The University of the State of New York

The State Education Department
State Review Officer
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No. 20-128

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

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Theresa Crotty, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which ordered it to reimburse respondents (the parents) for their son's tuition costs at the International Institute for the Brain (iBrain) for the 2018-19 school year. The 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 multiple prior State-level administrative appeals and a district court proceeding regarding the student's pendency placement after the parents filed a due process complaint notice challenging the district's offer of a public school placement for the 2018-19 school year and the parents unilaterally placed the student at iBrain (see F. v. New York City Dep't of Educ., 416 F. Supp. 3d 302 (S.D.N.Y. 2019); Application of a Student with a Disability, Appeal No. 18-132; Application of a Student with a Disability, Appeal No. 20-001), and an additional prior State-level administrative appeal in which the parties continue to dispute the student's stay put placement during challenges to the district's programming for the student for the 2019-20 school year (Application of a Student with a Disability, Appeal No. 20-010). In this current State-level review proceeding the parties have returned once more, this time to resolve the merits of the parents' Burlington/Carter claims for the 2018-19 school year that they commenced over two years ago (see Parent Ex. A). The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision in the instant matter is presumed and will not be recited here, except as relevant. Briefly, the hearing record reflects that the student attended a

nonpublic school, the International Academy of Hope (iHope), for the 2017-18 school year (see Parent Exs. B at p. 3; H at p. 1). The parents' unilateral placement of the student at iHope for the 2017-18 school year was the subject of a prior due process impartial hearing (see Parent Ex. B). At the conclusion of that impartial hearing concerning the student's 2017-18 school year, an IHO issued a decision, dated March 12, 2018, finding that the district conceded that it had failed to offer the student a free appropriate public education (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 an award of the costs of the student's tuition at iHope, including related services, for the 2017-18 school year (id. at pp. 3-5).

A. Due Process Complaint Notice

For the 2018-19 school year, the parents unilaterally placed the student at iBrain and filed a due process complaint notice dated July 9 2018 challenging an IEP developed by a CSE on March 14, 2018 (see Application of a Student with a Disability, Appeal No. 18-132; Parent Ex. A). The parents alleged that the district's inappropriate IEP failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (see Parent Ex. A). As relevant to the alleged denial of a FAPE to the student, the parents requested relief in the form of direct payment by the district to iBrain "for the cost of [f]ull [t]uition for the 2018-19 school year" and "[t]ransportation [c]osts including a 1:1 travel aide" (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 23, 2018 and concluded on May 5, 2020 after 11 days of proceedings and three different IHOs (Tr. pp. 1-397).[1] In a decision dated June 25, 2020, IHO 3 determined that the district failed to offer the student a FAPE for the 2018-19 school year, and that iBrain was an appropriate unilateral placement because the evidence showed that it "provided direct and specialized educational instruction that was specifically designed to meet the student's unique educational needs" (IHO Decision at pp. 4-5). IHO 3 noted that the district did not present a case with respect to whether it offered the student a FAPE for the 2018-19 school year (id. at p. 2; see Tr. pp. 134, 192, 384). Turning to the parents' unilateral placement of the student at iBrain, IHO 3 specifically determined "to the extent that the student's vision services were not in place at the beginning of the school year," that fact did "not render [iBrain] an inappropriate placement," and he did "not credit the [d]istrict's assertion that the student only received 30 minutes of academic instruction per day" (IHO Decision at p. 5). Additionally, IHO 3 found that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement as the parents provided the district with sufficient notice of their intent to unilaterally place the student at iBrain, they cooperated with the CSE process, and the cost of tuition, related services and transportation was not unreasonable (id. at p. 6). As relief, IHO 3 ordered the district to reimburse the parents and/or directly pay iBrain for the cost of the student's tuition, related services, and transportation at the school for the 2018-19 school year (id.).

[1] The proceedings prior to April 24, 2020 were conducted by two other IHOs, who the undersigned referred to as IHO 1 and IHO 2 in Application of a Student with a Disability, Appeal No. 20-001 (see Tr. pp. 3, 84, 91, 110, 133, 161, 175, 189, 360). IHO 1 and IHO 2 dealt with record development regarding iBrain during the parties' nearly two-year pendency dispute (see Application of a Student with a Disability, Appeal No. 20-001), therefore I will continue in this appeal to refer to the IHO who issued the final determination on the merits as "IHO 3."

IV. Appeal for State-Level Review

The district appeals from IHO 3's final determination. The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parents' answer thereto is also presumed and will not be recited in detail here. The crux of the district's appeal is whether IHO 3 erred in determining that iBrain was an appropriate unilateral placement despite the lack of vision education services for a portion of the school year and its failure to provide the student with "intensive services" including "at least five hours of actual instruction per day." The district also asserts that IHO 3 erred in finding that equitable considerations favored the parents, as "there was no evidence at the hearing presented regarding the parents' level of cooperation with the CSE" and the parents failed to present evidence as to why the cost of iBrain—which the district alleges was "excessive"—was reasonable. In an answer, the parents assert that the IHO's determinations were correct request that the undersigned uphold the IHO's order and deny the district's appeal in its entirety.

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-

[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).

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

As the district has not appealed from the IHO's determination that it failed to offer the student a FAPE for the 2018-19 school year, that issue 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 for the student during the 2018-19 school year. The district specifically asserts on appeal that iBrain was not appropriate because it failed to provide all of the student's vision education services and did not offer the student a sufficient amount of academic instruction.

A. Unilateral Placement at iBrain

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

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

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

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

While the student's needs are not in dispute in this matter—or at least no one felt it important to develop the hearing record regarding any significant differences of opinion between the parties concerning the nature or details of the student's deficits—a brief description thereof provides context for the discussion regarding whether or not the student's unilateral placement at iBrain was appropriate.[3] The evidence in the hearing record reflects that the student had received diagnoses including cerebral palsy, seizure disorder, and asthma (see Parent Exs. C at p. 1; R at p.

[3] Even when conceding its case, it is troubling when the district cannot be bothered with putting the challenged IEP in evidence. The due process complaint alleged a denial of a FAPE due to numerous problems with the procedures in conducting the CSE meeting and ensuring the parents' participation. Among other things, the parents also complained that the IEP was not the product of any individualized assessment of all the student's needs, would not confer any meaningful educational benefit for the 2018-19 school year, inadequately described the student's present levels of performance and management needs, contained immeasurable goals, failed to offer an appropriate school program, programming was not the LRE, and that the 12:1+(3:1) special class was insufficient to address student's needs because it was too large a ratio (see Parent exhibit A). There is no information regarding what if anything the district conceded, or why one or more of these issues resulted in a denial of a FAPE. Once the district indicated that it would not defend itself with regard to a FAPE, any concern about the accuracy of the information regarding the student's special education needs in the hearing record seemed to evaporate, however I have taken into account that the parents are the only ones who offered evidence with regard to the student's needs. The determination as to whether a parent has demonstrated that the totality of a unilateral placement is reimbursable is inevitably made more difficult where, as here, the district has conceded FAPE and failed to produce any evidence demonstrating the student's needs. One court in this jurisdiction has addressed whether a unilateral placement was appropriate under circumstances in which the student's needs remained unclear (A.D. v. Bd. of Educ. of City Sch. Dist. of New York, 690 F. Supp. 2d 193, 206 [S.D.N.Y. 2010]). In A.D., the Court discussed how New York has placed the burden of production and persuasion on parents to establish that the unilateral placement was appropriate (690 F. Supp. 2d at 206). However, if there is a lack of required evaluative information and the IEP is deficient as a result, the Court held that, when analyzing whether the unilateral placement addresses the student's needs, the district, rather than the parent, is held accountable for any lack of information regarding the student's needs because the IDEA places the responsibility for evaluation procedures on the district in the first instance (id. at p. 207). I have considered all of the available information in absence of any further hint from the parties.

1; S at p. 4). He was nonverbal, nonambulatory, and g-tube dependent for nutrition due to his risk for aspiration (Parent Exs. C at p. 1; R at pp. 1, 10, 12). The student communicated via vocalizations, facial expressions, reaching, body movements, and by using communication switches (Parent Ex. D at p. 1). He required total assistance for all activities of daily living including toileting and was provided taste trials of puree foods and thickened liquids (id. at pp. 5, 11, 14). Physically, the student was dependent for all mobility, transfers and transitions and used an adapted stroller to facilitate functional mobility at school and in the community (id. at p. 14). The student had also received diagnoses of cortical visual impairment (CVI), which impacted his ability to attend to, perceive, and remember what he saw, as well as myopia, nystagmus, and extropia (Parent Ex. C at p. 9).[4] Additionally, the student required "a high level of visual adaptations in order to access visual material" (Parent Ex. D at p. 8).

Turning to the unilateral placement, the director of special education at iBrain (director) testified that iBrain was a 12-month school-age program developed for students with brain injury or brain-based disorders ages 5 to 21 years old (Tr. pp. 7, 11, 13, 225, 229). iBrain class sizes were either a 6:1+1 or an 8:1+1 student to staff ratio and every student received 1:1 paraprofessional support (Tr. pp. 11-12, 225-27, 261-62). The extended school day was from 8:30 am to 5:00 pm and the school offered physical therapy (PT), occupational therapy (OT), speech-language therapy—in sessions of 60 minutes in length—and also of a deaf and hard of hearing teacher services and assistive technology services (Tr. pp. 12, 227-29). Additionally, iBrain provided individual instruction to students from a teacher and also in small group settings (Tr. p. 229).

The unilateral placement created its own private version of an IEP (iBrain IEP) for the student, one that the district did not participate in creating (see Parent Ex. C). The director testified that the student's March 2018 iBrain IEP was developed from his similar, prior year, privately created iHope IEP and input from his "team" there, which included his family, therapists, and teacher (Tr. pp. 242-45, 257, 272-74; see Parent Exs. C; D).[5] The evidence shows that during the 2018-19 school year the student received 12-month programming in a 6:1+1 classroom with the support of a 1:1 paraprofessional (Tr. p. 249; Parent Ex. C at pp. 43-44). The director stated that the student received five 60-minute sessions per week of PT and OT, four 60-minute sessions per week of speech-language therapy, and one 60-minute session of speech-language therapy per week in a group (Tr. pp. 16, 249-52). Further, the student received twice weekly 60-minute sessions of assistive technology services, and the parents received one session per month of parent counseling and training (Tr. pp. 16, 295). At the time of her August 2018 testimony, the director stated that the student "will be receiving" vision therapy services (i.e. in accordance with the iBrain IEP) twice weekly for 60-minute sessions; subsequent testimony confirmed that the student did receive some vision education services during the 2018-19 school year (Tr. pp. 16, 250-52).

[4] The hearing record reflected that "CVI is a term that is used to describe visual impairment due to brain damage," where "the interference in visual functioning does not exist in the structure of the eye or optic nerve, but in the visual processing centers and visual pathways of the brain" (Parent Exs. C at p. 9; D at pp. 5-6). The March 2018 iBrain IEP reflected information from an August 2016 optometry report which described myopia as "nearsightedness," nystagmus as "the involuntary movement of the eyes," and exotropia as "an eye misalignment where one eye turns away from the nose, while the other eye focuses normally" (Parent Ex. C at p. 9).

[5] The March 2018 iBrain IEP also had an "[u]pdate" date of January 7, 2019 (Parent Ex. C at p. 1). For the purpose of this decision, the document will be referred to as the March 2018 iBrain IEP.

As relevant to the particular disputed issue on appeal regarding the vision education services the student received at iBrain, the March 2018 iBrain IEP provided information about the student's visual preferences and skills, vision management needs, and vision education goals and service recommendations (Parent Ex. C at pp. 9-15, 25, 34-35). According to the IEP the student was working on visually locating and reaching for a novel object, visually locating a brightly colored object at a distance, and sorting familiar objects according to salient visual features (id. at p. 9). The IEP reflected parent reports that the student exhibited a left visual field preference and required presentation of "very interesting" items in order to maintain his attention (id. at p. 10). An assessment of the student's "CVI Range" indicated that the student was "transitioning from using his vision for functional use to incorporating his vision into academic and other educational tasks" (id. at pp. 10-13). Annual vision education goals in the iBrain IEP included that the student would improve his ability to visually identify familiar landmarks in school and visually locate specific items used for activities (id. at p. 34).

In accordance with iBrain's written plan, for the 2018-19 12-month school year, the student was supposed to receive two 60-minute sessions per week of individual vision education services beginning on July 9, 2018 (Parent Ex. C at pp. 1, 43). In this case, as the district points out, the student did not receive vision education services from July 9, 2018, the first day of the 12-month school year, through September 14, 2018 as iBrain had planned in its IEP (Tr. pp. 12, 53, 289-91; Parent Ex. U at p. 1). Instead, the hearing record shows that the student began receiving vision education services on September 14, 2018, which continued through June 20, 2019 (Tr. pp. 250-51, 290, 293-94; see Parent Ex. U). Review of the summary of session notes shows that the student received approximately 36 sessions of direct vision education services during the 2018-19 school year (see Parent Ex. U).[6]

The director testified that although iBrain did not have a vision education provider at the start of the 12-month school year, staff were "following the vision recommendations" and implementing the vision education goals from the student's prior year iHope IEP, including "the environmental supports, modifications, adaptations . . . even things such as how to present different items to [the student]" (Tr. pp. 19-20, 53-56, 290-91; see Parent Ex. D at pp. 5-10, 17, 26-27). She continued that due to the student's cortical visual impairment iBrain was "working on the strategies and the goals there in terms of what type of items to use, how to present them to [the student] so that he can attend to them best and see and process that image" (Tr. p. 20). Also, iBrain staff relied on the information they had from the iHope program regarding the student's success with "looking and reaching," which iBrain worked on "constantly" (id.). The director described different techniques used with visually impaired students, and specifically how the student worked with large foam letters to make visual choices and 3-D objects at close range to help the student process that visual information (Tr. pp. 46-47). She further testified that all classroom teachers had the

[6] The director testified that the student received twice weekly sessions of vision education services unless he was absent (Tr. pp. 293-94). The hearing record does not contain evidence of the student's attendance at iBrain during the 2018-19 school year (see Tr. pp. 1-394; Parent Exs. A-V; Dist. Ex. 1). Additionally, according to the iBrain vision education services log the student received a total of 62 hours of vision education services during the 2018-19 school year, which in addition to direct services, included activities such as teacher and caregiver training, progress documentation, parent-teacher conferences, "IEP prep consultation," and an IEP meeting (see Parent Ex. U). Although the director testified that activities other than direct visual education services did not count toward the student's twice weekly mandate, the log does not appear to distinguish between the direct services provided and other activities for purposes of computing the total number of sessions (compare Tr. pp. 297-98, with Parent Ex. U).

student's IEP, which provided information about the student's "ideal" visual range (Tr. pp. 47-48; see Parent Ex. C at p. 13). Additionally, according to the director the way iBrain staff presented different materials to the student and the specific materials used were "directly in line" with the vision education goals (Tr. pp. 54-56). Although the October 2018 iBrain progress report did not have progress information specific to the student's vision education services, many of the student's goals addressed improving visual skills (see Parent Ex. I). For example, the iBrain progress report reflected that the student was working on improving his ability to identify target vocabulary, numbers, and colors using an eye gaze device or by reaching, access activities using eye gaze, and increase sustained visual attention to improve his participation in classroom activities (id. at pp. 1-3, 6, 8). Further, although the director opined that it would have been possible for the student to regress if there was a "disruption" in the provision of his vision education services, there is no evidence that regression occurred (compare Tr. pp. 270-71, with Tr. p. 291).

On appeal the district asserts that the IHO 3 erred in finding iBrain appropriate even though the student did not receive all of the sessions of vision education services called for in the March 2018 iBrain IEP. Although the private school IEP may be helpful in determining what iBrain intended to provide to the student, it is not necessary. As a general matter, private institutions which are not State-approved to provide special education services to students with disabilities—such as iBrain—are not required to follow the same procedural process of developing their own written IEPs for students in the same way as public school districts are (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 13-14 [1993]), and, furthermore a unilateral placement is not mandated by the IDEA or State law to provide services in compliance with an IEP. Thus noncompliance with the privately created iBrain IEP is not a basis for denying the parents' request for public funding of the unilateral placement.

Furthermore, to the extent the district argues 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). "The test for the private placement 'is that it is appropriate, and not that it is perfect'" T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877–78 [2d Cir. 2016] [citations omitted]). 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 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.

Next, the district attempts to use prior State-level review determinations on the issue of the student's pendency placement to attack the merits of the parents' unilateral placement case on the merits. The district indicates that

> the SRO has acknowledged the importance of [vision education services] in prior decisions for this case. Appeal No. 18-132 ps.13-14 and Appeal No. 20-001, ps. 14-15. Respectfully, even though the aforementioned cases

> were decided in the context of pendency, this logic should also apply in finding that iBRAIN was not an appropriate placement for [the student] for the 2018-2019 school year because the student's placement did not provide "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" Frank G. at 365

(Req. for Rev. at pp. 7-8). The district's argument is deeply flawed in that it misreads the purpose of the prior substantial similarity holdings, and even the district must confront that the prior administrative decisions were addressing the issue of the student's pendency placement. While urging the undersigned on appeal of the merits of the Burlington/Carter dispute to apply the same "logic" regarding the importance of the student's vision education services previously analyzed in a pendency context in which I applied a "substantial similarity" test, the district has conveniently overlooked the law of this circuit, namely that that a claim for tuition reimbursement pursuant to a stay put motion is "evaluated independently" from the evaluation of a claim for tuition reimbursement based upon an inadequate IEP (Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 160 [2d Cir. 2004]; see A.W. v. Bd. of Educ. Wallkill Cent. Sch. Dist., 2015 WL 3397936, at *5 [N.D.N.Y. May 26, 2015]). [7, 8] The purpose of a pendency determination is to ensure the continuity of services in accordance with stay put,[9] referred to as the "then current educational placement" without a substantive assessment of the continuing adequacy of the

[7] Although I determined previously the lack of vision education services resulted in a failure to show substantial similarity between the iHope and iBrain programs for pendency purposes (see Application of a Student with a Disability, Appeal No. 20-001), that standard was used because the stay-put provision was implicated, which triggered the applicability of an automatic injunction designed to maintain the student's educational status quo while the parties' IEP dispute is being resolved (see L.A. v. New York City Dep't of Educ., 2020 WL 5202108, at *4 [S.D.N.Y. Sept. 1, 2020] citing Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 529 [2d Cir. 2020]). The district has mixed apples and oranges, figuratively speaking, as the standard applied here is whether iBrain provided educational instruction specially designed to meet the student's unique needs, supported by such services as are necessary to permit him to benefit from instruction (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65), not whether there is substantial similarity between in the student's current services and those provided during a previous school year.

[8] Incidentally, since the student's case was last before me, the Second Circuit's holding has clarified the question of "whether under the 'stay-put' provision of the IDEA parents who unilaterally enroll their child in a new private school and challenge the child's IEP are entitled to public funding for the new school during the pendency of the IEP dispute, on the basis that the educational program being offered at the new school is substantially similar to the program that was last agreed upon by the parents and the school district and was offered at the previous school" (Ventura de Paulino, 959 F.3d at 524–25). Ventura de Paulino squarely resolved that question in the negative, which effectively abrogated any previous reliance on the substantial similarity test for pendency purposes in these proceedings by the undersigned. Instead, the Court clarified that the "substantially similar" language in Concerned Parents v. New York City Board of Education (629 F.2d 751, 756 [2d Cir. 1980]) could permit the district to transfer special education students from one school to another without necessarily offending the stay put rule, but that the same rule did not apply to parents seeking to move a student's pendency placement from one unilaterally selected private school to another (Ventura de Paulino, 959 F.3d 519, 533). That said, the facts regarding the type and quantity of special education services that were provided to the student at the private school during the 2018-19 school year are nevertheless relevant to the question of whether the student received appropriate special education services at iBrain.

[9] The effect of a stay put determination is that it will "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]).

programming in the stay put placement, whereas a Burlington/Carter analysis addresses the substantive adequacy of a student's programming, that is, the question of whether special education services are reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07).

The district's argument also rings particularly hollow when the district abdicated its responsibility toward its own burden of production during the impartial hearing by failing to put on any evidence regarding the student's needs or the publicly proposed programming, such as its own IEP, a document which might have suggested how much vision education services the district personnel believed would be appropriate to address the student's vision deficits. Therefore, the totality of evidence in the hearing record supports the IHO's finding that to the extent the student's vision education services were not in place at the beginning of the school year and he may not have received the amount of sessions envisioned by his iBrain IEP for the 2018-19 school year, that did not render iBrain an inappropriate placement, where as described above, iBrain identified the student's needs related to his vision impairment and provided supports to address those needs until formal vision education services could commence.

Turning to the district's assertion on appeal that iBrain was not appropriate because it lacked sufficient academic instruction, the director testified that iBrain used a direct instruction model in the classroom, whereby the student received 1:1 instruction from the teacher for 30 minutes, which the director opined was "the best practice for students with brain injury and brain-based disorders" (Tr. pp. 12-13, 246-47). According to the director, the direct 1:1 instruction model the student received at iBrain involved "working directly with the student to identify what the target skill [was] that you [were] working on" and included pacing, frequent opportunities for the student to respond, feedback and reinforcement to maintain the student's engagement and ensure his learning (Tr. pp. 23-24, 262-63). During direct instruction "as many multisensory supports" were provided as possible to help the students process images at a later time (Tr. pp. 266-67). The director continued that teachers modeled the skill, reviewed it, ensured students were familiar with the concept, and presented students with options for responding (Tr. p. 263). If a student attempted to make an incorrect choice, it was important to provide an immediate correction and reinforce the correct response (Tr. pp. 263-64). Direct instruction time was primarily when the student's individual academic goals were addressed and assessed (Tr. pp. 246-47, 308). The director also testified that the direct instruction methodology was implemented during other instructional activities throughout the day, albeit not necessarily in a 1:1 context, to help the student generalize his learning and have "continual access and exposure to [the] educational environment" (Tr. pp. 246-27).

The student's 2018-19 school schedule reflected that he received 30 minutes per day of "Academics," three 30-minute sessions of "Read Aloud" per week, and four 30-minute sessions of "Math Centers" per week (Parent Ex. F). The director testified that in addition to the 1:1 period per day of academic instruction provided by the teacher, there were other opportunities for academic instruction during the day including literacy, science, art, and communication activities that were supported by the student's related service providers (Tr. pp. 247-48, 267-68, 307). Specifically, on a typical school day the students participated in "morning meeting," which entailed covering topics such as identifying the months and seasons of the year, clothing, and sequencing of events (Tr. pp. 39-40, 267). During this time, the student worked on his goal to identify his name, and later participated in "classroom time of either small group work or his academic sessions" (Tr. pp. 40-42). The director testified that the student participated in community outings

at which time students worked on money skills such as counting, and social studies and science concepts were integrated into read-aloud time (Tr. pp. 267-68). The student also worked with an assistive technology service provider during small group academic time to help the student use his device to engage in activities such as answering literacy questions and "practicing" colors (Tr. p. 43).

The director testified that the information in the October 2018 iBrain progress report was "an accurate reflection and recording of [the student's] progress" (Tr. p. 270). According to the report, the student was working on literacy, reading, math, and receptive vocabulary annual goals (see Parent Ex. I at pp. 1-4). During testimony elicited after the conclusion of the 2018-19 school year, the director stated that the student had "made really good progress across all the areas, not just as indicated in this report, but in my conversations after this report with his therapists and teachers" (Tr. pp. 270-71). She continued that "[e]verybody was very happy with [the student's] progress in all domains" (Tr. p. 271). Although not dispositive to the issue of whether iBrain was appropriate, this evidence of the student's progress during the 2018-19 school year was unrebutted.

In addition to its fact-based argument regarding the amount of academic instruction, the district argues from a technical, regulatory standpoint that that iBrain was not an appropriate placement in part because it lacked sufficient academic instruction that would comply with State regulation, asserting that an instructional day for students in kindergarten through sixth grade "must have at least five hours of actual instruction" (Req. for Rev. ¶ 18; 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). Although the student would be, chronologically speaking, approaching the end of elementary school if he were placed with nondisabled peers his own age, in asserting its challenge to the amount of "academics" in the unilateral placement, the district appears to minimize the student's other needs and the evidence showing that the student has global, severe impairments, and the argument neglects that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (Endrew F., 137 S. Ct. at 1001 [emphasis added]). Instead, the question is whether iBrain provided the student with special education supports that were commensurate with his academic abilities and needs, such that it can be said to have provided an appropriate education to the student under his circumstances in this particular case. The totality of the evidence in the hearing record, the more salient points of which are 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.

B. Equitable Considerations

Turning next to the parties' dispute over equitable considerations, the district asserts on appeal that IHO 3 erred in finding that the parents cooperated with the CSE process because the hearing record lacked such evidence. The district points out that IHO 3 did not take any new testimony and based his decision on the record that had been previously developed when IHO 1 and IHO 2 presided over the case. The district also alleges that the cost of the student's program at iBrain would be "significant" and that the parents failed to present evidence as to why those costs were reasonable. The parents contend that the district conceded twice during the impartial hearing that there was no "prong III" equitable considerations dispute between the parties for the IHOs to resolve, and the only question to be determined during the hearing was whether the services at iBrain provided an appropriate special education placement for the student. In the alternative, the parents contend that they provided timely notice of their unilateral placement of the student at iBrain and that the district failed to present a case with respect to the IEP development process or excessive costs and that there is no basis to conclude that equitable considerations do not favor the parents.

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).

During the impartial hearing before IHO 3 in the instant matter the district conceded that it did not offer the student a FAPE and indicated that following the pendency hearing, the parties "had an entire hearing—subsequent hearing on the merits" wherein they "went through the entire case" (Tr. pp. 380, 382). IHO 3 asked the district's attorney if there was "a Prong III case," to which the district's attorney replied, "I don't believe [the district] raised any Prong III issues" (Tr. p. 383). IHO 3 then stated to the district's attorney "there's no Prong I. There's no Prong III," and clarified "[i]t's just Prong II?" and the district's attorney replied "[y]es" (Tr. p. 384).

Thus the hearing record shows that the district was in no way limited to presenting evidence solely on the issue of the appropriateness of iBrain, rather, it was who affirmatively indicated that the district would not present evidence regarding the provision of a FAPE to the student or the parents' level of cooperation with the CSE process, despite having the burden of production on conducting a CSE meeting and developing an IEP for the student's proposed public programming. Given counsel for the district's representations during the hearing to IHO 3 that a whole hearing on the merits had been completed and the district was not raising equitable considerations as an issue for IHO 3 to decide, on appeal it is too late and manifestly unreasonable for the district to suggest that the hearing record lacked evidence regarding the parents' level of cooperation with the CSE process. Moreover, while the district ultimately included equitable consideration arguments in its closing brief, including claims that the tuition and transportation costs for iBrain were excessive and the parent's failure to testify should weigh against her with respect to equitable considerations, the brief failed to include an equities argument focused on the parents' cooperation with the CSE process (Dist. Ex 1 at pp 14-16). Moreover, to the extent the district waived presenting any equitable consideration arguments during the impartial hearing, only to assert them for the first time in its closing brief, raising new issues in a post hearing memorandum is not permitted in an impartial hearing (see M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011] [rejecting compensatory education claims where the parents failed to include a request for compensatory education in their due process complaint and raised such claims for the first time in their closing brief]). Accordingly, the hearing record shows that the district effectively conceded the issue of whether equitable consideration weighed in the parents' favor.

Even assuming for the sake of argument that the district had not conceded the issue, the evidence shows that the parents provided the district with a 10-day notice of unilateral placement dated June 21, 2018, which indicated that

> [the student's] needs are multifaceted and complex, and to date, the [district] has not offered [the student] a program or placement that can appropriately address his educational needs for school year 2018-2019. The [district] has not conducted an annual IEP for this student. The parent has repeatedly requested the CSE to conduct a Full Committee Meeting along with a [district] school physician to develop an appropriate and timely IEP for the 2018-2019 school year. As of today, the [district] has not properly responded to this request. The parent is still requesting the CSE schedule

> an appropriate IEP meeting at a mutually agreeable date and time to allow for all mandated members of the IEP team to participate . . . The parent remains 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

(Parent Ex. O).[10] By failing to come forward with any evidence regarding the CSE process, the available evidence could only support the conclusion that it was the district that was uncooperative during the development of the student's IEP.[11] Therefore, the evidence in the hearing record does not compel a different outcome from IHO 3 on whether the parents cooperated with the district.

Similarly, the district asserts on appeal that "[c]onsidering the extensive services for which the [s]tudent [wa]s recommended, th[at] cost would likely be significant" and the parents failed to present any evidence as to why those costs were reasonable; requesting that "any tuition award should be denied based on these excessive costs." However, as stated above, the district confirmed at the hearing that it was not raising equitable consideration issues such as excessive cost, and to do so now—without also attempting to present evidence about what the district deems a reasonable cost for a program for this student would be—is unpersuasive and also does not result in a different conclusion from IHO 3.[12]

VII. Conclusion

Having determined that the evidence in the hearing record supports IHO 3's determination that iBrain was an appropriate unilateral placement for the 2018-19 school year and there being no

[10] Regarding the parents' cooperation or lack thereof with the CSE process, in their July 2018 due process complaint notice the parents asserted that the CSE "committed several substantive and procedural errors under the IDEA and state law" during the development of the March 14, 2018 IEP (see Parent Ex. A at p. 2). Specifically, the parents alleged that the CSE "significantly impeded [the parents'] opportunity to participate in the decision-making process regarding the provision of a FAPE to [the] student," and "failed to hold an annual review meeting at a time that was mutually agreeable with [the parents] and which complied with [the parents'] documented request for a Full Committee meeting to discuss the extraordinary needs of [the student] for the extended school year 2018-2019" (id.). Additionally, the parents argued that the district "ignored" the parents' April 17, 2018 written request for a reconvene of the March 2018 meeting, and proceeded to hold an IEP review meeting without the parents "or any of the mandated members being present" (id.). Only the parents' version of events appears in the hearing record, and there is no evidence that the district responded at all to these concerns or that there were other mitigating circumstances that should be considered.

[11] The district points to Application of a Student with a Disability, Appeal No. 18-079 as support for the proposition that the parents should have produced more evidence of their cooperativeness; however, that case precisely demonstrates the flaw in the district's approach to the merits in this case. In that case, the district came forward with evidence to meet its burden of production regarding the CSE process and its offer of a FAPE to the student, and the parent failed to offer contrary evidence to rebut district's evidentiary presentation about the public school process. Here, the district failed to present any evidence whatsoever and now belatedly points the finger at the parents.

[12] The district did not even go as far as to identify a dollar figure that it believed would be a reasonable cost for private schooling within the geographic region of the district, much less provide actual evidence regarding other similarly situated private school program costs. Instead, the district indicates that the any tuition award in favor of the parents should be denied.

reason to deny the relief granted by IHO 3 on the basis of equitable considerations, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 3, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER