meeting with a district physician in attendance, the district's notice of the meeting and prior written notice were unresponsive. Further, the parents assert that the district conducted a CSE meeting without providing the parents with proper notice in that the notice indicated a May 11, 2018 date, whereas the IEP states that the CSE meeting occurred on May 10, 2018. Finally, the parents contend that,

even if one assumes that the balance of equities were in equipoise, a total denial of tuition reimbursement was not warranted.

For relief, the parents request full reimbursement of tuition and related services, including special transportation, at iBrain for the 2018-19 school year.

In an answer and cross-appeal, the district responds to the parents' allegations and argues that the IHO's denial of the parents' request for relief on equitable grounds should be upheld. With respect to the parents' appeal of IHO 1's interim decision on pendency, the district argues that the issue of pendency has been litigated in district court and, therefore, the SRO should dismiss the parents' appeal of the interim decision on res judicata grounds. Next, in response to the parents' appeal of the IHO's determinations regarding the appropriateness of iBrain, the district asserts that the parents have not specified in the request for review the adverse findings they appeal or argue the reasons why those findings were error, which is required by State regulations governing practice before the Office of State Review. Accordingly, the district asserts that those adverse determinations should be deemed final and binding. With respect to equitable considerations, the district asserts that the IHO's credibility determinations should be afforded due deference and that the hearing record, as a whole, reflects the parents' lack of cooperation.

In its cross-appeal, the district argues that the IHO erred by finding that iBrain was an appropriate unilateral placement. Generally, the district argues that the IHO erred in not setting forth an analysis as to why he determined iBrain was appropriate. The district notes that, elsewhere in this decision, the IHO makes references to evidence in the hearing record that iBrain could not meet the student's needs. The district further argues that the IHO credited a district witness's testimony that 30-minute related service sessions were appropriate, which the district asserts should be deemed support for a finding that the 60-minute sessions delivered at iBrain were not appropriate for the student. The district further asserts that iBrain did not provide sufficient academic instruction, offering far less than the five hours per day called for in State regulation.

The parents submit a reply and answer to the district's cross-appeal, in which they restate their arguments on appeal and oppose the district's cross-appeal, arguing that the IHO correctly found iBrain to be an appropriate unilateral placement for the student.

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]).[8]

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. Pendency

In response to the district's argument about the preclusive effect of the district court's decision on the question of pendency in the present matter, the parents argue that substantial similarity "is the standard that has been applied at the district [court] and at the SRO [level], and that Judge Caproni based her decision on a definition of 'educational placement' that is at odds with this standard" (Reply& Answer to the Cross-Appeal at pp. 5-6).

Here, the district court squarely addressed the pendency question, finding that the pendency provision "does not require the [district] to fund a student's attendance at a preferred, 'substantially similar' school, at least not when the existing school is concededly able to service the student's IEP" and, therefore, denied the parents' request for a finding that iBrain was the student's pendency placement (New York City Dep't of Educ., 2019 WL 3531959, at *5-*8). As to the parents' argument about the definition of "educational placement" relied upon by the district court, this argument was also specifically addressed by the district court in its decision denying the parents'

[8] 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).

motion for reconsideration (New York City Dep't of Educ., 2019 WL 5865245, at *1-*2). It should go without saying, but since the parties continue to try to argue the point, I will stress that do not sit in review of a decision from the district court.

The law of the case doctrine "'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case'" (Perreca v. Gluck, 262 F. Supp. 2d 269, 272 [SDNY 2003], quoting Arizona v. California, 460 U.S. 605, 618 [1983]). "Administrative agencies are no more free to ignore the law of the case doctrine than are district courts" (Ankrah v. Gonzales, 2007 WL 2388743, at *7 [D. Conn. July 21, 2007]). The doctrine of the law of the case is intended to avoid retrial of issues that have already been determined within the same proceeding (People v. Evans, 94 N.Y.2d 499, 502-04 [2000] [noting that law of the case has been described as "'a kind of intra-action res judicata'"]; see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Cone v. Randolph Co. Schs. Bd. of Educ., 657 F. Supp. 2d 667, 674-75 [M.D.N.C. 2009]; see generally Application of a Child with a Disability, Appeal No. 98-73 [noting that a pendency determination by an SRO would not be reopened during the proceeding once it was decided]). For the law of the case doctrine to be a bar, the issue must have been actually considered and decided by the higher court (see Ms. S. v. Regl. Sch. Unit. 72, 916 F.3d 41, 47 [1st Cir. 2019]). As set forth above, the district court considered and decided the pendency issue and, therefore, the district court's decision represents the law of the case in this matter.[9]

Moreover, after the pleadings for this matter were submitted, the Second Circuit Court of Appeals issued a decision in Ventura de Paulino v. New York City Department of Education, 2020 WL 2516650 (2d Cir. May 18, 2020) addressing similar factual circumstances, which reached a similar result. Thus, there would be no reason to depart from the law of the case in this instance. In that case, the Second Circuit concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 2020 WL 2516650, at *9-*11). Given the recent legal developments, the undersigned provided the parties with an opportunity to brief how, or if, the Court's opinion in Ventura de Paulino should be applied to the facts of this appeal. The district argues that the parents' position that pendency should be transferred from iHope to iBrain on the basis that the two programs are substantially similar is defeated by both the district court's decision involving this student and the Second Circuit's ruling in Ventura de Paulino and that, therefore, there are procedural (res judicata) and substantive grounds to dismiss the parents' appeal of IHO 1's interim decision on pendency. The parents contend that the Ventura de Paulino decision involves only the issue of pendency, rather than a fully litigated FAPE claim, and therefore Ventura de Paulino involves a legal issue not addressed in the instant matter and so has no bearing on this matter.[10] The parents also argue that,

[9] To the extent the parents imply that, because the district court's decision has been appealed (see No. 19-4068 [filed Dec. 9, 2019]), it is not controlling on the parties or administrative decisionmakers in the interim, the parents cite no authority in support of such a proposition nor am I aware of any. Absent a determination from the Second Circuit Court of Appeals on this case, the district court's decision is binding.

[10] While the instant matter involves a final determination on the merits of the parents' claims relating to the 2018-19 school year, the parent also asserts an appeal of IHO 1's interim decision on pendency (see 8 NYCRR 279.10[d] [providing that "in an appeal to the Office of State Review from a final determination of an [IHO], a party may

because the petitioner(s)/appellant(s) in the matter decided by the Second Circuit filed a petition for rehearing or rehearing en banc, the Second Circuit decision has been stayed and, therefore, may not be deemed controlling in the instant matter.[11]

The parents provide no persuasive arguments in support of their positions that either the district court's decision involving this student's pendency placement in the current proceedings or the Second Circuit's determination on a similar legal and factual issue should not dictate the holding the present matter. Accordingly, the parents' appeal of IHO 1's interim decision on pendency is dismissed based on both the doctrines of law of the case and stare decisis.

B. Unilateral Placement

As the district has not cross-appealed from the IHO's determination that it failed to offer the student a FAPE for the 2018-19 school year, that issue is deemed abandoned and has become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]). Accordingly, I turn next to the issue of whether iBrain was an appropriate unilateral placement. The parents request an affirmance of the IHO's ultimate ruling that iBrain was appropriate, while the district contends in its cross-appeal that the IHO erred in finding that iBrain was an appropriate unilateral placement for the student during the 2018-19 school year. The district's arguments are that iBrain's "uniform practice" of scheduling 60-minute related services sessions did not meet the student's needs for shorter, 30-minute long sessions, and that iBrain did not provide sufficient academic instruction.[12]

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

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seek review of any interim ruling, decision, or failure or refusal to decide an issue"]). It is unclear if by this argument the parents intend to disavow their appeal of the interim decision. In any event, for the reasons set forth herein, the parents' appeal of IHO 1's interim decision is dismissed.

[11] The petition for rehearing or rehearing en banc would not affect the applicability of the Second Circuit's decision in Ventura de Paulino in the present matter. Rule 41 of the Federal Rules of Appellate Procedure provides that a "mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later" (Fed. R. App. P. Rule 41[b]). However, "[t]he issuance of the mandate is relevant only to the transfer of jurisdiction from the Circuit to [the district court] . . . it has nothing to do with an opinion's precedential authority" (S.E.C. v. Amerindo Inv. Advisors, Inc., 2014 WL 405339, at *4 [S.D.N.Y. Feb. 3, 2014] [also noting that "if the mere possibility of reversal were enough to make authority non-binding, no precedent would ever control"], affd sub nom., 639 Fed. App'x 752 [2d Cir. Feb. 26, 2016]). Accordingly, the Second Circuit's decision in Ventura de Paulino is controlling authority.

[12] In its cross-appeal, the district also asserts that the IHO made "made adverse determinations with respect to the appropriateness of iBrain" which the parents failed to specify on appeal, and notes that it is not "the SRO's role to research and construct [the parents'] argument or guess what they may have intended" (Answer with Cross Appeal ¶ 25). The district continues, alleging that, "[a]s such, those adverse determinations as to the appropriateness of iBrain should be rendered final and binding as [the parents] failed to appeal those as required by regulations" (id.). However, the district also did not identify the adverse determinations the IHO made with respect to the appropriateness of the student's placement at iBrain to which it refers, and therefore I decline to address any issues with respect to iBrain beyond the scope of those specifically identified in the district's cross-appeal.

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. The Student's Needs

While the student's needs are not in dispute in this matter, a brief description thereof provides context for the discussion regarding whether or not the student's unilateral placement at iBrain was appropriate.[13] According to the May 2019 affidavit prepared by the iBrain director of special education (director), the student has received diagnoses that included quadriplegic cerebral palsy with dystonia caused by bilateral brain bleed, periventricular leukomalacia, infantile spasms, seizure disorder, and gastroesophageal reflux disease (Parent Ex. X at p. 2; see Tr. p. 345).[14] The director also stated that the student is nonverbal, non-ambulatory, has highly intensive management needs, is administered medications for various medical conditions, and requires adult support for all activities of daily living due to his brain injury (Parent Ex. X at p. 2; see Tr. pp. 257-59).

Review of a January 12, 2018 iHope progress report revealed at that time, the student's pre-academic annual goals included improving his comprehension and identification of target vocabulary, answering "wh" questions, identifying objects by color, counting manipulatives, and identifying quantities for numbers 1-10 (Parent Ex. H at pp. 1-2). The student also received PT, OT, speech-language therapy, and assistive technology services to improve his ability to function in school and in consideration of his physical limitations (id. at pp. 3-10). The January 2018 iHope progress report reflected that the student's instruction involved a multimodal approach that incorporated his use of assistive technology devices across multiple areas of instruction (id. at pp. 1-2, 6-10). Moreover, the January 2018 iHope progress report included an individualized healthcare plan to address the student's specific health concerns, which included his need for 1:1 paraprofessional services to observe aspiration, fall, seizure, and incontinence precautions (id. at pp. 10-11).

2. iBrain

The director testified that iBrain opened on July 9, 2018, and she described the school as "a private, not-for-profit, and highly specialized special education program" that was created for students who have traumatic or acquired brain injury or brain-based disorders (Tr. pp. 38, 46; Parent Ex. X at p. 1). The school offered a 12-month extended day program for school-age students

[13] At the impartial hearing, the IHO did not enter into evidence the student's April 2018 iHope IEP or the student's 2018-19 iBrain IEP (see Tr. pp. 314-29). However, as discussed below, review of the evidence in the hearing record provides sufficient information about the student's needs and his iBrain program to make the determination that the 2018-19 school year unilateral placement at iBrain was appropriate.

[14] The parents offered the direct testimony of the iBrain director and iBrain's clinical director by affidavit in lieu of in-hearing testimony; both witnesses were available at the impartial hearing for cross examination (see Tr. pp. 63-70, 294-417; Parent Exs. D; X; see also 8 NYCRR 200.5[j][xii][g]). The affidavit from the clinical director at iBrain is two pages in length and appears to consist of nine paragraphs, but part of paragraph five, as well as paragraphs six, seven, and eight were not included (Parent Ex. D). After the exhibit was entered into evidence, IHO 1 and the parents' counsel had a discussion with respect to the missing text (see Tr. pp. 67-68). The parents' counsel acknowledged that the exhibit was missing a page due to a "copying" error, and he agreed to be "bound by the two pages [as submitted into] evidence" (Tr. pp. 67-68). In addition, the affidavit is not signed by the witness or notarized (Parent Ex. D at p. 3). The clinical director's testimony was specific to the pendency dispute; accordingly, it is not necessary to rely on this testimony for purposes of reviewing the IHO's determination that iBrain was an appropriate unilateral placement for the student.

between 5 to 21 year of age, many of whom are nonverbal and non-ambulatory (Parent Ex. X at p. 1-2). According to the director, every student at iBrain required 1:1 paraprofessional services to assist with activities of daily living, and many students required a 1:1 nurse to attend to medical needs (id. at p. 1). iBrain provided its students with an IEP, which the director stated was "geared toward improving functioning skills appropriate to their cognitive, physical and developmental levels, through a collaborative and multi-disciplinary approach which incorporate[d] the best practices from the medical, clinical, and educational fields" (id. at p. 2). She further stated that these practices included but were not limited to, "direct instruction, cognitive strategies, and compensatory education (using diagnostic-prescriptive approaches), behavior management, physical rehabilitation, therapeutic intervention, social interaction, and effective transition services" (id.). The director testified that iBrain offered its students services including OT, PT, speech-language therapy, vision education, assistive technology, and parent counseling and training (id.). Related services were provided "usually in 60-minute intervals," using a "push-in and pull-out model, which ensure[d] that each student's therapeutic goals [we]re addressed in multiple locations," adding that iBrain students "generally require[d] 60-minute sessions because of transferring and re-positioning needs, additional transition time and rest, and [the] repetition need[ed] to foster neuroplasticity" (id.).

At the time of the impartial hearing the student population at iBrain ranged in age from 6 to 19 years old (Tr. p. 38). The school had both 6:1+1 and 8:1+1 classrooms, each comprised primarily of students who were nonverbal, non-ambulatory, and who exhibited significant impairments (id.). A large majority of the students were fed via "G-tube" because they were unable to eat by mouth and approximately 25 to 30 percent of the students at iBrain also received 1:1 nursing services due to the medical complexity of their needs (id.).

The director testified that during the 2018-19 school year the student was in a 6:1+1 classroom with other students between seven to ten years of age, all of whom were working at a pre-kindergarten level in math and English language arts (ELA) and were non-ambulatory but very social given the right supports and environment (Tr. pp. 43, 381-84; Parent Ex. X at p. 2). She also stated that the student had a 1:1 paraprofessional to assist him throughout the day, and he was administered various medications for his medical conditions (Tr. p. 43; Parent Ex. X at p. 2). According to the director, the student had highly intensive management needs that required a high degree of individualized attention and intervention, and he required adult support for all activities of daily living due to the effects of his brain injury (Parent Ex. X at p. 2). At iBrain, the student received five 60-minute sessions per week each of individual OT and individual PT, four 60-minute sessions per week of individual speech-language therapy, and one 60-minute session per week of speech-language therapy in a group (id.). The director testified that all of the student's services were provided using a push-in or pull-out model, whereby therapists spent some of the therapy time working with the student outside of the classroom and some of the time working on a skill in the classroom to ensure that it transferred to activities in the classroom environment (Tr. pp. 43-44).

According to the director, the student also received two 60-minute sessions per week of assistive technology services and used a "variety of devices, including an AAC device, a switch note that [went] on his wheelchair," and a "Tobii Eye Gaze," device that was "like an iPad," which enabled the student to do "everything you do with your mouse," but with his eyes (Tr. pp. 43-44,

394-96).[15] The student also used head switches, an "alternative pencil" and "some adaptive art tools," as well as adaptive computer books on his device (Tr. pp. 44, 399). In addition to his wheelchair, the student had an activity chair in which he sat and used a tray to complete tabletop activities with greater success (Tr. p. 45).

Turning to the district's assertion on appeal that iBrain was not an appropriate placement because it lacked sufficient academic instruction, the student's 2018-19 iBrain schedule reflects his in-school activities on Mondays through Thursdays from 8:30 a.m. to 5:00 p.m. (Parent Ex. G).[16] The schedule indicates that the student received 30 minutes of academic instruction per day, as well as a 30-minute "Math Centers" session on Wednesdays (id.). The student's schedule also reflects that he received three 30-minute sessions of "Read Aloud" (id.). The director testified that, during the student's direct, individual, daily academic instruction, about half of the session (15 minutes) addressed math and the remaining half of the session (15 minutes) addressed ELA (Tr. pp. 342-43, 383).

Regarding the manner in which iBrain provided academic instruction to the student, the director testified that the school had approximately 14 private treatment spaces where the student could go when working on skill development on a pull-out basis to minimize distractions (Tr. p. 401).[17] She further testified that on at least three occasions per week for 30 minutes at a time, the student's teacher took him out of the classroom to a private treatment space and provided him with 1:1 academic instruction (Tr. pp. 401-02; see Parent Ex. G). The October 2018 and February 2019 iBrain progress reports both indicated that academically the student worked on annual goals related to comprehending and identifying targeted vocabulary, responding to wh-questions, identifying colors, identifying numbers 6-10, and using a multimodal approach that incorporated assistive technology devices across multiple areas of instruction for academics and during related service sessions (Parent Exs. I at pp. 1-8; V at pp. 1-6, 8, 10).[18] The iBrain progress reports also reflected that in school the student worked to increase his visual attention and participation by using electronic switches to scan and navigate an "electronic bookshelf," choose a desired book with accuracy and consistency, and turn pages (Parent Exs. I at p. 7; V at p. 10). Through use of an

[15] Although not defined in the hearing record, an augmentative and alternative communication device is commonly referred to as an "AAC" device.

[16] Unlike the rest of the parents' exhibits filed with the Office of State Review, the copy of this document was not marked with an exhibit letter; however, according to transcript of the impartial hearing and the exhibits list appended to the IHO's decision, the student's "iBrain Class Schedule" was admitted into evidence as parent exhibit G and will be referred to as such in this decision (see IHO Decision at p. 28; Tr. pp. 113, 122). Review of the exhibit reflects the student's school schedule from Monday through Thursday only (see Parent Ex. G).

[17] The director confirmed that the student was "highly distractible" (Tr. pp. 401-03). In addition to the smaller class size limiting the amount of classroom distractions, the 1:1 paraprofessional also provided redirection and refocusing to the student (Tr. p. 401).

[18] Review of the student's 2018-19 iBrain academic annual goals shows that they are similar to and continuation of his 2017-18 iHope annual goals (compare Parent Ex. H at pp. 1-2, with Parent Ex. I at pp. 1-4, and Parent Ex. V at pp. 1-4).

"alternative pencil" assistive technology, the student also worked to improve his emergent writing skills using the full alphabet (Parent Exs. I at pp. 7-8; V at p. 10). The director testified that the student had "done well" with "academic work" including number and name recognition, and she anticipated that he would begin working on putting letters in the correct order and spelling his name (Tr. pp. 333-34). According to the director, the student had also "made a great deal of progress" in using his communication device, communicating his needs in the classroom, and responding to comprehension questions based on text read in class on both a 1:1 basis with the teacher and in small group reading instruction (Tr. p. 333).

In its cross-appeal the district argues that iBrain is not appropriate in part because it lacks sufficient academic instruction pursuant to State regulation, which it asserts requires that an instructional day for students in kindergarten through sixth grade "must have at least five hours of actual instruction" (Answer with Cross Appeal ¶ 28; see 8 NYCRR 175.5). However, the district's argument is unpersuasive insofar as the express purpose of that regulation is "intended to provide school districts with flexibility in meeting the 180-day requirement in order to receive State aid pursuant to Education Law §§ 1704(2) and 3604(7)" for all student's whether disabled or not (8 NYCRR 175.5[a]), and not as a weapon to ward off private school placements made by parents of children with disabilities when a school district has already denied the student a FAPE. Thus, the district's argument is not persuasive because iBrain is not a school district, but is a unilateral placement and, therefore, generally "need not to meet state education standards or requirements" to be considered appropriate to meet a student's special education needs under IDEA (Frank G., 459 F.3d at 364; see Carter, 510 U.S. at 13-14). Instead, the question is whether iBrain provided the student with special education supports that were commensurate with is academic abilities and needs, such that it can be said to have provided an appropriate education to the student in this particular case. The totality of the evidence in the hearing record, some of which is described above reflects that iBrain provided the student with academic instruction that appropriately addressed his academic needs and that he exhibited progress. As such, the amount of academic instruction the student received at iBrain, even if he could have theoretically received more, is not a basis to overturn the IHO's finding that his placement there was appropriate.[19]

Next, in its cross-appeal the district also contends that the IHO credited the testimony of the district's supervising school psychologist, in which she opined that 30-minute related service sessions were appropriate for the student and that, therefore, the 60-minute sessions provided at iBrain could not be deemed to meet his needs (see Answer with Cross Appeal ¶¶ 26-27; see also IHO Decision at p. 26). The supervising school psychologist testified that she had been involved in "hundreds, probably thousands" of CSE meetings and was familiar with students classified with traumatic brain injury, which she stated "impact[ed] a myriad of functions" (Tr. pp. 253, 256). She stated that she was familiar with the student in this matter because she had "seen" him and reviewed

[19] It is noteworthy that iBrain incorporated the use of assistive technology in the classroom and during related service sessions as possible, to give this nonverbal student a consistent mode of communication to make choices, express his preferences, and communicate his understanding of presented subject matter (see Parent Exs. I; V). It would be unrealistic to expect this student, who has severe disabilities, to sit at a desk and receive five hours of academic instruction per day in a manner similar to a non-disabled student.

his evaluation reports (Tr. pp. 256-57). According to the supervising school psychologist, the student presented as "multiply involved," in that his limbs and torso were "compromised quadriplegically," which affected his ability to function independently (Tr. p. 257). Her understanding of the student's needs was that he used a wheelchair and required "ongoing support in all adaptive daily living skills" including self-care, feeding, ambulation, and communication (Tr. p. 258). When asked why the May 2018 CSE recommended related service sessions of 30-minute duration for the student, the supervising school psychologist testified that the student displayed frequent spasms and tensed up, therefore, "his ability to receive benefit from an instruction or a related service [was] within a certain time because he spasm[ed] quickly" (Tr. pp. 259-60; see Dist. Ex. 4 at pp. 11, 14). The supervising school psychologist testified that 30-minute sessions were appropriate for the student and that "hopefully" he would receive benefit from sessions of that length, although she even questioned that due to the student's "physical compromise" and his tendency to "spasm frequently" throughout sessions (Tr. p. 260). She opined that the student was "not going to be able to stay beyond [30-minute sessions] if he [could] make it up to that [point]" (id.). The supervising school psychologist further testified that she believed it would be "somewhat egregious on [the student's] body" to go beyond that amount of time (Tr. pp. 260-61, 274-75).

While acknowledging the supervising school psychologist's opinion expressed during the impartial hearing that the student would not receive benefit from related service sessions of longer than 30 minutes, review of the hearing record offered little evidence that the supervising psychologist had knowledge of the student's past progress with 60-minute related service sessions, or iBrain's rationale for why the student required sessions of that length. Specifically, the information the supervising school psychologist testified that she had reviewed about the student was prepared by the district and included a psychoeducational evaluation report, a social history, a classroom observation report, and an IEP (Tr. pp. 270-71; see Dist. Exs. 4; 6-8).[20] However, the student received related service sessions of 60-minute duration during the 2017-18 school year while attending iHope, and review of the student's January 2018 iHope progress report generally reflects that the student was making progress toward his related service annual goals and did not indicate that he was not able to tolerate 60-minute sessions (see Parent Exs. D at p. 2; H at pp. 3, 5-9). Notably, the school psychologist testified that she had never observed the student when he received any related service sessions when he attended iHope, nor did she otherwise indicate that she had observed the student during related service sessions at iBrain (Tr. p. 268; see Tr. pp. 251-78). Thus, while it is possible that her opinion might be validly used to support district programming under a public school IEP that called for less time in related services (i.e. 30-minute related services sessions), it does not follow that 60-minute sessions in a private school would be

[20] In February 2018 the district conducted a classroom observation of the student for an unspecified period of time during a conductive education therapy session at iHope (Dist. Ex. 6). The observation report reflected that a teacher and the student's paraprofessional worked with him to improve his leg, head, and trunk control (see id. at p. 1). Although the classroom observation report indicated that "the teacher was engaging in what seemed to be a labor intensive process for [the student]," the observation report did not reflect that the student became distressed or otherwise indicate that he was unable to tolerate the session (see id. at pp. 1-2).

per se inappropriate, merely because of a pedagogical difference in approach, especially without evidence of inappropriate levels of fatigue to support that assertion.[21]

Furthermore, the director testified that the 60-minute sessions the student received at iBrain were required due to transferring and re-positioning needs, additional transition time and rest, and the repetition needed to foster neuroplasticity (Parent Ex. X at p. 2). According to the director, during PT and OT sessions, and at times during speech-language and assistive technology sessions, the student was removed from his wheelchair, which took approximately 10-12 minutes at both the beginning and the end of the therapy session to accomplish (Tr. pp. 412-13). The parent also stated that within a 60-minute time frame, if a student got off-track, there was time left to "give the child a second to take a breath, relax, and get refocused" (Tr. pp. 421-22).

Lastly, although not dispositive, the director testified that the student had made progress toward his related service goals, and review of the student's October 2018 and February 2019 iBrain progress reports generally reflected that progress (Tr. p. 333; Parent Ex. X at p. 3; compare Parent Ex. I at pp. 4-9, with Parent Ex. V at pp. 5-11).[22] According to the parent's testimony, the student had progressed in his ability to use his hands, and participate in eating, drinking, and using assistive technology to communicate (Tr. pp. 425-26). She further testified that she "attribute[d] [the student's] progress to the 60-minute therapy sessions that he receive[d] at iBrain, to the fact that he [got] PT, OT, and speech[-language therapy] on a daily basis" (Tr. p. 485).

Therefore, review of the evidence in the hearing record supports the IHO's conclusion that iBrain was an appropriate unilateral placement for the student, including its provision of related service sessions of 60-minute duration.

C. Equitable Considerations

The IHO denied the parents' request for tuition reimbursement for the cost of the student's attendance at iBrain for the 2018-19 school year based on a weighing of equitable considerations.

[21] The test for a public school IEP would similarly be whether the student was likely to make progress, not regression. Just because I find that 60-minute related service sessions were appropriate in the private school does not mean that a public school must, by definition, mirror the parents' preferred approach taken in the private school.

[22] A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v Northeast Sch. Dist., 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; C.L. v Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

The parents assert that the IHO erred because the parents did cooperate and the district did not act in good faith.

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"]).

For the reasons set forth below, I decline to disturb the IHO's finding that equitable considerations did not weigh in favor of an award of tuition reimbursement.[23] That is, the IHO conducted a well-reasoned analysis of the relevant evidence and did not abuse his discretion in denying the parents' requested relief on equitable grounds (E.M., 758 F.3d at 461; Bd. of Educ. of Wappingers Cent. School Dist. v. M.N., 2017 WL 4641219, at *10 [S.D.N.Y. Oct. 13, 2017]).

Initially, the IHO discussed the relevant statutes, State and federal regulations, and caselaw concerning an award of tuition reimbursement, including a discussion of the law with respect to equitable considerations consistent with that set forth above (IHO Decision at pp. 5-10). Next, the IHO set forth a thorough written summary of the evidence and witness testimony in the impartial hearing record, including the instances in the hearing record where contradictory or confusing facts and testimony existed (id. at pp. 10-26).

With respect to equitable considerations and the parents' request for tuition reimbursement—which the IHO considered to be the "gravamen" of this matter—the IHO's

[23] The parents argue that, because the district did not present a case regarding its offer of a FAPE to the student, the district cannot assert that equitable considerations weigh against an award of tuition reimbursement to remedy that denial. I do not find that this is an instance where the district would be precluded from arguing that equitable considerations favored it rather than the parent, as such preclusion has typically only been applied in cases where a district has not evaluated a student and has failed to produce an IEP for a student, neither of which circumstances are present herein (see N.R. v. Dep't of Educ. of City Sch. Dist. of City of New York, 2009 WL 874061, at *7 [S.D.N.Y. Mar. 31, 2009] [finding that the district's "abdication of its responsibility" was so clear that equitable considerations weighed in the parents' favor]; see, e.g., Application of the Dep't of Educ., Appeal No. 13-072)

decision sets forth the facts and reasoning that he based his determinations on in detail (IHO Decision at p. 20). First, the IHO summarized the testimony at the impartial hearing (id. at pp. 10-20). The IHO then turned to an analysis of whether the hearing record as a whole supported a denial of the parents' requested relief based on the district's assertion that the parents failed to cooperate with the CSE (id at pp. 20-26).

The IHO stated his concern that the same attorney who founded both iHope and iBrain also served as the parents' advocate in this matter, as well as in the matter relating to the 2017-18 school year when the student attended iHope (IHO Decision at p. 20). The IHO then restated the entire text of an email contained in the hearing record from iHope's new director, addressed to the "[p]arents of iHope" which stated that the director had been informed that "certain parents have been advised by their attorney to cancel IEP Meetings", noted that attorney[s] representing parents did "not represent iHope" and that the particular attorney's "strategy towards IEP meetings may differ from the school's" (id. at pp. 20-21; see Dist. Ex. 3). The cited email also stated iHope's commitment to abide by its understandings with the CSE to conduct CSE meetings on the schedule agreed to and offered to help parents find alternative legal representation (IHO Decision at p. 20-21; see Dist. Ex. 3).

The IHO next determined that the district's CSE chairperson had credibly testified about a number of things, including that the district had rescheduled a CSE meeting for the student at iHope's request, that she had received meeting cancellations for a number of iHope students, that those families were represented by the same attorney, that the attorney was advising parents not to participate in meetings with the CSE, and that CSE meeting "cancellation letters" were coming from the particular attorney (IHO Decision at pp. 22-23).

With respect to the requests that district physicians attend CSE meetings in person, the IHO determined that, "[i]t is apparent that these request for doctors and group cancelation were part of an orchestrated campaign to stymie the [district's] effort to create IEPs for the students that had been attending iHope but were now disenrolling from iHope and enrolling in mass at the iBrain school" (IHO Decision at p. 23).[24]

The IHO also questioned the reasons for the parents' failure to attend the May 2018 CSE meeting, noting that in testimony the student's mother did not proffer any reason for the failure and

[24] To the extent that the parents argue that the IHO erred by relying on gossip related to other cases involving students unilaterally placed at iBrain, the IHO has in fact heard other cases similar to this one regarding iBrain. It is not a basis to disturb the IHO's determination in this case. Even the Second Circuit took the time to note that "[t]o our knowledge, these tandem cases are just two of approximately 23 cases presenting similar, if not virtually identical, legal questions in our Court and in the Southern District of New York. In these cases, the parents or natural guardians of the students with disabilities transferred their children from iHOPE to iBRAIN for the 2018-2019 school year without the City's consent and are now claiming that they are entitled to an order requiring the City to pay for the educational services at iBRAIN on a pendency basis. The vast majority, if not all, of these plaintiffs are represented by the Parents' counsel in these tandem cases." (Ventura de Paulino, 2020 WL 2516650, at *6). Thus, observable patterns of behavior can be noted by an adjudicator. While an IHO should not rely on matters that are solely outside the record to make a finding of fact, the IHO in this case did not do so. It was not error for the IHO to note that he has observed a pattern of conduct with respect to the founders of iBrain or the parents' counsel, because his determination regarding equitable considerations was ultimately rooted in the evidence regarding the parents and their counsel that appears in this hearing record.

conceded that she was not employed at the time in question and that the student saw doctors on a regular basis (IHO Decision at p. 24). The IHO found that "[i]t would seem that the parent was available to attend the IEP meeting" (id.). The IHO called into question contradictory information in the mother's testimony about whether she discussed the iBrain tuition contract with an attorney and described the mother's testimony about what occurred at the March 20, 2018 CSE meeting (id. at pp. 24-25). The IHO made the determination not to credit the testimony of the student's mother with respect to cooperation with the CSE process (id. at pp. 20, 25).

In contrast, the IHO found that the hearing record evidenced "numerous efforts made by [the district] to garner [the parents'] cooperation, conduct an IEP meeting and produce an IEP for the student's 2018-19 school year" (IHO Decision at p. 25). The IHO noted that because the "fact pattern" in the instant matter "mirrors that of so many other former iHope students who are now attending the iBrain school evidences an orchestrated campaign to stymie [the district's] effort to create valid IEPs for these students" (id.). The IHO concluded by stating that he did not believe the hearing record showed the parents had made a good faith effort to cooperate with the district, or give a fair consideration to the IEP that resulted from the May 2018 CSE meeting (id.).

Overall, the IHO relied upon the evidence in the hearing record as well as assessments about the witnesses' credibility to concluded that equitable considerations did not support an award of tuition reimbursement. Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this instance, neither non-testimonial evidence in the hearing record nor the hearing record read in its entirety compels a contrary conclusion with regard to the credibility of the witnesses.

Upon review of the impartial hearing record, particularly the hearing transcript, I note that this was a hotly argued case, with little agreement between the parties on some essential facts. While I may not agree with a few the IHO's fact findings there is nonetheless an ample basis in the hearing record to support the IHO's credibility findings as well as his ultimate determination that the parents had failed to cooperate with the CSE and frustrated the district's attempts to develop an appropriate IEP for the student's 2018-19 school year.

With respect to the parents' assertion that the IHO erred in a total denial of tuition reimbursement, I disagree. The law provides that tuition reimbursement may be reduced or denied upon equitable considerations, and it is therefore a matter of discretion for the fact-finder as to the extent of the reduction or denial of the requested relief (E.M., 758 F.3d at 461). In light of the totality of circumstances in this matter and a full, independent review of the impartial hearing record, I find no abuse of discretion in the IHO's determination to deny tuition reimbursement in full.

VII. Conclusion

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
June 8, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER