The University of the State of New York

The State Education Department
State Review Officer
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No. 20-138

Application of a STUDENT WITH A DISABILITY, by his parent, 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 petitioner, by John Henry Olthoff, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq., of counsel

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 parent) appeals from the decision of an impartial hearing officer which did not address whether her son's educational programming during the 2018-19 and 2019-20 school years at the International Institute for the Brain (iBrain) was appropriate and which denied her request for relief based on equitable considerations. Respondent (the district) cross-appeals from those portions of the IHO's decision which found that it did not offer the student a FAPE for the 2019-20 school year and that the student's pendency placement was at iBrain. The appeal must be sustained in part. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student, during the time period discussed in this matter, demonstrated significant cognitive and global developmental delays, was non-verbal and non-ambulatory, and was dependent on others to meet all of his self-care needs (Parent Exs. D at pp. 1, 14; E at pp. 1, 15). His diagnoses included cystic encephalomalacia, seizure disorder, cerebral palsy, scoliosis, and

optic atrophy/cortical vision impairment (Parent Exs. D at p. 1; E at p. 1). The student received all means of nutrition and medication via gastric tube and he communicated using facial expressions, vocalizations, and activating switches with assistance (Parent Ex. E at pp. 1, 3-5).

The student attended the International Academy of Hope (iHope) during the 2015-16, 2016-17, and 2017-18 school years (see Dist. Exs. 4 at p. 1; 7 at p. 1; 14 at p. 1).

A CSE convened on April 12, 2016, found the student eligible for special education as a student with a traumatic brain injury, and developed an IEP for the student for the 2016-17 school year with recommendations including 12-month services and a 6:1+1 special class placement in a State-approved nonpublic school (Parent Ex. B). For the 2016-17 school year, the student attended iHope and the district funded the student's program (Parent Ex. A at p. 3).

With respect to the 2017-18 school year, a CSE convened on May 23, 2017, found the student eligible for special education as a student with multiple disabilities, and developed an IEP with recommendations including 12-month services and a 12:1+4 special class in a specialized school (Dist. Ex. 12). The parent sought an impartial hearing and, in a June 27, 2018 decision, an IHO determined that the district conceded it did not offer the student a free appropriate public education (FAPE), that iHope was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's requested relief (Parent Ex. A at pp. 6-7). The IHO in that matter directed the district to fund the student's placement and related services at iHope for the 2017-18 school year (id.at p. 7).[1]

On March 26, 2018, a CSE convened to develop the student's IEP for the 2018-19 school year (Dist. Ex. 1). Finding that the student was eligible for special education as a student with multiple disabilities, the March 2018 CSE recommended a 12-month, 12:1+4 special class placement in a specialized school together with three 30-minute individual sessions per week of occupational therapy (OT), five 30-minute individual sessions per week of physical therapy (PT), four 30-minute individual sessions per week of speech-language therapy, one 30-minute session per week of speech-language therapy in a group, two 30-minute individual sessions per week of vision education services, and one 60-minute session per month of parent counseling and training in a group (id. at pp. 1, 14-15, 17). In addition, the CSE recommended supports to meet the student's management needs, developed 13 annual goals and corresponding short-term objectives, and determined that the student was eligible for alternate assessments and specialized transportation services (id. at pp. 3-17).

The parent signed an enrollment contract with iBrain on June 5, 2018 for the 2018-19 school year (Parent Ex. F). By letter dated June 21, 2018, the parent notified the district that she was unilaterally placing the student at iBrain and would be seeking public funding for that placement (Parent Ex. S). The student began attending iBrain in July 2018 and remained there throughout the 2018-19 school year (Parent Exs. GG at p. 3; HH at p. 1).

[1] In addition, the IHO in that matter ordered the district to reconvene the CSE to amend the student's IEP for the 2017-18 school year in light of the decision and change the student's eligibility classification to traumatic brain injury (Parent Ex. B at p. 8).

A. July 2018 Due Process Complaint Notice

In a due process complaint notice dated July 9, 2018, the parent requested an impartial hearing alleging that the district had denied the student a FAPE for the 2018-19 school year (Parent Ex. C). As an initial matter, the parent requested pendency based on the June 2018 IHO decision directing the district to fund the student's placement at iHope and requested that the district prospectively pay the student's full tuition at iBrain including special transportation during the pendency of the proceeding (id. at pp. 1-2; see Parent Ex. A). Turning to the merits, the parent asserted that the district failed to hold the March 2018 annual review meeting at a time mutually agreeable to the parent and in a manner which complied with the requirements of a full committee meeting, did not adequately consider the evaluative information available, and failed to reconvene the CSE upon the parent's request (Parent Ex. C at p. 2). Further, the parent asserted that the March 2018 IEP was not appropriate because it: failed to accurately state the student's classification as a student with traumatic brain injury, was not the product of any individualized assessment of the student's needs, inadequately described the student's present levels of performance and management needs, included "immeasurable" annual goals, inappropriately reduced the student's related services mandates, failed to provide an appropriate special class placement with sufficient 1:1 instruction in the least restrictive environment (LRE), and did not provide for extended school day programming (id. at pp. 2-3). As relief, the parent requested that the district directly pay iBrain the cost of the student's tuition for the 2018-19 school year, including transportation and 1:1 travel paraprofessional services (id. at p. 3).

B. Events Subsequent to July 2018 Due Process Complaint Notice

The parties proceeded to the impartial hearing on July 26, 2018 and concluded the pendency portion of the hearing that day (see Tr. pp. 1-85). In an interim decision on pendency dated August 2, 2018, the IHO determined that the student's pendency placement was the programming at iHope detailed in a prior IHO decision regarding the 2017-18 school year but that, because iBrain was "substantially similar" to iHope, the district would be required to fund the student's tuition at iBrain pursuant to pendency (see Aug. 2, 2018 Interim IHO Decision at pp. 1-2; see also IHO Decision at p. 46; Parent Ex. A at pp. 3, 7-8).[2]

On May 31, 2019, a CSE convened to develop the student's IEP for the 2019-20 school year (see generally Dist. Ex. 34). Determining the student continued to be eligible for special education programming as a student with multiple disabilities, the May 2019 CSE recommended a 12-month, 12:1+4 special class placement in a specialized school together with three 30-minute individual sessions per week of OT, five 30-minute individual sessions per week of PT, four 30-minute individual sessions per week of speech-language therapy, one 30-minute session per week of speech-language therapy in a group, two 30-minute individual sessions per week of vision education services, three periods per week of adapted physical education, and one 60-minute session per month of parent counseling and training in a group (id. at pp. 1, 23-24, 28; see Dist.

[2] The hearing record filed on appeal includes a "Final Order on Pendency" that is undated and unsigned (see Interim IHO Decision at pp. 1-2); however, according to the IHO's final decision, he issued his pendency decision on August 2, 2018 (IHO Decision at p. 46).

Ex. 1 at p. 1). In addition, the CSE recommended supports to meet the student's management needs, developed 14 annual goals and corresponding short-term objectives, and determined that the student was eligible for alternate assessments and specialized transportation services (Dist. Ex. 34 at pp. 6-22, 26-27). The May 2019 CSE also recommended that the student receive the support of a full-time individual paraprofessional for health and activities of daily living (ADL) skills and full-time individual transportation paraprofessional services, as well as individual assistive technology devices (id. at p. 24).

The parent signed an enrollment contract with iBrain on June 14, 2019 for the 2019-20 school year (Parent Ex. X). In a letter dated June 21, 2019, the parent notified the district of her intent to unilaterally place the student at iBrain for the 2019-20 school year and seek public funding for that placement (Parent Ex. DD). The student continued to attend iBrain during the 2019-20 school year (see Parent Ex. GG at p. 4).

C. July 2019 Due Process Complaint Notice

On July 8, 2019, the parent filed a second due process complaint notice regarding the 2019-20 school year (Parent Ex. V). At the outset, the parent requested that the complaint be consolidated with the ongoing matter regarding the 2018-19 school year, which the parent asserted had "not been fully adjudicated" (id. at p. 1). She further requested an immediate interim decision on pendency, asserting that the basis for the student's pendency rested in the August 2, 2018 interim decision on pendency decided in the matter regarding the 2018-19 school year (id. at p. 2). The parent asserted that the district failed to hold the May 2019 annual review meeting at a date and time mutually agreeable to the parent and in a manner which complied with the requirements of a full committee meeting (id.). Further, the parent asserted that the May 2019 IEP was not appropriate because it: failed to accurately state the student's classification as a student with a traumatic brain injury, was not the product of any individualized assessment of the student's needs, inadequately described the student's present levels of performance and management needs, inappropriately reduced the student's related services mandates, failed to provide an appropriate special class placement with sufficient 1:1 instruction in the LRE, and did not provide extended school day programming (id. at pp. 2-3). As relief, the parent requested that the district directly pay iBrain the cost of the student's tuition for the 2019-20 school year, including transportation and 1:1 travel paraprofessional services (id. at p. 3).

D. Impartial Hearing Officer Decisions

In an interim decision dated July 21, 2019, over the objection of the district, the IHO consolidated the 2018-19 and 2019-20 school year cases as he determined "on the whole, the two may be heard far more efficiently together than apart" (July 21, 2019 Interim IHO Decision).[3]

[3] There is no explanation in the hearing record for why the impartial hearing relating to the 2018-19 school year had not continued for almost a year since the July 26, 2018 hearing date on pendency.

The parties continued with the impartial hearing on February 10, 2020, March 2, 2020, and June 8, 2020 (see Tr. pp. 86-306).[4] In a final decision dated July 12, 2020, the IHO determined that the district "had not meaningfully defended its 2018-19 IEP, but instead, ha[d] simply admitted an IEP dated March 26, 2018 . . . into evidence"; the IHO also noted that a different IHO had overturned "an identical program for this student for the 2017-18 school year" (IHO Decision at pp. 2, 45). Regarding both the 2018-19 and 2019-20 school years the IHO determined that the district had not "meaningfully shown that it had taken [the prior IHO's] order concerning the 2017-18 school year into account or that it had adequate clinical support for a decision to change radically the program and placement deemed appropriate" by that IHO (id. at p. 46).

The IHO then reiterated that his unappealed pendency order was retroactive to July 10, 2018 and that "[b]oth school years in question ha[d] come and gone" (IHO Decision at p. 46). The IHO found that his pendency determination "was and continues to be in keeping with" recent Second Circuit precedent, specifically finding that "in the absence of a pendency offer by the district, the family's proposed setting was appropriate because it was substantially similar" (id. at p. 47). The IHO also determined that in this case the student's pendency entitlement was "not subject to revision based on any equitable findings" (id.). However, the IHO stated that equitable considerations amounted to "'a plague on both your houses'" as both parties had "outdone the other in undermining the legitimacy of the process laid with such care and in such detail by the IDEA" (id. at pp. 45-46). As such, regarding the unilateral placement at iBrain, the IHO determined that "the equities arising from the family's failure adequately to cooperate with the district undermine any basis for reaching a determination that their placement was substantively appropriate for the years in question, and explicitly mitigate against extending the pendency entitlement" to the "brief" period of time prior to the filing of the due process complaint notice (id. at pp. 46-48).

IV. Appeal for State-Level Review

In a request for review, the parent asserts that the IHO correctly found that the district had denied the student a FAPE during the 2018-19 and 2019-20 school years and also correctly denied the district's request to reopen or reverse his pendency determination in light of a recent Second Circuit decision. The parent alleges that the IHO erred by failing to issue a determination that the student's educational programming at iBrain during the 2018-19 and 2019-20 school years was appropriate. The parent further asserts that the IHO erred by denying the parent's requested relief based on equitable considerations. According to the parent, the balance of the equities does not warrant a "total denial of reimbursement."

In an answer the district responds to the parent's allegations and argues that the evidence in the hearing record supports a finding that iBrain was not an appropriate unilateral placement during the 2018-19 school year. Regarding the 2019-20 school year, the district asserts that a finding regarding the appropriateness of iBrain is unnecessary and that equitable considerations weigh in favor a denial of tuition reimbursement. In a cross-appeal, the district argues that the

[4] On February 10, 2020, the IHO and the parties discussed the district's motion for the IHO's recusal (see Tr. pp. 86-93), which the IHO subsequently denied in an interim decision dated February 10, 2020 (see Feb. 10, 2020 Interim IHO Decision).

IHO erred in determining that the May 2019 IEP failed to offer the student a FAPE. The district also alleges in a cross-appeal that the IHO erred when he "reopened" the pendency decision but failed to render a decision in light of the Second Circuit's determination rejecting the substantial similarity standard, and when he found that the student's pendency placement was at iBrain. The district further asserts that it is not required to offer the student a "pendency seat."

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]).[5]

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

[5] 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).

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

Turning first to the district's cross-appeal regarding the student's pendency placement, the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "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]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has

been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

Initially, in addressing the district's request that he revisit the question of pendency in light of the Second Circuit's decision in Ventura de Paulino, the IHO opined that "pendency orders are not interim orders but rather are limited final orders of finite duration" that are "final and appealable" (IHO Decision at pp. 2-3, 46). Based on this view, the IHO found that the district's failure to appeal the IHO's August 2018 interim decision on pendency rendered that decision final and binding (id. at pp. 3, 46). An IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). However, State regulation explicitly treats "a pendency determination" as an interim determination, and, while a party may interpose an interlocutory appeal of a pendency determination, State regulation also provides that a party may seek review of "any interim ruling, decision or refusal to decide an issue" in an appeal from the final decision of an IHO (8 NYCRR 279.10[d]; see Application of a Student with a Disability, Appeal No. 18-027; Application of the Bd. of Educ., Appeal No. 16-074; Application of the Bd. of Educ., 11-072). Accordingly, the IHO's August 2018 interim decision on pendency did not become final and binding as the district has appealed it as part of its appeal from the IHO's July 2020 final decision as permitted by State regulation.[6]

[6] That the IHO's August 2018 interim decision on pendency "bore the standard notice of right to appeal" (IHO Decision at p. 46; Aug. 2, 2018 Interim IHO Decision at p. 2) does not alter this analysis because as stated above, although the parties had the option to interpose an interlocutory appeal of the IHO's interim decision, this did not foreclose the option permitted by State regulation of appealing the interim decision after the IHO issued his final determination (8 NYCRR 279.10[d]).

As to the merits of the pendency dispute, in the August 2018 interim decision, the IHO indicated that the parties were in agreement that the unappealed IHO decision, in which an IHO found that iHope was an appropriate unilateral placement for the student for the 2017-18 school year, formed the basis for the student's pendency placement (Aug. 2, 2018 Interim IHO Decision at p. 1; see Parent Ex. A). The IHO further determined that iBrain was substantially similar to iHope and that, therefore, the district was responsible to fund iBrain during the pendency of the proceedings (Aug. 2, 2018 Interim IHO Decision at p. 2).

Subsequently, in Ventura de Paulino, the Second Circuit Court of Appeal was confronted with a set of facts similar the present matter in that the IHOs had concluded that iHope was an appropriate unilateral placement for the students for prior school years and the district did not appeal those rulings, meaning that the district, by operation of law, consented to the students' placements at iHope (959 F.3d at 532). The issue presented was whether the parents could unilaterally move the student to iBrain and still receive pendency funding (id.). The Court concluded the parents could not effectuate this unilateral move since it is the district that is authorized to decide how (and where) the students' pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (id. at 533-35). The Court observed that:

> If a parent disagrees with a school district's decision on how to provide a child's educational program, the parent has at least three options under the IDEA: (1) The parent can argue that the school district's decision unilaterally modifies the student's pendency placement and the parent could invoke the stay-put provision to prevent the school district from doing so; (2) The parent can determine that the agreed-upon educational program would be better provided somewhere else and thus seek to persuade the school district to pay for the program's new services on a pendency basis; or (3) The parent can determine that the program would be better provided somewhere else, enroll the child in a new school, and then seek retroactive reimbursement from the school district after the IEP dispute is resolved

(id. at 534). Therefore, the Court concluded that "[r]egardless of whether the educational program that the Students are receiving at iBRAIN is substantially similar to the one offered at iHOPE, when the Parents unilaterally enrolled the Students at iBRAIN for the 2018-2019 school year, they did so at their own financial risk" (id.).

In the present case, the last agreed upon placement is based on the June 2018 unappealed IHO decision in the proceedings concerning the 2017-18 school year, which ordered the district to fund the student's unilateral placement at iHope (see Parent Ex. A). Applying Ventura de Paulino to the instant dispute, when the parent unilaterally enrolled the student at iBrain for the 2018-19 and 2019-20 school years, she did so at her own financial risk (959 F.3d at 534).

In his final decision, the IHO acknowledged the Second Circuit's decision in Ventura de Paulino but found it "inapposite" because the district had not made the student "a pendency offer"

and that, therefore, the parent appropriately located a "substantially similar" setting as a form of "self-help" (IHO Decision at p. 47). However, as the IHO found in the interim decision, the parties were in agreement that the June 2018 unappealed IHO decision, which found that iHope was an appropriate unilateral placement, formed the basis of the student's pendency (Aug. 2, 2018 Interim IHO Decision at p. 2; see Parent Ex. A). As the Court in Ventura de Paulino explained:

> When the impartial hearing officers in these tandem cases concluded that iHOPE was an appropriate placement for the Students and the City chose not to appeal the ruling to a state review officer, the City consented, by operation of law, to the Students' private placement at iHOPE. At that moment, the City assumed the legal responsibility to pay for iHOPE's educational services to the Students as the agreed-upon educational program that must be provided and funded during the pendency of any IEP dispute.

(959 F.3d at 532 [emphasis added]). The IHO emphasized that he inquired of the district whether or not "it had a seat in that school to offer the family" and that "the district demurred" (IHO Decision at p. 47); however, very recently, the Second Circuit Court of Appeals specifically rejected this requirement that the district obtain a seat for the student in the nonpublic school and held, under similar facts, that: "iHOPE became the student['s] pendency placement not at the [district's] instigation, but rather by operation of law after the [district] chose not to appeal the ruling[] of [an] impartial hearing officer[] holding that iHOPE was an appropriate placement for th[is] student[]" (Neske v. New York City Dep't of Educ., 2020 WL 5868279, at *1 [2d Cir. Oct. 2, 2020]). Based on this, the Court stated that "deemed the [district] to have implicitly chosen iHOPE as the pendency placement" (Neske, 2020 WL 5868279, at *1; see also Aruajo v. New York City Dep't of Educ., 2020 WL 5701828, at *4 [S.D.N.Y. Sept. 24, 2020] [rejecting the parents' argument in that case that, because the district "had not yet provided the students with any pendency placement, Ventura [wa]s inapplicable"]).[7]

[7] In Neske, the Second Circuit also rejected the argument that the facts of that matter fell under a footnote in Ventura de Paulino, where the Court left open the question as to what would happen if a student's prior nonpublic school placement was not available to provide pendency services and the district either refused or failed to provide pendency services (Neske, 2020 WL 5868279, at *2; Ventura de Paulino,959 F.3d at 534 n.65). The Court in Venutra de Paulino cited a decision by the Fourth Circuit Court of Appeals, which held that 20 U.S.C. § 1415(j) does not impose any affirmative obligations on a school district to seek out alternative placements when a student's then-current educational placement is not functionally available (Wagner, 335 F.3d at 301 [finding that "the question of availability is entirely irrelevant to the task of identifying the child's then-current educational placement, and it is only the current placement, available or unavailable, that provides a proper object for a 'stay put' injunction"]). However, the Fourth Circuit noted two situations in which a student's pendency placement could be changed: either by an agreement of the parties or by "a preliminary injunction from the district court, changing the child's placement" (Wagner, 335 F.3d at 302). This follows the long-standing principle that "the stay-put provision in no way purports to limit or pre-empt the authority conferred on courts" (Honig, 484 U.S. at 327; see 20 USC 1415[i][2][C][iii]). These situations do not contemplate the parent's exercise of self-help, as the IHO characterized it (IHO Decision at p. 47). In any event, as with the facts in Neske, the current matter does not present such an instance, as the evidence in the hearing record does not support a finding that iHope was not available or that the district "refuse[d] or fail[ed] to provide pendency services as iHOPE" (2020 WL 5868279, at *2).

Based on the foregoing, the IHO erred in finding that iBrain was the student's stay put placement for purposes of pendency. As a consequence, the IHO's findings regarding the necessity of reviewing the appropriateness of the parent's unilateral placement of the student at iBrain and the scope of his "equitable findings," which he deemed not applicable to the period of time covered by pendency (IHO Decision at pp. 47-48), were based on the erroneous pendency determination and, therefore, must also be reversed. On this basis, I considered remanding the matter to the IHO to consider the appropriateness of iBrain and the scope of equitable considerations in the first instance (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). However, because this matter has already been pending for over two years and because there is a sufficient hearing record upon which to base findings on these issues, I will exercise my discretion and reach the merits of the parent's claims and requests for relief in this instance.

B. 2018-19 School Year

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 has become final and binding upon the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]). Therefore, the next issues to be addressed regarding the 2018-19 school years are whether iBrain was an appropriate unilateral placement and whether equitable considerations support an award of tuition reimbursement.

1. iBrain

The parent argues that the IHO erred in failing to find that the program at iBrain was appropriate to meet the student's needs during the 2018-19 school year. The district asserts that the parent failed to sustain her burden to show iBrain was appropriate as the school "did not have a full staff of teachers and providers at the start of the school year," in particular, a social worker, assistive technology provider, and vision education provider. For the reasons discussed below, review of the evidence in the hearing record supports a finding that iBrain provided a program and placement that was appropriate to meet the student's needs during the 2018-19 school year.

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).

As noted above, evidence in the hearing record indicates that the student had received an array of diagnoses including cystic encephalomalacia, seizure disorder, hypoxic-ischemic encephalopathy, cerebral palsy, developmental delay, gastroesophageal reflux disease, asthma, and visual impairment including "many characteristics of [c]ortical [v]isual [i]mpairment" (Parent Exs. E at p. 1; GG at p. 3; Dist. Exs. 13 at p. 1; 15 at p. 1). The student was nonambulatory, nonverbal, and received all means of nutrition and medication through a gastric tube (Parent Exs. E at pp. 5, 15; GG at p. 3; Dist. Ex. 13 at pp. 5, 15). The student was fully dependent in all domains of mobility and required one to one assistance for feeding and activities of daily living (Parent Exs. E at p. 15; GG at p. 3; Dist. Ex. 13 at p. 15). He communicated using facial expressions, head turning, touching desired objects, vocalizations, and pressing switches with maximum physical support (Parent Ex. E at pp. 1, 9, Dist. Ex. 13 at pp. 1, 9, 12).

According to the hearing record, iBrain was a private special education school for students with acquired brain injuries or brain-based disabilities ages 5 to 21 years old (Tr. p. 34; Parent Ex. G at p. 2; GG at p. 2). All students received the services of a 1:1 paraprofessional to assist them throughout the school day, and iBrain provided a variety of related services, generally in 60-minute sessions, in an extended school day program (Tr. pp. 34-36; Parent Ex. GG at p. 2). The director of special education services at iBrain (director) testified that students received 30 minutes per day of 1:1 "individualized direct instruction" from their teacher, a methodology she described as "repetitive" and which corrected students' errors in a way that reinforced correct answers (Tr. pp. 32-33, 41). iBrain also provided students with opportunities to generalize skills into small group settings, and related services were provided in both push-in and pull-out models to promote generalization (Tr. pp. 41-42).

In March 2018, iHope—the private school the student attended during the 2017-18 school year—developed an individualized education plan (iHope IEP) for the student for the 2018-19 school year (Dist. Ex. 13). The document included extensive descriptions of the student's academic achievement, speech-language and communication—including his use of augmentative and alternative communication (AAC) devices—oral motor, social, gross and fine motor, vision, sensory processing, and activities of daily living skills (see id. at pp. 1-14). The iHope IEP provided health and medical, special education, vision, PT, OT, and speech-language therapy management needs to support the student (id. at pp. 14-17). Of note to the issue on appeal regarding the student's vision education services, the iHope IEP included results of an assessment that included administration of an assessment entitled "CVI Range" (id. at pp. 5-7). Results of the assessment indicated that the student "demonstrated delays in all areas tested" and provided specific information about the student's visual preferences, ability to visually attend to various stimuli, and visual latency (id.). The student's score on the CVI Range indicated students at that level "use vision for functional tasks," and were "working on integrating vision with function" (id. at p. 7).

The director testified that iBrain developed the student's individualized education plan (iBrain IEP) for the 2018-19 school year based off of the student's iHope IEP, which included "the most recent report of progress and recommendations from providers that knew him well" (see Tr. pp. 228-31; Parent Ex. E; Dist. Ex. 13). The student's teacher from iHope "transferred" to iBrain and participated in the development of the student's 2018-19 iBrain IEP (Tr. p. 232). The director opined that the program developed for the student was appropriate because it was based upon information from iHope providers who had the "most extensive experience" with the student and because iBrain made changes based on its own assessment of the student (Tr. p. 233).

At the start of the 2018-19 extended school year, the director testified that the student attended iBrain in a 6:1+1 class with the support of a 1:1 paraprofessional and received five 60-minute individual sessions per week each of OT, PT, and speech-language therapy (Tr. pp. 37-39, 224-25; see Parent Exs. E at p. 30; H; GG at p. 3). Further, iBrain determined that the student should receive three 60-minute sessions per week of vision education services (see Tr. pp. 37-38; Parent Exs. E at p. 30; H). The student also received school nurse services as needed and special transportation accommodations including 1:1 paraprofessional support (Tr. pp. 38-39; see Parent Exs. E at p. 30; GG at p. 4). At that time the student's academic skills were at a pre-k level for both math and literacy, and he received "daily 30-minute individual academic sessions" as well as

"small group academics through the rest of the day" (Tr. pp. 243-46; see Parent Ex. H). According to the student's 2018-19 class schedule, four mornings per week for 30 minutes each the student participated in sensory activities geared to regulate him, which included use of multisensory and academic activities (Tr. pp. 246-48; see Parent Ex. H).

In a quarterly progress report dated October 2018, iBrain described the student's progress towards his literacy, math, speech-language, OT, and PT annual goals (Parent Ex. I). Review of the progress report shows that, for the annual goals that were being addressed at that time, the student was making "[e]merging" or [d]eveloping" progress or had "[p]artially [a]chieved" the majority of the short-term objectives (see id.). During the 2018-19 school year, the director testified that she had a "series of meetings" with providers on an "informal basis" whereby they discussed ideas, progress, and how to support the generalization of students' skills (Tr. pp. 235-36). In addenda to the student's iBrain IEP, staff provided annual goals in the areas of literacy, math, speech-language therapy, vision education, PT, and OT, as well as recommended frequency and durations for each related service (Parent Ex. E at pp. 18-25).

On appeal the district asserts that iBrain was not an appropriate unilateral placement for the student during the 2018-19 school year because it "did not have a full staff of teachers and providers at the start of the school year" including a social worker, an assistive technology provider, and a vision education services provider.[8] The district also argues that iBrain's "failure to provide [vision education services] to the student [was] particularly problematic given [the student's] significant vision impairment." The director testified that iBrain did not have a vision education services provider at the start of the school year in July 2018 but did have a provider by mid-September 2018 (Tr. pp. 225-26, 239). In the interim, the director testified that she worked "with the classroom teachers to implement all the recommendations from the vision service - - recommendations from their IEPs, which [were] pretty extensive, in order to try to help to carry over [the students'] skills" (Tr. pp. 44-45). According to the director, iBrain was "implementing all of the suggestions and working on the goals within the classroom" (Tr. p. 45). She further testified that iBrain "ended up having to do makeup sessions for vision" (Tr. pp. 225-26, 234-35). Regarding the student's vision education services, the director testified that although she could not speak to "every single circumstance," she was "confident" that the missed sessions were made up (see Tr. pp. 234-35, 241-42). The director testified that the student demonstrated progress throughout the 2018-19 school year with his then-current mandate and that he was "able to retain what he learn[ed]" during his vision education sessions (Tr. pp. 259-61).[9]

[8] To the extent that the district suggests iBrain was not appropriate because the school did not have an assistive technology provider until August or September 2018, although the 2018-19 iBrain IEP called for the student's use of an "AAC" communication device all day, iBrain had not recommended a specific level of assistive technology services for the student (see Parent Ex. E at p. 30). Further, regarding parent counseling and training, the director testified that the first session of the year "ended up having to be made up later on," as the social worker started at iBrain on August 1, 2018 (Tr. pp. 226, 234-35; see Parent Ex. E at p. 30).

[9] Additionally, although not dispositive, the director testified that the student made "considerable progress across all domains during the 2018-2019 school year at iBRAIN" (Parent Ex. GG at p. 4; see Parent Ex. HH at p. 1).

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 parent's 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 v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). "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 his 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. As discussed above, iBrain identified the student's special education needs and provided a program that addressed those needs in which he demonstrated progress during the 2018-19 school year.

2. Equitable Considerations

The parent asserts on appeal that "the equities support a full award of tuition and related services for [the student] at iBRAIN" during the 2018-19 school year. For the reasons discussed below, the evidence in the hearing record supports the parent's position.

The final criterion for a reimbursement award is that the parent's 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"]).

Review of the evidence in the hearing record shows that the parent had provided consent for the district to conduct evaluations and observations of the student that were used for the March 2018 CSE meeting (see Parent Ex. HH at p. 1; Dist. Exs. 1 at p. 1; 4; 5; 9; 21 at p. 14). The parent was present during the March 2018 CSE meeting, as were staff from iHope who participated by telephone (see Tr. p. 117; Dist. Ex. 1 at p. 20). Review of the March 2018 IEP shows that it included reports prepared by the student's then-current providers in the areas of special education, speech-language therapy, vision education, PT, and OT (see Dist. Exs. 1 at pp. 2-3; 10 at p. 2). By letter dated June 21, 2018 the parent informed the district of her intent to unilaterally place the student at iBrain for the 2018-19 school year and seek reimbursement for that placement (Parent Ex. S). In the letter, the parent requested that the CSE schedule an "appropriate" CSE meeting at a date and time that allowed for "all mandated members of the IEP team to participate" and also that she remained "willing and ready to entertain" an appropriate district program, public, or approved nonpublic school placement once that occurred (id.). In the request for review, the parent asserts that the district "failed to take any action in response" to her notice of unilateral placement, or seemingly in response to her request that the CSE reconvene and the hearing record does not show otherwise (see Dist. Ex. 21 at pp. 10-11). Therefore, there is no evidence in the hearing record that would warrant a reduction or denial of tuition reimbursement on equitable grounds, and the district shall be required to reimburse the parent for the full costs of the student's tuition at iBrain for the 2018-19 school year.

C. 2019-20 School Year

The district asserts in a cross-appeal that the IHO erred in finding that the May 2019 IEP did not offer the student a FAPE. Specifically, the district argues that the IHO's conclusion that "the clinical record for a student as significantly disabled as this one is entirely too sparse to support a substantial change in the detailed program previously deemed appropriate by my colleague" was not supported by the hearing record and that the IHO in this matter should not have considered a prior IHO's decision concerning the 2017-18 school year.

As an initial matter, in making a determination regarding the district's offer of a FAPE to the student for the 2019-20 school year, the IHO placed undue weight upon the June 2018 IHO decision related to the 2017-18 school year (see IHO Decision at p. 46). The June 2018 IHO decision found that the district conceded that it failed to offer the student a FAPE for the 2017-18 school year, determined that iHope was an appropriate unilateral placement, and ordered the district to fund the student's tuition at iHope along with related services and transportation for the 2017-18 school year (see Parent Ex. A at p. 7). The IHO in the 2017-18 proceeding also ordered the district to reconvene the CSE to amend the student's IEP for the 2017-18 school year in light of her decision (id. at p. 8).

The IHO in the present matter placed upon the district an affirmative obligation to "take . . . into account" the prior IHO decision in its educational planning for the student for the 2019-20 school year and to support the May 2019 CSE's "decision to change" the recommendations for the student as compared to the "program and placement deemed appropriate" in the June 2018 IHO decision (i.e., the program and placement delivered to the student at iHope) (IHO Decision at p. 46). The IHO's requirements are beyond what the IDEA requires. The IDEA requires that a student's IEP be reviewed periodically, but not less frequently than annually, and revised as appropriate (20 U.S.C 1414[d][4][A]; 34 CFR 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]), and, in examining a district's offer of a FAPE, each school year is treated separately (see J.R. v. New York City Dep't of Educ., 748 Fed App'x 382, 386 [2d Cir. Sept. 27, 2018]; M.C., 226 F.3d at 67; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X, 2008 WL 4890440, at *16). While review of the district's offer of a FAPE need not occur in a vacuum and a decisionmaker may take into account issues that arise with a student's IEP in context, there is no requirement that an SRO or IHO—or for that matter a district—be bound by the prior decision of a IHO who rendered a determination concerning a different school year.[10] Here, the determination in the 2017-18 proceeding was made by a different IHO after considering the evidence in a different hearing record that was not before the IHO in this proceeding. Although the prior IHO's decision has become final and binding on the parties relative to the student's 2017-18 school year, the prior decision is not binding on the IHO's or SRO's consideration of the merits of the parent's claims pertaining to the 2019-20 school year, and does not in and of itself provide a basis for a finding that the district failed to offer the student a FAPE.[11]

As will be examined further below, the evidence in the hearing record does not support the IHO's determination that information available to the May 2019 CSE was insufficient to support its recommendations. However, given the narrow basis stated by the IHO for his determination, it is necessary to determine if other claims regarding the district's offer of a FAPE for the 2019-20

[10] To the extent the IHO was relying on a rationale that he has articulated in prior cases whereby he deems a change in the student's then-current placement for purposes of pendency to constitute unconditioned assent by the district to fund that placement on a going forward basis outside of the pendency context (see IHO Decision at pp. 41-42), that rationale has been specifically reviewed in other recent appeals and found erroneous (see Application of the Dep't of Educ., Appeal No. 20-092; Application of the Dep't of Educ., Appeal No. 20-080; see also O'Shea, 353 F. Supp. 2d at 459 [finding that "pendency placement and appropriate placement are separate and distinct concepts"]; Student X, 2008 WL 4890440, at *20; see Mackey, 386 F.3d at 162 [a claim for tuition reimbursement under pendency is evaluated separately from a claim for tuition reimbursement pursuant to the inadequacy of an IEP]). Moreover, in this instance, as discussed above, the IHO erred in finding that iBrain was the student's placement for pendency and, therefore, any further finding based on that flawed determination is also error.

[11] Moreover, even if it was appropriate to rely on prior findings of an IHO regarding a CSE's similar recommendations, there is absolutely no support for the IHO's view that the CSE would be required to support its recommendations for a student as measured against a prior finding regarding the appropriateness of a unilateral placement (M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018] [noting that while "the district's proposed program would not have replicated the class size, structure and supports available at [the unilateral placement]. . . . that is not the standard the statute imposed on the CSE"]; see Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004]).

school year are properly before me. The IHO did not address the other claims in the parent's due process complaint notice pertaining to the May 2019 CSE process and the resultant IEP (see Parent Ex. V), and, on appeal, the parent does not allege that the IHO erred in failing to address such other claims.[12] State regulations governing practice before the Office of State Review require that a "request for review clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding," and shall indicate the relief sought by the petitioner (8 NYCRR 279.4[a] [emphasis added]). Tethered closely to this requirement is the State regulation which mandates that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately" (8 NYCRR 279.8[c][2]). "[A]ny issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][4]).

To be sure, the parent was not aggrieved by the IHO's determination that the district failed to offer the student a FAPE for the 2019-20 school year. However, when State regulations governing appeals before the Office of State Review were last amended, it was specifically contemplated that a prevailing party would be chargeable with the knowledge that they may have to defend themselves in an appeal and that might require an appeal of any underlying determinations made by the IHO (or failures to rule) that were unfavorable to the prevailing party (see N.Y. State Register Vol. 38, Issue 26, at p. 49 [June 29, 2016]; Application of a Student with a Disability, Appeal No. 18-131). Here, the parent was on notice by the district's service of the notice of intention to cross-appeal and case information statement that the district intended to cross-appeal the IHO's determination that the district failed to offer the student a FAPE for the 2019-20 school year (see Dist. Notice of Intention to Cross-Appeal; see also 8 NYCRR 279.2[d]). Therefore, it was incumbent upon the parent to assert in her appeal, the alternative bases for her allegation that the district failed to offer the student a FAPE. With that said, at least one district court has held that, notwithstanding the explicit language in the regulation, "a non-aggrieved party's failure to []appeal an unaddressed issue does not constitute a waiver" (G.S. v Pleasantville Union Free Sch. Dist., 2020 WL 4586895, at *16 [S.D.N.Y. Aug. 10, 2020]).[13] Accordingly,

[12] Although the parent's memorandum of law in support of her request for review reiterates some of the claims pertaining to the May 2019 CSE and IEP, it has long been held that a party is required to set forth the issues for review in a pleading and that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see, e.g., Application of a Student with a Disability, Appeal No. 19-060).

[13] However, even the court in G.S. seemed to be of the view that facts similar to the present matter would warrant a finding that the alternative grounds for the allegation of a denial of a FAPE were abandoned, i.e., where "an aggrieved parent appealed an IHO's decision, but only on certain grounds, and the omitted grounds were then considered waived," as opposed to "where the Parents did not appeal or cross-appeal to the SRO at all, as they had not been aggrieved by the IHO decision, which awarded them the exact relief they sought" (2020 WL 4586895, at *16, citing AR v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 6251196, at *12 n.8 [S.D.N.Y. Nov. 21, 2019]). Moreover, while the district court in G.S. summarized several court cases supporting the view that a non-aggrieved party need not appeal unaddressed issues, the authority cited pre-dated the amendment to the State regulations, effective January 1, 2017, which added the language explicitly requiring an appeal of unaddressed issues and providing that issues not appealed would be deemed abandoned, and it is unclear whether or not this regulatory history was available to the court (2020 WL 4586895, at *16, citing NB & CB v. New York

despite my view that the parent's other claims asserted in the due process complaint notice regarding the May 2019 CSE and resultant IEP have been abandoned pursuant to 8 NYCRR 279.8(c)(4), they are addressed herein out of an abundance of caution.[14]

1. CSE Process

In the July 2019 due process complaint notice the parent asserted that the CSE failed to hold the May 2019 annual review meeting at a time mutually agreeable to the parent and which complied with the requirements of a full committee meeting (Parent Ex. V at p. 2).[15]

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

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City Dep't of Educ., 2016 WL 5816925, at *4 [S.D.N.Y. Sept. 29, 2016], aff'd sub nom., 711 Fed. App'x 29 [2d Cir. Oct. 10, 2017], W.W. v New York City Dep't of Educ., 2014 WL 1330113, at *15 [S.D.N.Y. Mar. 31, 2014], T.G. v. New York City Dep't of Educ., 973 F. Supp. 2d 320, 337-38 [S.D.N.Y. 2013], FB v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 588 [S.D.N.Y. 2013], and J.M. v. New York City Dep't. of Educ., 2013 WL 5951436, at *21 [S.D.N.Y. Nov. 7, 2013]; see N.Y. State Register Vol. 38, Issue 39, at pp. 37-38 [Sept. 28, 2016]; N.Y. State Register Vol. 38, Issue 26, at pp. 49-52 [June 29, 2016]; N.Y. State Register Vol. 38, Issue 4, at pp. 24-26 [Jan. 27, 2016]). Among the intentions of the amendments to the regulations was to ensure that parties articulated all aspects of the IHO's rulings or failures to rule that they intended to pursue so that the State Review Officer would not be tasked with reviving every claim asserted in the due process complaint notice on a parent's behalf or further prolonging proceedings by remanding matters to impartial hearing officers if avoidable. Further the mechanism of the notices of intention to appeal and cross-appeal were contemplated to, among other things, give each party notice of the other party's intentions early on in the process to allow proper contemplation of which claims needed to be asserted if it became necessary to argue, for example, that alternative grounds supported the IHO's ultimate decision (see 8 NYCRR 279.2).

[14] I again considered remanding this matter to the IHO to consider the other grounds for the parent's allegation that the district denied the student a FAPE for the 2019-20 school year (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B., 923 F. Supp. 2d at 589; see also D.N., 2013 WL 245780, at *3). However, for the same reasons stated above regarding the length of the proceedings thus far and the sufficiency of the hearing record, I will exercise my discretion and reach the merits of the parent's alternative grounds for the allegation that the district failed to offer the student a FAPE for the 2019-20 school year.

[15] In the post-hearing brief to the IHO, as well as in the memorandum of law accompanying the request for review, the parent argues that the May 2019 CSE predetermined the student's program and placement (see IHO Ex. IV at pp. 20-21; Parent Mem. of Law at p. 21); however, as the parent did not raise predetermination in the July 2019 due process complaint notice (see Parent Ex. V), it is an issue that is outside the scope of the impartial hearing and of my review and will not further discussed (see 20 U.S.C. § 1415[c][2][E][i]; [f][3][B]; 34 CFR 300.508[d][3]; 8 NYCRR 200.5[i][7][i]; [j][1][ii]; see also R.E., 694 F.3d at 187 n.4).

mutually agreed upon time and place for the meeting (34 CFR 300.322[d]; 8 NYCRR 200.5[d][3], [4]).

In this case, according to the district's computerized Special Education Student Information System (SESIS) log, the district sent an email to the parent on February 6, 2019, indicating that it was "in the process of scheduling [the student's] IEP meeting for the school year 2019-20" and would be seeking any evaluations or updated progress reports from iBrain (Dist. Ex. 21 at p. 8). The district indicated to the parent that it wanted to "hear from [her] regarding any particular scheduling preferences for [her] child's meeting" and asked that she provide "any scheduling request" by February 24, 2019 (id.). The district also expressed the CSE's commitment to developing an IEP for the student "before July 1st" (id.).[16]

In a CSE meeting notice dated March 19, 2019, the district notified the parent that a meeting would take place on April 12, 2019 at 12:00 p.m. and indicated the attendees would include a school psychologist who would serve as a district representative, a school social worker, the parent, the student's then-current iBrain team, and the iBrain director of special education (Dist. Ex. 28 at p. 1).[17] The meeting notice also indicated that the purpose of the meeting was to review the results of the "reevaluation," determine the student's continued eligibility for special education services, and develop the student's IEP (id.). According to the meeting notice, the parent could request that an additional parent member of the CSE attend the meeting or that "the school district include the participation of the school physician in the CSE meeting" (id. at p. 2). The meeting notice indicated that such requests "must be made in writing at least 72 hours (three days) before the meeting" (id.).

In an April 5, 2019 letter, the parent's advocate informed the district that the "IEP [m]eeting currently scheduled for Friday, April 12, 2019, c[ould] not proceed" (Dist. Ex. 29 at p. 1). On the parent's behalf, the advocate requested that a "[district] [s]chool [p]hysician and [p]arent [m]ember" participate in person in the student's CSE meeting, and indicated that the parent did not agree for those members to participate "through telephonic attendance" (id. at pp. 1, 3). Further, the advocate asserted that, although the meeting notice had been emailed, the parent had not yet received the notice by mail, and that the parent had not been informed of "the actual names of the participants" who would attend the meeting (id. at p. 1). The advocate also indicated that the

[16] According to the SESIS log, prior to this, on January 2, 2019, the district also sent an email to iBrain acknowledging that the school had relocated to the particular CSE "catchment area" and requesting among other things the school's "assistance in coordinating IEP reviews" (Dist. Ex. 21 at pp. 9-10). To this end, the district requested that iBrain provide a school calendar as well as "any specific dates which may help [the CSE] schedule meetings" (id. at p. 10). The district also requested that iBrain provide teacher reports or other student information at least two weeks prior to scheduled meetings (id.).

[17] According to the SESIS log, an email was sent to the parent and iBrain on March 19, 2019, informing them of the scheduled meeting and requesting teacher reports and other medical and educational records at least three days prior to the meeting (Dist. Ex. 21 at pp. 5-6). The log also included entries on March 26 and March 28, 2019 indicating that the CSE meeting notice had been sent on those days (id. at pp. 4-5). According to a log entered on April 4, 2019, the CSE meeting notice mailed to the parent had been returned undelivered due to an incorrect address (id. at p. 4). The notice was re-sent on that date to the mailing address that the parent confirmed by e-mail (id.).

district had not sent the parent the requested medical accommodations and special transportation forms for the 2019-20 school year for the student's physician to complete and requested that such forms be sent as soon as possible (id. at pp. 1-2, 3).[18]

In a prior written notice dated April 18, 2019, the district acknowledged the parent's cancellation of the April 12, 2019 CSE meeting and informed the parent that the notice served as the CSE's response to the parent's advocate's letter regarding the "2019-20 school year CSE meeting" (Dist. Ex. 31 at p. 1). In response to the April 2019 letter, the district first noted that the parent's advocate was incorrect in stating that the meeting notice had not included the names of the CSE participants, as all mandatory CSE members had been named in the March 19, 2019 notice (id.). The district provided that the CSE would accommodate the parent's request to have an additional parent member and a district physician available for the 2019-20 CSE meeting and indicated that the medical accommodation and special transportation forms were attached to the notice (id. at pp. 1, 3). With respect to scheduling the meeting, the district noted that the parent had not responded to a February 6, 2019 email asking for the parent's scheduling preferences for the CSE meeting and, hearing nothing, the district had scheduled the CSE meeting for April 12, 2019 (id. at p. 2). However, the district granted the parent's request to reschedule the meeting and notified the parent that the CSE meeting would take place on May 31, 2019 at 12:00 p.m. (id.). In bolded letters, the district informed the parent that "[t]o ensure appropriate and timely services for the 2019-2020 School Year, [the CSE] must proceed with the scheduled IEP Meeting" (id.). The district also requested assistance to obtain teacher reports or other information about the student prior to the CSE meeting (id.). The prior written notice provided a contact person's name and phone number if the parent had questions or would like to request a meeting to further discuss information contained in the notice (id. at p. 3). As "[e]nclosures," the prior written notice included a procedural safeguards notice, CSE meeting notices dated March 19, 2019 and April 23, 2019, "[r]ecent assessments," and medical accommodation forms (id.).

In a CSE meeting notice dated April 23, 2019, the district notified the parent that a meeting would take place on May 31, 2019 at 12:00 p.m., and provided the names of the attendees including a school psychologist who would serve as a district representative, a special education teacher, a school social worker, the parent, an additional parent member, the student's then-current iBrain team, the iBrain director of special education, and a district physician (Dist. Ex. 32 at p. 1). The meeting notice also indicated that the purpose of the meeting was to review the results of the "reevaluation," determine the student's continued eligibility for special education services, and develop the student's IEP (id.).[19]

[18] According to the SESIS log, the letter was received as an attachment to an email on April 5, 2019 (Dist. Ex. 21 at p. 4). In an email dated April 7, 2019, the district acknowledged receipt of the April 5, 2019 letter from the parent's advocate (id.).

[19] The SESIS log included an entry on May 1, 2019 indicating that the CSE meeting notice had been sent on that day, as well as an entry on May 5, 2019 indicating that the CSE meeting notice had been "[e]mailed to parent and school" (Dist. Ex. 21 at pp. 3-4). The log reflected that the email sent to the parent included six attachments regarding the upcoming CSE meeting (id. at p. 3). An entry on May 7, 2019 indicated that assessments and medical forms were mailed on that day (id.).

According to an entry on the SESIS log on May 23, 2019, the district sent the parent a note "to remind [her] about the upcoming IEP meeting" and to request assistance in "obtaining updated progress reports and medical forms," the latter which were attached for completion (Dist. Ex. 21 at p. 3). The note also indicated that "recent assessments" were also attached for the parent's "convenience" (id.).

In a May 30, 2019 letter, the parent's advocate informed the district that the "IEP [m]eeting currently scheduled for Friday, May 31, 2019" needed to be rescheduled (Dist. Ex. 33 at p. 1). The reasons outlined for the cancellation were that the parent had not been able to have the student's doctor complete the medical "[a]dministration" or special transportation forms, which the parent had received from the district on May 23, 2019, and the parent wanted these forms submitted to the CSE office prior to any CSE meeting (id.). Additionally, the letter indicated that the parent could not continue past 1:00 p.m. and the meeting was to start at 12:00 p.m., which would "not allow" for a "productive meeting" (id.). The advocate requested that the district propose a date and time for the meeting to be scheduled between the hours of 9:00 a.m. with a definitive stop at 1:00 p.m., or that the parent schedule the meeting after submitting the medical forms (id.). Finally, the advocate informed the CSE that the parent did not consent to the district proceeding with any CSE meeting without her being present (id.).[20]

According to the SESIS log, on May 31, 2019 at 6:55 a.m. the district responded to the parent's request to reschedule the meeting, noting that the meeting had already been rescheduled based on the parent's previous cancellation (Dist. Ex. 21 at p. 2). Regarding the medical accommodation forms, the district "remind[ed] [the parent] that the mentioned forms were emailed to [her] on May 5, 2019" (id.). In addition, the district noted that the CSE had "medical information" about the student, that a district physician would be participating in the meeting, and that the CSE would "gladly contact [the student's] medical provider during the meeting" (id.). The district informed the parent that it had "no alternative" but to go forward with the meeting scheduled for that day "to ensure a timely IEP for the beginning of next school year" (id.).

The district members of the CSE, along with the additional parent member, convened the meeting on May 31, 2019 in the parent's absence and developed the student's IEP, which was to be implemented on July 1, 2019 (Dist. Ex. 34 at pp. 1, 23-24, 31). The May 31, 2019 IEP attendance page indicated that two attempts were made to contact the parent by phone and one attempt was made to contact the school and that voicemails were left for both the parent and the school (Dist. Ex. 34 at p. 31; see Tr. p. 205).

With regard to the parent's claim that the CSE meeting had not been scheduled at a mutually convenient time, the parent's argument is belied by the evidence in the hearing record. The hearing record shows that the district attempted to accommodate the parent by soliciting preferred dates or times, cancelling the first scheduled CSE meeting, responding to the parent's concerns, and rescheduling the meeting. Specifically, absent feedback from the parent regarding preferred times and dates for the CSE meeting, the district informed the parent of the scheduled April 12, 2019

[20] According to the SESIS log, the letter was received as an attachment to an email sent on March 30, 2019 at 3:50 p.m. (Dist. Ex. 21 at p. 4; see Dist. Ex. 33 at pp. 1-2).

CSE meeting (see Dist. Exs. 21 at p. 8; 28 at p. 1; 31 at p. 2), and when asked to change that date, the district did so, along with attempting to accommodate additional parent requests regarding CSE participants (see Dist. Exs. 29 at pp. 1-3; 31 at pp. 1-3; 32 at p. 1). The district issued a new meeting notice that gave the parent more than a month to raise any concerns with date or time of the scheduled May 31, 2019 meeting (Dist. Ex. 32). However, the parent waited until the late afternoon on the day before the scheduled CSE meeting to provide preferred times to hold the meeting (Dist. Ex. 33 at p. 1). It is unclear how the parent expected the district to know what times were convenient for her if she did not communicate that information in a timely manner.[21]

The branch of the parent's argument with regard to the district's alleged failure to conduct a "Full CSE" meeting also does not rise to the level of a denial of a FAPE because, as described above, a district physician (via telephone) and an additional parent member were present at the May 31, 2019 meeting (Dist. Ex. 34 at p. 31).[22] The only procedural requirement for CSE membership in this case that bears serious scrutiny is the parent herself. The evidence summarized above shows that the district accommodated many of the parent's demands for CSE membership and rescheduling. The question becomes whether the district followed through with its obligations to attempt to secure the parent's attendance at the CSE meeting consistent with State and federal regulations (34 CFR 300.322[c]-[d]; 8 NYCRR 200.5[d][1], [3]). In this case, the parent was clearly aware of the CSE meeting in view of her correspondence through her advocate on the afternoon prior to the meeting (Dist. Ex. 33). To be sure, the parent requested that the meeting be rescheduled rather than outright refusing to attend (see id. at p. 1; see also Bd. of Educ. of the Toledo City Sch. Dist. v. Horen, 2010 WL 3522373, at *15-*18 [N.D. Ohio Sept. 8, 2010] [discussing the difference between an affirmative refusal to attend versus a request to reschedule a meeting]; see also Doug C. v. Hawaii Dep't of Educ., 720 F.3d 1038, 1044 [9th Cir. 2013] [noting that parental involvement requires the agency to include the parents in a CSE meeting unless they affirmatively refused to attend]). However, in this instance, the district promptly followed up with an email indicating that the meeting had to go forward and specifically addressing several of the parent's rationales for requesting that the meeting be rescheduled (i.e., as related to the medical accommodation forms) to attempt to persuade the parent to attend (see Dist. Ex. 21 at p. 2; 33 at p. 1). Further, the CSE telephoned the parent two times once the CSE meeting convened to attempt to secure her participation (see Dist. Ex. 34 at p. 31). The parent failed to respond to the district's subsequent attempts to contact her. Under these circumstances, the district kept sufficiently detailed records of its attempts to encourage the parent's attendance at the May 31, 2019 CSE meeting, and I do not find that the CSE's decision to proceed without the parent in attendance was a procedural violation that that resulted in a denial of a FAPE.

[21] As to the parent's concern that she could not participate in the meeting beyond 1:00 p.m., there is no explanation why she could not attend the meeting at its scheduled time of 12:00 p.m. and, if necessary, request that the meeting be continued on another date and time if it could not be completed before 1:00 (see Dist. Ex. 33 at p. 1).

[22] The parent points to the requirement that "[w]hen conducting a meeting of the committee on special education, the school district and the parent may agree to use alternative means of participation, such as videoconferences or conference telephone calls" (8 NYCRR 200.5[d][7]), and her request that the school physician attend in person (Dist. Ex. 29 at pp. 1, 3), but the parent does no more than try to take advantage of a technical error, and that is insufficient basis upon which to find a denial of a FAPE.

2. May 2019 IEP

As noted above, in its cross-appeal the district argues that the IHO erred in determining that the May 2019 IEP failed to offer the student a FAPE. The parent asserted in her July 2019 due process complaint notice that the May 2019 IEP was not appropriate because it: failed to accurately reflect the student's classification as a student with traumatic brain injury, was not the "product of any individualized assessment" of the student's needs, inadequately described the student's present levels of performance and management needs, failed to offer an appropriate special class placement with sufficient 1:1 instruction in the LRE, inappropriately reduced the student's related services mandates (Parent Ex. V at pp. 2-3).[23]

a. Disability Classification

With respect to the student's disability classification, the May 2019 IEP indicated that the student was eligible for special education programming as a student with multiple disabilities (Dist. Ex. 34 at p. 1).

Generally, with respect to disputes regarding a student's particular disability category or classification, federal and State regulations require districts to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA, as well as to gather information that will enable the student to be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]). Courts have places considerably less weight on identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed though special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). "Indeed, '[t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education'" (Heather S. v. State of Wisconsin, 125 F.3d 1045, 1055 [7th Cir. 1997]).

[23] In the July 2019 due process complaint notice, the parent also alleged that the May 2019 IEP failed to provide extended school day programming for the student (Parent Ex. V at p. 3). However, the parent did not further pursue that issue in either her post-hearing brief to the IHO or in her memorandum of law accompanying her request for review (see generally Parent Mem. of Law; IHO Ex. IV). To the extent the parent sought extended school day services based on her view that the student required 60-minute related services sessions, as discussed below the CSE's recommendation for 30-minute sessions was supported by the evidence in the hearing record and, therefore, it was not necessary for the CSE to accommodate the longer sessions by recommending a longer school day.

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

"Traumatic brain injury" is defined as;

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

(8 NYCRR 200.1[zz][12]). "Multiple disabilities means concomitant impairments (such as intellectual disability-blindness, intellectual disability-orthopedic impairment, etc.), the combination of which cause such severe educational needs that they cannot be accommodated in a special education program solely for one of the impairments. The term does not include deaf-blindness" (see 8 NYCRR 200.1[zz][8]).

At this juncture, when the student's eligibility for special education is not in dispute, the significance of the disability category label is more relevant to the local educational agency and State reporting requirements than it is to determining an appropriate IEP for the individual student.[24]

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[24] The disability category for each eligible student with a disability is necessary as part of the data collection requirements imposed by Congress and the United States Department of Education upon the State, which require annual reports of "[t]he number and percentage of children with disabilities, by race, ethnicity, limited English proficiency status, gender, and disability category," who fall in several subcategories (20 U.S.C. § 1418[a][1][A] [emphasis added]; see 34 CFR 300.641). Although it does not bind the CSE in its responsibility to provide individualized services in accordance with the student's unique needs, for reporting requirement purposes:

> [i]f a child with a disability has more than one disability, the SEA must report that child in accordance with the following procedure:
>
> (1) If a child has only two disabilities and those disabilities are deafness and

By affidavit, the iBrain director testified that the student was "a boy with an acquired brain injury" and that the disability classification for iBrain's purposes for the 2019-20 school year was traumatic brain injury (see Parent Ex. GG at pp. 3-4). The director testified that this classification was "important because such a classification warrant[ed] the use of a direct instruction model and inform[ed] the clinical approach taken throughout the interdisciplinary program (related services)" (id.). However, as noted, the student must be assessed in all areas of his special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified and that information should be described in the present levels of performance sections of the IEP, which then forms the basis for developing the student's special education program (see 34 CFR 300.304[c][6], 300.320[a][1]; 8 NYCRR 200.1[ww][3][i], 200.4[b][6][ix], [d][2][i]). As detailed below, the May 2019 IEP included a detailed description of the student's needs in the areas of academic achievement, functional performance and learning characteristics (including literacy and math, speech-language, and vision education), social development (detailing the student's communication skills), physical development (including PT, OT, and medical needs), and management needs (Dist. Ex. 34 at pp. 1-8). The present levels of performance also noted that, "[d]ue to his brain injury, there are severe impairments in [the student's] cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem solving, and information processing and speech" and that the student's "rate of progress" was "dictated by his physical health and well-being" (id. at p. 2). Accordingly, while the iBrain director's testimony focused on the student's eligibility classification itself, the IEP contains a wealth of information regarding the student's needs and sufficiently identified the areas of concern related to classification raised in the iBrain director's testimony. Thus, I find no basis in the hearing record to find that the CSE's classification of the student as a student with multiple disabilities denied the student a FAPE.

b. Evaluative Information and Present Levels of Performance

Next, turning to the sufficiency of the evaluative material and reports available to the May 2019 CSE, an initial evaluation of a student must include a physical examination, a psychological

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> blindness, and the child is not reported as having a developmental delay, that child must be reported under the category "deaf-blindness."
>
> (2) A child who has more than one disability and is not reported as having deaf-blindness or as having a developmental delay must be reported under the category "multiple disabilities"

(34 CFR 300.641[d]). Local education agencies (LEAs) must, in turn, annually submit this information to the State though its Special Education Data Collection, Analysis and Reporting (SEDCAR) system (see, e.g., Verification Reports: School Age Students by Disability and Race/Ethnicity," available at http://www.p12.nysed.gov/sedcar/forms/vr/1819/pdf/vr3.pdf; see also "Special Education Data Collection, Analysis & Reporting," available at http://www.p12.nysed.gov/sedcar/data.htm). According to the Official Analysis of Comments to the revised IDEA regulations, the United States Department of Education indicated that the multiple disability category "helps ensure that children with more than one disability are not counted more than once for the annual report of children served because States do not have to decide among two or more disability categories in which to count a child with multiple disabilities" (Multiple Disabilities, 71 Fed. Reg. 46,550 [Aug. 14, 2006]).[24] As a part of the IEP form, the IEP included a "yes" or "no" box for whether the student was eligible for special.

evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district agree otherwise (34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]). Pursuant to 8 NYCRR 200.4(b)(4), a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability and, in accordance with 8 NYCRR 200.4(b)(5), the reevaluation must be "sufficient to determine the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education." A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). Whether it is an initial evaluation or a reevaluation of a student, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

According to the May 2019 IEP, the affidavit of the district school psychologist, and the June 2019 prior written notice, the May 2019 CSE considered a March 1, 2017 iHope IEP; the district May 23, 2017 IEP; a March 19, 2018 vision therapist report; the district March 26, 2018 IEP; the February 8, 2019 psychoeducational evaluation report; results of administration of a February 8, 2019 Vineland Adaptive Behavior Scales-Third Edition (Vineland-3); a February 11, 2019 social history; an April 1, 2019 classroom observation report from a March 13, 2019 observation; and a May 12, 2019 assistive technology evaluation report (compare Dist. Ex. 34 at

pp. 1-8, with Parent Ex. D at pp. 1-29; Dist. Exs. 1 at pp. 1-20; 12 at pp. 1-22, 24 at pp. 1-4; 25 at pp. 1-14; 26 at p. 1; 27 at pp. 1-2; 30 at pp. 1-4; 35 at p. 2; 37 at p. 2).[25]

With respect to the student's cognitive functioning, formal testing was attempted with the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), but according to the evaluator could not be completed due to the student's "inability to use his hand appropriately" and because he was non-verbal, therefore "[n]o scaled scores or composite scores could be obtained for the WISC-V" (Dist. Exs. 24 at pp. 2-3; 34 at p. 1). According to the February 2019 psychoeducational evaluation report, the student's cognitive functioning was "significantly below expectancy" and similarly, according to the March 2017 iHope IEP, and reflected in the May 2019 IEP, due to his brain injury, the student demonstrated severe impairments in cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem solving, and information processing and speech (Parent Ex. D at p. 1; Dist. Exs. 24 at p. 3; 34 at p. 2).

With respect to speech-language skills, the student was non-verbal and used a combination of vocalizations gestures facial expressions and a head switch to communicate (Parent Ex. D at pp. 3-4; Dist. Ex. 34 at p. 3). The student demonstrated a significant delay in auditory comprehension skills, and although highly inconsistent, turned his head toward people when they were talking to him (Parent Ex. D at pp. 3-4; Dist. Ex. 34 at p. 3). Likewise, the student demonstrated a significant delay in expressive language skills; he vocalized pleasure and displeasure sounds and occasionally smiled in response to preferred objects and sounds (Parent Ex. D at pp. 3-4; Dist. Ex. 34 at p. 3). The student was learning to use a head switch but demonstrated inconsistent ability which varied significantly with his level of fatigue and alertness (Parent Ex. D at pp. 3-4; Dist. Ex. 34 at p. 3). Additionally, the student received all nutrition via a G-tube and did not participate in taste trials, although he responded to oral-motor stimulation (Parent Ex. D at p. 4; Dist. Ex. 34 at p. 4).

With respect to the student's academic skills, the May 2019 IEP reflected the 2017 iHope IEP that indicated that the student had made steady progress in academic achievement, communicated his needs by smiling and sometimes vocalizing, and noted that the student presented with "very significant academic, communicative and social/interpersonal needs" (Parent Ex. D at pp. 1-2; Dist. Ex. 34 at p. 2). Further, the student required "a high amount of adult support" because of the challenges he faced in attending to academic tasks in a large group setting and performed "his best academic work when in a modified environment with reduced noise and movement" (Parent Ex. D at p. 2; Dist. Ex. 34 at p. 2). In the area of literacy, the student had been working on responding to his name, visually locating objects related to a story with maximum adult support when the object was presented in his peripheral visual fields, as well as tracking different food items related to a story (Parent Ex. D at pp. 1-2; Dist. Ex. 34 at p. 2). With respect

[25] Although the May 2019 IEP reflected information from a March 2018 vision therapist report, the report itself was not included in the hearing record (Dist. Ex. 34 at pp. 4-5; see Parent Exs. A-HH; Dist. Exs. 1-38). Further, although referred to by the district as a "School Report 1" or an iHope "Teacher Report," the March 2017 iHope document was entitled "PROPOSED IEP 2017-2018" (compare Dist. Exs. 34 at pp. 1, 3-4, 6; 35 at p. 2, with Parent Ex. D at p. 1). For consistency in this decision, the document will be referred to as the March 2017 iHope IEP.

to mathematics, the student was working on identifying numbers one through four using a multisensory approach (Parent Ex. D at p. 2; Dist. Ex. 34 at p. 2).

Regarding adaptive behavior skills, the student's mother served as respondent for the February 2019 administration of the Vineland-3, and the subsequent report indicated that the student's adaptive skills in the areas of communication, daily living skills, and socialization were significantly below expectancy with his overall score below the first percentile ranking (Dist. Exs. 25 at p. 2; 34 at p. 1). The student demonstrated significant global delays and required "24/7 support for all" ADLs, including feeding, dressing, and toileting (Dist. Exs. 25 at p. 7; 34 at p.1). From a sensory standpoint, the student presented with low sensory arousal and used tactile input from a variety of sources (Parent Ex. D at p. 11; Dist. Ex. 34 at p. 5). Socially, the student demonstrated the need to increase skills necessary for social interaction, including attending to preferred activities, continuing participation and engagement, and directing his eye gaze or turning his head toward his communication partner (Parent Ex. D at p. 10; Dist. Ex. 34 at p. 4).

According to the vision therapist report reflected in the May 2019 IEP, the student was working on integrating vision with function, in that he was able to briefly attend to multicolored items, stationary items, and items that had movement (Dist. Ex. 34 at p. 4). The student demonstrated a non-purposeful eye gaze when fatigued, not engaged, or when expected to visually attend to items that were novel or visually complex or when there was too much background noise (id.). The student had received a diagnosis of cortical visual impairment that affected his visual processing skills, although he visually tracked objects depending on his sensory arousal and physical state (Parent Ex. D at p. 11; Dist. Ex. 34 at p. 5).

With respect to physical development, the student presented with decreased tone centrally, velocity dependent spasticity on bilateral biceps, length dependent spasticity on bilateral lower extremities, and impairments upper extremity motor skills (Parent Ex. D at p. 10; Dist. Ex. 34 at p. 5). In addition, the student presented with decreased head and neck control, and required maximal physical support to sit with his head in an upright/midline position and demonstrated limited active range of motion in both extremities (Parent Ex. D at p. 11; Dist. Ex. 34 at p. 5). The student was non-ambulatory, used a manual tilt in space wheelchair for mobility and wore bilateral solid ankle foot orthoses throughout the day in school to improve foot alignment, prevent progression of deformity, and during weight bearing activities (Parent Ex. D at p. 10; Dist. Exs. 26 at p. 1; 34 at p. 5). Additionally, the student demonstrated reaching for objects with his right upper extremity, used a gross palmer grasp with both upper extremities while being given maximum physical support for hand placement and stability of object, and benefited from having extra time to complete a movement as his response time to a command was delayed (Parent Ex. D at p. 11; Dist. Ex. 34 at p. 6).

According to the March 2019 50-minute classroom observation report, the student was observed at iBrain while in his wheelchair in a class that consisted of four students, four paraprofessionals, one teacher, and a nurse assigned to another student (Dist. Ex. 27 at p. 1). A buzzer/switch was placed by the student's head, and in order to answer the teacher's questions, the student was to turn his head which prompted the recorded answers in response to the teacher's questions (id.). During the "AM meeting" activity, the student made no vocalizations or sounds until the teacher brought a card within three inches of his face, after a few seconds the student

turned his head hitting the buzzer/switch with his head (id. at pp. 1-2). During another activity, the student was to indicate whether he was in school; after a 30 second delay, he required physical prompting and the switch being moved within two to three inches of his head to activate the switch (id. at p. 2). To indicate the "all done" pre-recorded response, the student demonstrated about a 15 second delay prior to activating the head switch (id.). The student next transitioned to "academics" and the teacher "utilized the hand over hand technique" to have the student feel the different textures of the animal/objects in a book (id.). He demonstrated 15 to 30 second delays to activate his head switch to indicate when the teacher should turn the pages (id.). The teacher placed the student's hand on laminated pictures associated with the book that had added texture, and the teacher described the color and the textures to the student; then the teacher asked the student the color of eight different "monsters" and the student turned his head to prompt the switch four out of the eight trials (id.).[26] According to the observer the student had low energy, was non-verbal and non-ambulatory, and dependent on his paraprofessional and teacher (compare Dist. Ex. 27 at p. 2, with Dist. Ex. 34 at p. 1).

Consistent with the May 2019 IEP, the May 2019 assistive technology evaluation report indicated that the student demonstrated limited voluntary movement of both hands with more movement in the left arm, that he wore wrist hand splints with volar plates on both hands, and actively reached with assistance (compare Dist. Ex. 30 at p. 1, with Dist. Ex. 34 at p. 5). The evaluator and the May 2019 CSE recommended that the student receive a "Step-by-Step, string switch and mount, jelly bean switch and mount, and switch interface" (compare Dist. Ex. 30 at p. 2, with Dist. Ex. 34 at p. 24).

Based on the foregoing, the evidence in the hearing record shows that the May 2019 IEP reflected the multiple sources of evaluative information and reports available to the CSE at the time, and was the product of individualized assessments of the student's needs (Dist. Ex. 34 at pp. 1-8; see Parent Ex. D at pp. 1-29; Dist. Exs. 1 at pp. 1-20; 12 at pp. 1-22; 24 at pp. 1-4; 25 at pp. 1-14; 26 at p. 1; 27 at pp. 1-2; 30 at pp. 1-4; 35 at p. 2; 37 at p. 2). Further, review of the May 2019 IEP present levels of performance shows that the evaluative information regarding the student's skills and needs was accurately and adequately described.

c. 12:1+4 Special Class and Management Needs

Next, in the due process complaint notice, the parent asserted that the district failed to offer an appropriate special class placement with sufficient 1:1 instruction and denied the student a FAPE for the 2019-20 school year by recommending a 12:1+4 special class placement in a specialized school (Parent Ex. V at pp. 2-3). The parent also asserted that the recommended program and placement did not represent the student's LRE (id. at p. 2). In addition, the parent argued that the district's May 2019 IEP inadequately described the student's management needs (id.).

[26] The student's teacher stated that if the student answered the question by turning his head prompting the switch within 30 seconds, his answer was marked correct, but if not then it was marked incorrect (Dist. Ex. 27 at p. 2).

State regulation provides that the maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students (see 8 NYCRR 200.6[h][4][iii]). In addition to the teacher, the staff/student ratio shall be one staff person to three students (id.). The additional staff may be teachers, supplementary school personnel, and/or related service providers (id.).

State regulation also indicates that the maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction (see 8 NYCRR 200.6[h][4][ii][a]). Management needs, in turn, are defined by State regulations as "the nature of and degree to which environmental modifications and human material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social and physical development (8 NYCRR 200.1[ww][3][i][d]).

Initially, to address the parent's argument regarding LRE requirements, class size and the level of adult support are, generally speaking, unrelated to the IDEA's LRE requirement (34 CFR 300.114[a][2][i]; 300.116[a][2]; 8 NYCRR 200.6[a][1]; R.B. v. New York Dep't of Educ., 603 Fed App'x 36, 40 [2d Cir. Mar. 19, 2015] [stating that "[t]he requirement that students be educated in the [LRE] applies to the type of classroom setting, not the level of additional support a student receives within a placement"]; see T.C. v. New York City Dep't of Educ., 2016 WL 1261137 at *13 [S.D.N.Y. Mar. 30, 2016] [stating that "[a] less restrictive environment refers to the ratio of special education to general education students in the same classroom, not the ratio of special education students to teachers"]). As neither party disputes that the student should not attend a general education class setting or otherwise participate in school programs with nondisabled students, there is no basis for a finding that the May 2019 CSE's recommendations run afoul of LRE requirements.

Turning to the May 2019 CSE's recommendations, as previously described, the student exhibited significant, global, cognitive, communication, physical, and health-related needs (see Parent Ex. D at pp. 1-16; Dist. Ex. 34 at pp. 1-9). To address those needs, the May 2019 CSE recommended a 12:1+4 special class in a specialized school with the support of a full-time 1:1 paraprofessional and related services including OT, PT, speech-language therapy, vision education services, adapted physical education, and parent counseling and training (Dist. Ex. 34 at pp. 23-24). Contrary to the parent's assertion that the May 2019 IEP inadequately described the student's management needs, review of the May 2019 IEP shows that the majority of the extensive special education, vision, PT, OT, and speech-language therapy management needs from the March 2017 iHope IEP were included (Tr. pp. 199-200; compare Parent Ex. D at pp. 14-16, with Dist. Ex. 34 at pp. 6-8; see Parent Ex. V at p. 2). For example, management needs included in the May 2019 IEP indicated that the student needed "direct instruction for all new concepts," "minimal environmental noise for him to be able to focus well on instructions and directions given to him," "[c]ontinual 1:1 adult support and repetition of directions," and "[h]and-[o]ver-[h]and and physical prompting for participation and access to educational environment" (Parent Ex. D at pp. 14-15; Dist. Ex. 34 at p. 6). In addition, the May 2019 IEP indicated that the student benefited from the following: repositioning; use of several types of adaptive equipment; a high level of classroom

adaptations in order to access classroom modified materials; reduced classroom lighting and noise reduction; assistance with all ADLs; and many physical supports to address the student's management needs including frequent changes in position and additional time to complete fine/gross motor tasks (see Parent Ex. D at pp. 14-16; Dist. Ex. 34 at pp. 6-8).

Neither party disputes that the student had "highly intensive needs" requiring a high degree of individualized attention and intervention to maintain his physical well-being throughout the school day (see Dist. Ex. 34 at p. 6). The district school psychologist agreed that the student's management needs were "highly intensive" and that he required "a lot of support" (Tr. p. 200). As discussed above, the May 2019 IEP included a significant number of management supports and strategies to address those needs, in addition to full time 1:1 paraprofessional services to address health and ADL needs (see Dist. Ex. 34 at pp. 6-8, 24). However, the parent's strict adherence to the language in State regulation guiding 6:1+1 special class placements to the exclusion of other appropriate placement options is reductive and overlooks that the student's highly intensive needs were due to his severe multiple disabilities, and that a program consisting of habilitation and treatment was appropriate to meet the student's needs. Indeed, it is no mistake that the adult-to-student ratio required in a 6:1+1 special class and a 12:1+4 special class is a similar ratio, albeit with a greater variety in the type of school personnel typically found working with a student in the 12:1+4 special class setting—the very type of providers that this student requires and are not found in the definition of a 6:1+1 special class. Therefore, review of the hearing record provides a rationale to support the 12:1+4 special class for students with severe multiple disabilities called for in State regulation as precisely the type of programming that will address this student's unique needs.

d. Duration of Related Services

Next, in her due process complaint notice, the parent asserted that the May 2019 IEP would expose the student "to substantial regression due to the significant and unsubstantiated reduction in the related services mandates" (Parent Ex. V at p. 2).

The May 2019 IEP reflected information from the March 2019 classroom observation and the March 2017 iHope IEP which indicated that the student presented with low energy, low sensory arousal level, significant global developmental delays, and medical fragility and that the student's rate of progress was dictated by his physical health and well-being (Dist. Ex. 34 at pp. 1-3, 5). Additionally, the May 2019 IEP indicated that the student turned his head away from others when he was fatigued, his ability to activate a switch to communicate varied significantly with his level of fatigue and alertness, he was provided with sensory diets throughout the day to increase his arousal level, and his ability to visually track objects was dependent upon his sensory arousal level and physical state (id.). In contrast to the March 2017 iHope IEP, which provided that the student would receive related services in 60-minute sessions, the May 2019 CSE recommended that the student would receive OT, PT, speech-language therapy, and vision education services in sessions of 30-minute duration (compare Parent Ex. D at p. 27, with Dist. Ex. 34 at pp. 23-24).

The district school psychologist testified that when comparing the duration of related services between what iBrain provided to the student and the May 2019 IEP, the duration of sessions was different, but the frequency of sessions was similar (Tr. pp. 191-92). The school

psychologist testified that with respect to the May 2019 CSE's recommendation of 30-minute related service sessions, the CSE considered the student's age, "the child's area of needs, and the child's strength area" (Tr. pp. 192-93, 197). In addition, the school psychologist testified that the 30-minute sessions did not "incorporate the transition time and the breaks," which, although addressed, were not part of the timeframe in which the goals were addressed (see id.). The school psychologist further indicated that if a student required transition time, the providers did not typically start their time until the provider and the student entered the area where they would be working that day, such that transition was not included within the time that "we're going to work on goals" (Tr. pp. 193-94). However, the school psychologist clarified that if a student was working on a goal that incorporated transitioning skills such as some type of ambulation in the school environment, then that transition time was part of the session (Tr. pp. 195-96). With respect to progress, the school psychologist testified that students could make progress with 30-minute related service sessions, that the district considered 30-minute sessions for students in the lower grades as well as looking at their goal areas, and that "the 30 minutes was appropriate for [the student] to make progress" (Tr. pp. 197-99).

The special education director at iBrain testified that 60-minute related services sessions were recommended because the student had many physical needs that necessitated, for example, a two-person transfer at various points during the session, which was "not a fast process" (Tr. p. 267). In addition, the director testified that the student had equipment that might be necessary for an activity, which, to ensure safe usage, was "one piece that takes up time" (Tr. pp. 267-68). Further, she stated that the student required additional processing time, time to move through motor patterns, and time for rest breaks (Tr. pp. 268-69). According to the director, the student fatigued relatively easily if not given rest breaks and that the rest breaks were included within the 60-minute related service sessions (Tr. p. 243). She further testified that the rest breaks were a "really important piece" of that hour-long session (id.). The director did not agree that a 30-minute session would be enough for the student because reportedly, "his sweet spot in every session [was] right as you g[ot] to that 35, 40 mark and that last 20 minutes [was] consistently reported as the best" with regard to the student's accuracy and most fluent motor patterns (Tr. pp. 269-70). She opined that "cutting his sessions" to 30 minutes, the student's progress would be significantly inhibited (Tr. p. 70).

The parent alleged that the May 2019 IEP exposed the student to "substantial regression" due to the "reduction" in the related services mandates. However, review of the evidence in the hearing record reflects that the May 2019 IEP provided related services designed to address the student's needs as identified in the present levels of performance and his annual goals related to the same (Dist. Ex. 34 at pp. 1-22). The difference in the way in which iBrain implemented the related services—in 60-minute sessions that incorporated rest breaks, transition time, repositioning, etc.—and the district's 30-minute sessions that began only once the student was in place does not provide evidence that the student would experience "substantial regression" or otherwise render the related services inappropriate to the extent a FAPE was denied on this basis. Rather, in consideration of the student's documented difficulties with fatigue and alertness levels, the evidence in the hearing record supports a conclusion that the 30-minute sessions as recommended in the student's May 2019 IEP were appropriate for the student and designed to allow him to make progress towards his annual goals.

VII. Conclusion

As discussed above, the IHO erred in finding that iBrain was the student's placement for the pendency of this proceeding. With respect to the 2018-19 school year, the district has not appealed from the IHO's determination that it did not offer the student a FAPE, and the evidence in the hearing record supports a finding that iBrain was an appropriate placement for the 2018-19 school year and that equitable considerations are not a bar to relief. With respect to the 2019-20 school year, the IHO's rationale for finding a denial of FAPE was misplaced and a review of the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2019-20 school year. Having determined that the district offered the student a FAPE, for the 2019-20 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether iBrain was an appropriate unilateral placement for the student or whether equitable considerations support an award of tuition reimbursement for that school year. Accordingly, the parent is awarded reimbursement for the costs of the student's tuition at iBrain for the 2018-19 school year.

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

THE APPEAL IS SUSTAINED IN PART.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim decision dated August 2, 2018 and final decision dated July 12, 2020 are modified by reversing those portions which found that iBrain was the student's stay put placement during the pendency of the proceedings;

IT IS FURTHER ORDERED that the IHO's decision dated July 12, 2020 is modified by reversing those portions which declined to address the appropriateness of iBrain for the student's 2018-19 school year and denied the parent's request for the costs of the student's tuition and related services at iBrain for the 2018-19 school year;

IT IS FURTHER ORDERED that the IHO's decision dated July 12, 2020 is modified by reversing that portion which found that the district did not offer the student a FAPE for the 2019-20 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parent for the costs of the student's tuition and related services at iBrain, including transportation, upon proof of payment, for the 2018-19 school year.

Dated: **Albany, New York**
October 5, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER