



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 20-139

**Application of a STUDENT WITH A DISABILITY, by her 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 Peter G. Albert, Esq. and John Henry Olthoff, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail M. Eckstein, Esq.

### DECISION

#### I. Introduction

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

#### II. Overview—Administrative Procedures

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

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

The student has been the subject of prior State-level administrative appeals (Application of a Student with a Disability, Appeal No. 18-087; Application of a Student with a Disability, Appeal No. 18-147) and, as a result, the parties' familiarity with her educational history and the prior due process proceedings is presumed and will not be recited here in detail.

Briefly, the student has a history of stroke and diagnoses that include anoxic brain injury, cerebral palsy, global developmental delays, chronic lung disease, hypothyroidism, tracheal bronchial malacia, dysphasia, hypotonia, bilateral optic nerve atrophy, and cortical visual impairment with alternating exotropia (Dist. Exs. 3 at p. 1; 24 at p. 2; 25 at p. 1). The student is dependent on a trachea for respiration, a G-tube for nutrition, and requires constant monitoring of her heart and oxygen levels (Dist. Ex. 3 at p. 1). For the 2017-18 school year the student attended the International Academy of Hope (iHope); however, for the school year in dispute, 2018-19, the parent placed the student at iBrain (Parent Exs. C at p. 1; D at p.1; I; O).

As part of an "annual reevaluation process," on September 27, 2017, the district conducted a social history update interview with the parent via telephone (Dist. Ex. 24). The resultant social history update report included a review of the family status, the parent's view of the student's progress, the student's behavior in the community, the student's health status, and the student's interests, as well as a review of the parent's due process rights (*id.*).<sup>1</sup> In addition to the updated social history, on December 13, 2017, the district conducted a classroom observation of the student during an occupational therapy (OT) session (Dist. Ex. 23 at p. 1). The December 2017 classroom observation report noted the student's need for assistance when standing and her tendency to walk unsteadily (*id.*). The observation further noted the student's willingness to participate in activities that she preferred and described the student as engaging (*id.*). On March 6, 2018, at the request of the iHope director of vision services—the student's then current placement—the district conducted an evaluation of the student's orientation and mobility (Dist. Ex. 25). The evaluator reviewed the student's records, interviewed school staff, and observed the student in the classroom, school hallways, stairs, and a physical therapy (PT) session. (*id.* at p. 1). The evaluation resulted in a March 2018 orientation and mobility evaluation report in which the district's certified orientation and mobility specialist concluded that having assessed the student's travel skills, sensory and motor kinesthetic skills, safety, O&M related orientation, and social skills, the student did not demonstrate a need for orientation and mobility services (*id.* at p. 2). According to the March 2018 report, the student presented with the visual skills necessary to navigate through her school environment including the classroom and hallways (*id.*).

A CSE convened on June 12, 2018 to determine the student's continued eligibility for special education and to formulate the student's individual education plan (IEP) for the 2018-19 school year (Dist. Exs. 3; 4).<sup>2, 3</sup> For the 2018-19 school year the CSE determined that the student remained eligible for 12-month special education services as a student with multiple disabilities

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<sup>1</sup> According to the social history update the student received "twenty-four hours of nursing" (Dist. Ex. 24 at p. 1).

<sup>2</sup> The district scheduled CSE meetings for February 7, 2018 and May 9, 2018; however, the parent requested that the meetings be rescheduled (Tr. pp. 136, 151-52; Dist. Ex. 5; 6; 10; 18).

<sup>3</sup> For reasons discussed below, neither the parent nor the student's providers from the non-public school where in attendance at the June 12, 2018 CSE meeting or the June 25, 2018 CSE meeting (Dist. Exs. 14; Ex. 1 at p. 16).

and recommended a 12:1+(3:1) special class placement in a district specialized school (Dist. Ex. 3 at pp. 1, 8-9, 11). In addition, the June 12, 2018 CSE recommended that the student receive two periods of adapted physical education per week, and five 30-minute sessions per week each of individual OT, PT, and speech-language therapy (id. at pp. 8-9). The June 12, 2018 CSE also recommended one 60-minute group session of parent counseling and training and that the student be provided with a dynamic display speech generating device and a 1:1 nurse on the bus (id. at p. 9). All of the programs and services recommended by the CSE were to be implemented beginning July 5, 2018 (Dist. Exs. 3 at pp. 1, 8-9; 12 at pp. 1-3). Following the June 12, 2018 CSE meeting, the district sent the parent a prior written notice dated June 19, 2018 that detailed the recommendations of the CSE and included a school location letter that identified the specific school where the student's program would be provided (Dist. Exs. 12; 14 at p. 1).

In a June 20, 2018 IHO decision from a prior impartial hearing, which was the subject of a prior appeal (see Application of a Student with a Disability, Appeal No. 18-087), the district was ordered to reconvene a CSE before the end of the 2017-18 school year (Dist. Ex. 1 at p. 1; Interim IHO Decision Dist. Ex. 6 at p. 18).<sup>4</sup> The IHO, in that matter, also ordered the parent to attend the reconvened CSE meeting and "to provide all the necessary documentation required by the CSE to make a well-informed decision as to [the student's] placement and [] program" (Interim IHO Decision Dist. Ex. 6 at p. 18). By letter dated June 18, 2018, the district notified the parent of a CSE meeting scheduled for June 25, 2018 (Dist. Ex. 9 at p. 1).<sup>5</sup> A CSE meeting was held on June 25, 2018 without the parent in attendance (see Dist. Exs. 1; 11). Finding the student remained eligible for special education as a student with multiple disabilities, the June 25, 2018 CSE recommended the student for a 12-month, 12:1+(3:1) special class placement in a district specialized school (Dist. Ex. 1 at pp. 1, 10-11, 13). The June 25, 2018 CSE also recommended that the student receive two periods of adapted physical education per week; five 30-minute sessions each of individual OT, PT, and speech-language therapy per week; one 60-minute group parent counseling and training session; a dynamic display speech generating device; and adult supervision by a nurse while being transported (Dist. Ex. 1 at pp. 10-11, 13). The district notified the parent, by way of a prior written notice dated June 28, 2018, of the recommendations of the June 25, 2018 CSE and included a July 2, 2018 school location letter that identified the school where the student would receive the recommended program and services beginning July 5, 2018 (Dist. Ex. 13 at pp. 1-3).

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<sup>4</sup> During the hearing, the district admitted exhibits that had conflicting numbering with the exhibits entered during the pendency portion of the hearing; for clarification, the district's exhibits that were entered during the pendency portion of the hearing will be referenced as "Interim Decision" exhibits (Interim IHO Decision Dist. Exs. 1-8).

<sup>5</sup> As discussed below, it appears that the notice of meeting dated June 18, 2018 was created and emailed to the parent on June 21, 2018 (Tr. pp. 248-49).

## A. Due Process Complaint Notice

In a due process complaint notice dated July 9, 2018, the parent requested an impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (Parent Ex. A at pp. 1-2). Initially, the parent requested an interim decision on pendency directing the district to prospectively pay for the student's placement at iBrain, which the parent alleged included "a 1:1 professional during the school day," special transportation accommodations such as limited travel time and a nurse with a ventilator, and a private duty nurse during the school day (*id.* at p. 2). The parent asserted that the basis for pendency lay in the student's August 17, 2016 district IEP (*id.*).

The parent asserted that the district failed to offer the student a FAPE for the 2018-19 school year by committing several substantive and procedural errors while developing the IEP issued on June 12, 2018 and the subsequent placement recommendation, both of which the parent rejected (Parent Ex. A at pp. 2-3).<sup>6</sup> The parent maintains that the district impeded her opportunity to participate in the decision making process by failing to hold an annual review meeting at a mutually agreeable time that also complied with the parent's documented request for a full committee meeting (*id.* at p. 2). The parent also raised allegations related to the composition of the CSE asserting that the district ignored the parent's written request dated May 4, 2018, for a full committee CSE meeting and proceeded to hold the CSE meeting without the parent or any of the mandated members being present (*id.*). The parent argued that the recommended reduction in related services mandates found in the June 12, 2018 IEP and the student-to-teacher ratio of the recommended class size would have exposed the student to substantial regression (*id.*). The parent also asserted that the June 12, 2018 IEP was not the product of individualized assessments of all the student's needs and therefore would not confer meaningful educational benefit upon the student during the disputed school year (*id.*). The parent alleged that the recommended classroom ratio in a 12:1+(3:1) special class was insufficient to address the student's needs because the student to staff ratio was too large to ensure the constant 1:1 support and monitoring the student required in order to remain safe, did not offer the 1:1 direct instruction and support the student required to make progress, and the district specialized program did not offer an extended school day which was necessary to implement the related services mandated on the student's IEP (*id.* at p. 3). Further, the parent asserted that the CSE failed to properly draft an IEP reflective of the student's individual needs as the June 12, 2018 IEP failed to accurately state the student's IDEA disability classification as traumatic brain injury, inadequately described the student's present levels of performance and management needs, and contained unmeasurable goals (*id.* at p. 2). Lastly, the parent argued that the district failed to recommend an appropriate school program and placement that met the student's intensive management needs, which required a significant degree of individualized

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<sup>6</sup> The parent's due process complaint notice only references the June 12, 2018 IEP without including the June 25, 2018 IEP to be implement July 5, 2018 for the 2018-19 school and which was the IEP in effect at the time of the due process complaint notice (Parent Ex. A at pp. 2-3). While there are significant similarities between the two IEPs they are not identical documents (*compare* Dist. Ex. 1 at pp. 1-16, *with* Dist. Ex. 3 at pp. 1-14). Throughout the decision the IEP referenced will be identified by date as it pertains to the issue being addressed.

attention and intervention, and that the recommended placement did not represent the least restrictive environment for the student (*id.* at pp. 2-3). For relief, the parent requested direct funding for the student's tuition at iBrain for the 2018-19 extended school year, as well as direct funding for the cost of transportation including a 1:1 travel aide, and a reconvene of an annual review meeting for the student (*id.* at p. 3).

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened on August 17, 2018 to address the parent's application for an interim order for pendency (Tr. pp. 1-72). The parent requested that the IHO make a finding that the student's pendency placement be provided at iBrain (Tr. pp. 18-32). According to counsel for the parent, the student was placed at iHope for the 2016-17 school year and the district paid for that placement as part of an agreement; however, the agreement included a provision that prohibited it from being used as pendency for the student and counsel for the parent asserted that such an agreement was unenforceable as being against public policy and that therefore iHope was the basis for the student's pendency placement (Tr. pp. 18-21, 29-30). In the alternative, counsel for the parent argued that the basis for the student's pendency lay in the IEP developed for the 2016-17 school year because that was the last developed IEP that had not been challenged (Tr. pp. 21-28). Further, counsel for the parent asserted that for the pendency of this proceeding there was no school available that could implement the 2016-17 IEP and iBrain should be the student's pendency program because the student's program at iBrain for the 2018-19 school year was substantially similar to the IEP developed for the 2016-17 school year and to the student's placement at iHope (Tr. pp. 28-32). In an interim decision on pendency, the IHO denied the parent's request for pendency at iBrain noting first that there was no indication the parent was coerced into signing the settlement agreement for funding at iHope for the 2016-17 school year and there was therefore no evidence that it was against public policy, second that there was a dispute concerning whether the parent rejected the IEP for the 2016-17 school year which the parent contends was the basis for pendency, and third that it could not be determined at that time whether iBrain was substantially similar to the program recommended in the IEP for the 2016-17 school year (Interim IHO Decision on Pendency at pp. 4-7).

After the recusal of the IHO who presided over the August 2018 pendency hearing, the impartial hearing continued with a second IHO on May 23, 2019 and concluded on February 7, 2020 after three days of proceedings (Tr. pp. 73-372). In a decision dated June 9, 2020, the second IHO determined that the district offered the student a FAPE for the 2018-19 school year and that, even if the district IEPs were found to be deficient, equitable considerations did not favor an award of tuition reimbursement (IHO Decision at p. 29).

With respect to whether the district committed procedural errors that resulted in a denial of a FAPE, the IHO determined that the student's CSE meeting was composed of the required members noting that the parent, school physician, special education teacher, and school psychologist were all invited, the IEPs indicated that the CSE teams were duly comprised, and that the parent's concern regarding the CSE meeting attendees did not "vitiolate her responsibly to attend the meetings" (IHO Decision at pp. 17, 20). According to the IHO Decision, the parent claimed that she did not attend the June 12, 2018 CSE meeting because the school physician did

not participate in person and there was no evidence that the CSE sent the student's medical documentation or history to the physician (id. at pp. 17-18). The IHO found that the parent conceded that the school physician participated by phone, and that the district requested the medical documentation from the parent, who was represented by counsel; however, it was not provided to the district (id. at pp. 17-18).

Regarding the issue of lack of evaluations conducted by the district, the IHO cited the CSE's access to a December 13, 2017 classroom observation, a social history update dated September 27, 2017, and a mobility report dated March 20, 2018 (IHO Decision at pp. 18-19). The IHO reiterated that the student's teachers and related service providers were requested and invited to participate in the CSE meeting but were precluded from doing so by the parent's counsel (id. at p. 20).

The IHO explicitly found that the CSE considered the parent's description of the student (provided through the social history), her mobility report, and other reports in the student's file (IHO Decision at pp. 24-25). Additionally, the IHO reiterated that the district made numerous efforts to secure the parent's participation, as well as that of the student's current private school providers who chose not to attend (IHO Decision at pp. 24-25). Further, the IHO determined that the parent had ample opportunity to participate in the student's CSE meeting and was represented and guided through the process with the advice of counsel and did not "believe that it [was] equitable to find that the lack of a 'parent member' denied the [p]arent the right to participate at the [CSE] meeting that the record indicate[d] she chose not to attend" (IHO Decision at p. 25).

The IHO determined that the student's classification as a student with multiple disabilities rather than traumatic brain injury was a distinction without a difference as a "classification of 'multiple disabilities' can include 'TBI' and provide for the use of a direct instruction model and the clinical approach taken throughout the interdisciplinary program (related services), the Parent asserts TBI requires" (IHO Decision at pp. 22-23).

With respect to the recommended 12:1+4 class size and the parent's assertion that the ratio was too large to ensure the constant 1:1 support and monitoring the student required to remain safe, the IHO determined that, based on the hearing record, the student required a significant amount of individualized attention and intervention, which could be provided in a 12:1+4 classroom where there was "almost" one adult for every two students (IHO Decision at pp. 23-24). Further, the IHO determined that the student's social history update and mobility report did not comport with the parent's assertion that the student needed a 1:1 nurse, although he also noted that access to a nurse was "certainly appropriate" for the student (id. at p. 24).<sup>7</sup>

The IHO found that there was no evidence in the hearing record that the procedural errors asserted by the parent denied her the opportunity to participate in the CSE meeting and her

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<sup>7</sup> The IHO noted that the CSE recommendations were made without the parent who chose not to participate at the CSE meetings (IHO Decision at p. 24).

failure to appear at the CSE meeting was a result of following the advice of her counsel (IHO Decision at p. 27). The IHO noted that "mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation" and the procedural deficiencies asserted by the parent in this case did not amount to a denial of FAPE (IHO Decision at p. 27). The IHO concluded that given the evidence, the hearing record demonstrated that the district's recommended IEPs were appropriate to address the student's needs and were reasonably calculated to enable the student to receive more than de minimis educational benefits (IHO Decision at p. 27).

Finally, with respect to equitable considerations, the IHO noted that even if the IEPs could be found deficient, equitable considerations would require a denial of the parent's request for tuition reimbursement (IHO Decision at p. 29).

Finding that the district provided the student with FAPE and that equitable considerations did not favor the parent, the IHO indicated that it was not necessary to determine whether the student's then-current private school was an appropriate placement (IHO Decision at p. 29). Despite not finding a denial of FAPE, the IHO ordered the district to conduct evaluations of the student "in all areas of her suspected disabilities, not identified above and not evaluated within the last two years, for the student's 2020-2021 school year" (*id.*). Further, the IHO ordered the CSE to reconvene to produce a new IEP for the student that considered all of the student's available evaluations, as well as any related information, and produce a new IEP for the student for the 2020-21 school year (*id.*).

#### **IV. Appeal for State-Level Review**

The parent appeals asserting that the IHO erred in finding that the district offered the student a FAPE for 2018-19 school year; failing to determine that the parent's unilateral placement of the student at iBrain was appropriate; and denying the parent's request for relief based on equitable considerations. As a matter of procedure, the parent asserts that the IHO erred by failing to exclude the direct testimony of the district's witness, the CSE 10 chairperson. The parent maintains that because the CSE chairperson's was not available for cross-examination, the IHO should have excluded all of the chairperson's testimony.

The parent contends that the IHO erred in finding that procedural errors did not result in a denial of FAPE, including: finding that procedural errors in several CSE meeting notices did not deprive the parent of meaningful participation at the CSE meetings; finding no violation occurred as a result of the district's failure to have a school physician present at the June 12, 2018 CSE meeting; and finding that the district did not violate the IDEA when it failed to conduct evaluations of the student prior to the June 12, 2018 CSE meeting.

Additionally, the parent maintains that the IHO erred in finding the district offered a FAPE despite not recommending a 1:1 nurse, vision education services, or assistive technology for the student. Next, the parent asserts that the IHO erred in finding the district offered appropriate IEPs which properly addressed the student's management needs; timely met to address the student's needs and develop an IEP; and properly recommended related services to meet the student's needs. The parent asserts that the IHO erred in using non-record evidence to



support his findings and in not explicitly finding that iBrain was appropriate for the student for the student for the 2018-19 school year. The parent further contends that the IHO erred in finding that equitable considerations did not favor the parent.

In its answer, the district contends that the IHO properly found that the district offered the student a FAPE for the 2018-19 school year and the SRO should dismiss the parent's claim that she did not have the opportunity to cross-examine the CSE chairperson as the claim is belied by the record. The district asserts that the IHO's decision, when viewed in its entirety, accurately discussed the evidence presented. The district maintains that despite the alleged errors in the CSE meeting notices, any such minor typographical errors or inaccuracies did not render the June 25, 2018 IEP inadequate and the due process complaint notice lacks this specific allegation, therefore the claim should be dismissed. The district contends that the lack of parent participation at the CSE meetings was due the parent's refusal to attend the CSE meeting despite repeated attempts by the district to engage the parent.

The district also maintains that the IHO properly found that the composition of the CSE was not a procedural violation that resulted in a denial of FAPE and that the parent's allegations regarding the composition of the CSE were not raised in her due process complaint notice. The district also contends that the IHO properly found that the June 25, 2018 CSE reviewed sufficient evaluative data, properly found that the classification of the student as a student with multiple disabilities did not result in a denial of FAPE, and properly found that the recommended 12:1+4 classroom was appropriate for the student in light of her management and other individualized needs. The district maintains that, when viewed in conjunction with the other recommended services, the 12:1+4 special class could provide the individualized attention and intervention the student required. The district asserts that the parent's allegation that the student was denied a FAPE due to the lack of recommendation of a 1:1 nurse was not raised in the due process complaint notice and the IHO correctly determined that despite the student's medical needs, the 1:1 nurse was not necessary. The district maintains that although the IHO did not directly address the issue of related services, he properly found that the recommended program, as a whole, was appropriate, the IEPs addressed the student's needs and were reasonably calculated to enable the student to receive more than de minimis educational benefits, and the IEPs were timely as the parent's failure to cooperate resulted in any delay and was not in the control of the district. The district also maintains that the CSE did not engage in predetermination but that the IEP was based on the student's identified needs.

The district asserts that, despite the fact that the IHO did not put forth a finding regarding the appropriateness of the student's unilateral placement (iBrain), the hearing record is sufficient for an SRO determination that the parent failed to sustain her burden to show that iBrain was appropriate. Lastly, the district asserts that the IHO properly found in favor of the district with respect to equitable considerations.

## **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 Andrew 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]).

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

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Conduct of the Hearing**

On appeal the parent asserts that the IHO erred by failing to exclude the testimony of the district's witness, the CSE chairperson (Req. for Rev. at p. 5).<sup>8</sup> The parent contends that the chairperson was not available for cross-examination as scheduled on February 7, 2020.

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xi][c], [d]).

The hearing record indicates that the CSE chairperson began her testimony on May 23, 2019 and continued on August 23, 2019, at which time the district completed direct examination of the witness and the parent's counsel began cross-examination (Tr. pp. 73, 112-176, 194-264, 265-94). At the August 23, 2019 hearing, the parent's counsel engaged in cross-examination of the witness until approximately 3:30 p.m., at which time the hearing date was concluded because the parent had to attend to childcare issues (Tr. pp. 264-294). After discussion amongst the parties, the parent's counsel informed the hearing officer that it was important for the parent to be present during the entirety of the proceedings and both parties agreed to a continuance at which time the witness would be available to continue cross-examination (Tr. pp. 294-297). When the proceeding commenced on February 7, 2020 the district indicated that the witness was not available until 12:00 p.m., at which point the parent's counsel opposed an application for the hearing to start at 12:00 p.m. and further opposed the witness testifying via telephone (Tr. pp. 304-305). The district requested a continuance and extension of the compliance date to also call another witness (Tr. pp. 305-306). The parent objected on grounds of the length of the proceedings and their ability to move forward, and requested that the district be required to rest its case (Tr. pp. 306-307). The hearing officer denied the district's application for a continuance and required the district to either call its next witness or rest its case; the district rested (Tr. pp. 307-308). The parent then proceeded with the presentation of her witnesses and the hearing

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<sup>8</sup> The district witness described her position as the CSE chairperson; however, she did not attend either the June 12, 2018 or the June 25, 2018 CSE meetings (Tr. p. 112; Dist. Exs. 1 at p. 16; 3 at p. 14). The witness testified that she supervised the clerical and clinical personnel and was the person responsible for the daily functioning of the CSE office ensuring that students who are assigned to her specific CSE received timely evaluations, IEPs, and placement (Tr. p. 113).

concluded at approximately 12:40 p.m. (Tr. pp. 321-71). There is no indication that any attempt was made at that time to complete the cross-examination of the district's CSE chairperson who, according to the district's earlier representation, would have been available at that time.

Based on the above, the hearing record does not support the parent's request to have the testimony of the chairperson excluded. The witness was available for cross-examination at both the May 23, 2019 and August 23, 2019 hearing dates and accordingly, the parent had the opportunity to confront and question the witness.

## **2. Scope of Review and the Impartial Hearing**

On appeal, the parent raises several claims underlying the allegation that the district failed to offer the student a FAPE for the 2018-19 school year, asserting that the IHO failed to address procedural violations regarding the CSE meeting notices, erred in not finding the lack of the physical presence of a school physician at the CSE meeting was a denial of FAPE, erred in finding that the CSE conducted sufficient evaluations of the student, erred in not finding the lack of 1:1 nursing services to be a denial of FAPE, and erred in finding that the lack of vision services and assistive technology did not result in a denial of FAPE.

The IHO addressed each of the issues identified by the parent in detail in his decision (see IHO Decision at pp. 15-29). Reviewing the IHO's decision, I generally concur in his discussion of the alleged procedural violations regarding the CSE meeting notices not resulting in a denial of FAPE, the lack of a school physician being physically present at the CSE meetings not resulting in a denial of FAPE, and the lack of vision services and assistive technology not resulting in a denial of FAPE. Additionally, to the extent that the parent is appealing from the IHO's decision regarding the evaluative information available to the CSE, the IHO's determination regarding the evaluative information seems to be tied into his finding regarding equitable considerations as they run together and he specifically noted that the student's teachers and providers from the nonpublic school "were requested and invited and apparently withheld by the Parent's then attorney" (IHO Decision at p. 20; see IHO Decision at pp. 18-22). Accordingly, this will be addressed as part of the equitable considerations in this matter. The remaining issue that requires further discussion is the parent's allegation that the student required the assistance of a 1:1 nurse during the school day and that the failure to recommend this service resulted in a denial of FAPE.

As an initial matter, the district asserts that the parent did not raise allegations regarding the student's need for a 1:1 nurse in the due process complaint notice and that it is therefore outside the scope of the impartial hearing. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b], 300.508[a]; 8 NYCRR 200.5[j][1]; Application of a Student with a Disability, Appeal No. 13-151; Application of a Student with a Disability, Appeal No. 09-141). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is

amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*8-\*9 [S.D.N.Y. Aug. 5, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at \*9 [S.D.N.Y. Mar. 28, 2013]; S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at \*4 [N.D.N.Y. Feb. 28, 2013], aff'd, 553 Fed. App'x 65 [2d Cir. Jan. 30, 2014]; DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at \*23 [S.D.N.Y. Jan. 2, 2013]).

In this instance, the parent's due process complaint notice included an allegation that the recommended classroom ratio was "too large a ratio to ensure the constant 1:1 support and monitoring [the student] require[d] in order to remain safe" (Parent Ex. A at p. 3). Additionally, in introducing its evidence, the district proffered that the student's medical information was relevant because "there may be a dispute as to whether or not the student required a full-time nurse," to which counsel for the parent responded "that will be at issue" (Tr. p. 98).<sup>9</sup> Accordingly, both parties understood that the student's need for medical attention during the school day was at issue during the hearing and it is therefore within the scope and will be addressed further.

### **3. Clarification regarding the effective IEP for the 2018-19 school year**

At issue in the instant case is a dispute over the program and services recommended for the student for the 2018-19 school year. The CSE met on June 12, 2018 and developed an IEP to be implemented on July 5, 2018 (Dist. Ex. 3 at pp. 1-14). CSE meeting participants included a service provider, the district representative, a district attorney, and the school physician via telephone (id. at p. 14). The June 12, 2018 CSE reviewed the findings from classroom observations dated December 12, 2016 and December 13, 2017, a March 31, 2017 school report detailing the student's then-present levels of performance, and a June 22, 2017 school letter updating the student's progress (id. at pp. 1-3).<sup>10</sup> The June 12, 2018 IEP identified a number of resources needed to address the student's management needs, including: the use of hand splints and bilateral ankle-foot braces during weight bearing activities; a paraprofessional to attend to

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<sup>9</sup> Although the IHO excluded the bulk of the proffered exhibit including the student's medical information (Tr. pp. 96-100, 106; Dist. Ex. 16), the district has neither appealed from that decision nor submitted the excluded evidence for review with its answer in this matter.

<sup>10</sup> The June 19, 2018 prior written notice indicated that the CSE considered December 13, 2017 classroom observations and a March 12, 2018 orientation and mobility evaluation in developing the student's June 12, 2018 IEP (Dist. Ex. 12 at p. 2). The IEP itself additionally referenced several school reports (Dist. Ex. 3 at pp. 1-3).

her highly intensive needs which required a high degree of individualized attention; continual 1:1 adult support for hand-over-hand and physical prompting for participation and access to the educational environment; assistance with clothing management and toileting needs; adaptive feeding equipment, utensils grips, and switch based toys; additional time to complete fine/gross motor tasks and activities of daily living (ADLs); close monitoring for aspiration when receiving nutrition through her G-tube; and wedge/pillows or therapy ball to aid in positional changes when not sitting in her adaptive stroller (*id.* at p. 3). The June 12, 2018 IEP included 13 annual goals with accompanying short instructional objectives to address the student's needs related to academics, communication, and motor development as indicated in the present levels of performance (*id.* at pp. 4-8).

The June 12, 2018 CSE recommended that the student attend a 12:1+(3:1) special class placement in a district specialized school (Dist. Ex. 3 at pp. 8-9, 11). In addition, the CSE recommended that the student receive adapted physical education for two periods per week, and five 30-minute sessions per week each of individual OT, PT, and speech-language therapy (*id.* at pp. 8-9). The June 12, 2018 CSE recommended one 60-minute group session of parent counseling and training for the student's parent and use of a dynamic display speech generating device and the support of a 1:1 nurse on the bus for the student (*id.* at p. 9). With regard to special transportation, in addition to the 1:1 nurse, the June 12, 2018 CSE recommended a vehicle with a lift, oxygen, and air conditioning; limited travel time of not more than 60-minutes; and a vehicle that was able to accommodate a ventilator, walking aids, and an oversized wheelchair (*id.* at p. 11). All programs and services were to be implemented on a twelve-month basis beginning on July 5, 2018 (Dist. Ex. 3 at pp. 1, 8-9; 12 at pp. 1-3).

As noted above, on June 25, 2018, the CSE reconvened as a result of an IHO order from a proceeding regarding the 2017-18 school year (Interim IHO Decision Dist. Ex. 6 at p. 18). The IHO ordered the parent to attend the CSE meeting and to provide the CSE with all the necessary documentation it required to make a well-informed decision as to the student's placement and program (*id.*). The June 25, 2018 IEP noted that "[a]lthough multiple attempts were made, the parent and school did not provide any recent documentation, and did not participate in the develop[ment] of this IEP" (Dist. Exs. 1 at pp. 1, 16). However, in addition to information considered by the June 12, 2018 CSE, the June 25, 2018 IEP indicated that the CSE considered a July 25, 2017 ophthalmology report, an IEP dated August 7, 2017, and a September 27, 2017 social history update (*id.* at p. 1). Participants in the June 25, 2018 CSE included a service provider and the district representative (*id.* at p. 16).

The evaluation results section of the June 25, 2018 IEP included much of the same information as the June 12, 2018 IEP: however, the June 25, 2018 IEP also reflected the results of the December 13, 2017 classroom observation report and the student's health status from the social history update (*compare* Dist. Ex. 1 at pp. 1-2, *with* Dist. Ex. 3 at pp. 1-4). The IEP indicated that in the absence of new documentation provided by the parent or the student's school, the CSE reviewed the documents provided for the previous IEP review (Dist. Ex. 1 at p. 2). The June 25, 2018 IEP present levels of performance reflected the information included in the previous IEP regarding the student's abilities and needs in academics, communication, and motor development and included additional information from the September 27, 2017 social

history update (compare Dist. Ex. 1 at pp. 2, 4, with Dist. Ex. 3 at pp. 1-2).<sup>11</sup> The resources needed to address the student's management needs remained the same in the June 25, 2018 IEP as in the previous IEP, as did the annual goals (compare Dist. Ex. 1 at pp. 5-10, with Dist. Ex. 3 at pp. 3-8). To address the student's educational needs the June 25, 2018 IEP recommended the same 12:1+(3:1) special class in a special school, related services, and assistive technology services as identified in the June 12, 2018 IEP (compare Dist. Ex. 1 at pp. 10-11, with Dist. Ex. 3 at pp. 8-9). However, in contrast with the June 12, 2018 IEP, the subsequent IEP did not specify that the student needed a 1:1 nurse on the bus as a supplementary aid/service/modification/accommodation but did make a recommendation for adult supervision by a nurse on the bus under the student's special transportation needs (compare Dist. Ex. 1 at p. 11, with Dist. Ex. 3 at p. 9; Dist. Ex. 1 at p. 13).<sup>12</sup>

Both the June 12, 2018 and June 25, 2018 IEPs identified the implementation date as July 5, 2018, presumably the start of the 2018-19 extended school year (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 3 at p. 1). While the June 2018 IEPs are similar in that they contain the same resources to address the student's management needs, as well as the same annual goals, program, and related services recommendations, there are differences as noted above (compare Dist. Ex. 1 at pp. 1-16, with Dist. Ex. 3 at pp. 1-14).

The June 25, 2018 IEP is the most current IEP developed for the 2018-19 school year yet the parent's due process complaint notice, dated July 9, 2018, limited the disputed issues solely to the June 12, 2018 IEP (Parent Ex. A at pp. 2-3).<sup>13</sup> Likewise, on appeal, the parent's request

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<sup>11</sup> The June 25, 2018 IEP included information from the September 2017 social history where the parent indicated the student could match colors and numbers, greet people with her communication device, and was learning to say sentences via her communication device (Dist. Ex. 1 at p. 2). The June 25, 2018 IEP also reflected details regarding the student's diagnoses, health status, and medications, noting her need for constant monitoring of her heart and oxygen levels (id. at p. 4).

<sup>12</sup> The June 25, 2018 IEP special transportation needs specified the need for a vehicle with air conditioning, travel time limited to 60-minutes, adult supervision by a nurse, and a regular sized wheelchair (Dist. Ex. 1 at p. 13). It did not include the student's need for oxygen or a lift, which were included in the June 12, 2018 IEP, and modified the description of the wheelchair from "oversized" to "regular" (compare Dist. Ex. 1 at p. 13, with Dist. Ex. 3 at p. 11).

<sup>13</sup> The parent contends in her memorandum of law that the June 25, 2018 IEP was related to the 2017-18 school year; however, the June 25, 2018 IEP has an implementation date of July 5, 2018—the beginning of the 2018-19 school year (Parent Mem. of Law at pp. 4-5; Dist. Ex. 1 at pp. 1, 10-11). Additionally, a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of a Student with a Disability, Appeal No. 19-021; Application of the Dep't of Educ., Appeal No. 12-131). State regulations direct that "[n]o pleading other than a request for review, answer, answer with cross-appeal, or answer to a cross-appeal, will be accepted or considered" by an SRO, "except a reply to any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). Thus, any arguments included solely within the memorandum of law have not been properly raised and will not be considered or addressed in this decision.



for review references the June 12, 2018 IEP without mention of the June 25, 2018 IEP (Req. for Rev. pp. 4, 6-7, 9). As the June 25, 2018 IEP was the IEP in effect at the start of the 2018-19 school year and given the substantial similarities between the two IEPs with respect to the student's abilities and needs, goals, program and related services recommendations, the parent's allegations regarding the 2018-19 school year will be assessed against the June 25, 2018 IEP

## **B. FAPE for 2018-19 School Year**

Turning to the crux of the appeal, I will address the parent's assertion that due to her medical needs the student required additional 1:1 support during the school day. More specifically, the parent appeals from the IHO's finding that the student's social history update and mobility report did "not comport with the Parent's assertion that the student need[ed] a 1:1 nurse, although access to a nurse [wa]s certainly appropriate for her" (IHO Decision at p. 24).

### **1. The Student's Needs**

A brief review of the student's needs is necessary to determine if the IEP recommended by the district for the 2018-19 school year was appropriate.

With respect to academics, the June 25, 2018 IEP indicated that the student was able to use her hands to explore objects such as books, cards, and manipulatives, as well as technological devices such as a smart phone and iPad (Dist. Ex. 1 at p. 1). The IEP further indicated that the student was able to make a choice between two or more activities and objects (*id.*). According to the June 25, 2018 IEP, the student was able to attend to books when read aloud by others and had the ability to participate fully in learning activities when she was compliant and motivated (*id.*). When noncompliant or unmotivated the student did not effectively demonstrate her knowledge or skills (*id.*). The IEP detailed the student's basic academic skills including her ability to receptively identify picture words, colors, shapes, and numbers 1-5; match colors, shapes, and pictures, as well as objects to pictures; and sort by color and object (*id.*). In addition, the IEP indicated that the student was able to receptively demonstrate an understanding of the function of common objects and receptively able to identify body parts (*id.*). In reading, the student was working on answering "what" and "where" questions about a text read aloud and, in math, the student was working on counting objects and identifying quantities for numbers 1-10 (*id.*). The June 25, 2018 IEP stated that, the student's auditory comprehension was in the first percentile (*id.*). The student used an iPad with language acquisition through motor planning (LAMP) vocabulary, verbalizations, facial expressions, and gestures to communicate and needed a communication device to support expressive language skills (*id.* at p. 3). The student initiated interaction and conversation by pointing, making facial expressions, and verbalizing and terminated interactions by looking away, nodding or verbalizing "no," or placing her hands in front of her face (*id.* at p. 2). When provided with moderate to minimal prompting, the student demonstrated joint attention (*id.*). She had difficulty initiating turn-taking (*id.*). With respect to social development, the June 25, 2018 IEP described the student as sweet and "very smart" but noted that she easily got upset (*id.* at p. 3). The student liked to be around other children but not adult strangers (*id.*). The IEP noted that the student was "expressive" and that it was not difficult to understand when she was happy, upset, frustrated,

annoyed, or wanted to be silly (id.). With respect to motor skills development, the June 25, 2018 IEP indicated that the student demonstrated purposeful upper extremity movements for reaching and grasping (id. at p. 4). The student was able to form a pincer grasp and manipulate small objects and was able to hold a marker/crayon with a modified tripod grasp and closed webspace when the marker was positioned for her (id.). According to the IEP, the student was increasing her exploration of textures (id.). She required assistance for the majority of ADLs including dressing and personal hygiene; the student was fed via a g-tube and was not toilet trained (id.). In terms of gross motor skills, the student was able to take steps unassisted with close supervision and could walk from the therapy room to her classroom without breaks (id.). The student required minimum assistance to transition from sitting on the floor to standing (id.).

The annual goals and short-term instructional objectives/benchmarks recommended by the CSE addressed the student's need to identify her name in print and identify the symbol and quantity for numbers 7-15, answer "wh" questions related to a book read aloud, and complete one step academic tasks with four or less verbal cues (Dist. Ex. 1 at pp. 6-7). The IEP goals and short-term objectives also targeted the student's need to request preferred items and activities by way of gestures and/or eye gaze, improve comprehension related to identification of common objects, and understanding simple questions and 1-2 step directions (id. at p. 8). Regarding communication, the goals and objectives also addressed the student's need to follow one-step directives by responding to verbal requests, improve expressive language skills with a variety of modalities and her augmentative and alternative communication (AAC) device, and use her AAC device to maintain communication with a peer or adult for several conversational exchanges (id. at pp. 8-9). Additional goals and short-term objectives targeted the student's fine and gross motor weaknesses including her need to improve functional reaching skills, improve her head/neck/trunk control to reduce the need for caregiver support during self-care activities, and increase her core muscle strength (id. at pp. 9-10). The June 25, 2018 IEP also identified a number of resources/modifications needed to address the student's management needs including a paraprofessional to attend to her highly intensive needs; 1:1 hand-over-hand support; assistance with ADL's; additional time to complete motor tasks; monitoring for aspiration, heart and oxygen levels; as well as various adaptive equipment items (id. at pp. 4-5). The IEP also noted that the student required a highly structured and supportive special education program to make academic gains (id. at p. 3).

An iBrain IEP provided additional information regarding the student's educational needs (compare Dist. Ex. 1 with Parent Ex. D). The iBrain IEP indicated that academically the student was working on identifying the letters in her first name, 15 words related to her daily activities or that were personally meaningful, and answering "who," "what," and "where" questions related to appropriate level reading material (Parent Ex. D at p. 2). In math, the student was working on counting manipulatives and identifying quantities up to ten (id. at p 3). With respect to receptive language, the iBrain IEP indicated that the student was able to follow simple directions independently and identify nouns, pronouns, and actions (id. at p. 5). In terms of expressive language, the student used a combination of communication methods to express herself such as gestures/pointing, speech/verbalizations, sign language, facial expressions, and an AAC device (id.). The student was at the 1-3 word phrase level when using verbal communication and had difficulty producing some sounds (id. at p. 6). According to the iBrain IEP, the student presented

with difficulty imitating, planning, and producing the precise and specific series of movements of the tongue, lips, jaw, and palate that were necessary for speech and feeding (*id.* at p. 8). The iBrain IEP indicated that the student had a cortical visual impairment and demonstrated strengths in the areas of color preference, need for movement, and visual fields; moderate weaknesses in the areas of visual latency and distance vision; and significant delays in the areas of visual complexity and visual novelty (*id.* at p. 10).

Turning to social development, the iBrain IEP indicated that the student enjoyed social interaction with similar aged peers and would engage in social interaction with modeling and prompting (Parent Ex. D at p. 13). In terms of physical development, the student was ambulatory and walked with supervision within school boundaries but required a stroller for commuting outside of school as she tended to fatigue easily (*id.* at p. 14). The student demonstrated decreased overall strength, endurance, posture, and balance as well as delays in motor planning and body and spatial awareness (*id.*). The student was working on pre-writing skills and required assistance with ADLs (*id.* at pp. 15-18).

## **2. 12:1+ (3+1) Special Class Placement**

Prior to addressing the parent's allegations regarding the student's need for 1:1 nursing services, I will first discuss the recommended 12:1:(3+1) special class placement for the student. The parent acknowledges that the IHO found that the student's intense management needs warranted a significant degree of individualized attention and intervention but asserts that the IHO "simply ignore[d] the facts, the testimony, the evidence and the regulatory requirements" and found that the level of individualized attention and intervention the student required "could be provided in a class that was 50% larger than the number of students"; a special class size the parent's assert is identified by State regulations for students with intense management needs. The IHO determined that while the student required a significant amount of individualized attention and intervention, it could be provided in a 12:1+4 classroom where there was almost one adult for every two students (IHO Decision at p. 23).

State regulation 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]).

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]).<sup>14</sup>

It is undisputed that the student demonstrated global developmental delays related to cognition, communication, motor ability, and social development, along with accompanying health-related needs (see Dist. Ex. 1; Parent Ex. B). These concomitant impairments resulted in the severe educational needs that could not be accommodated in a special education program designed solely for one of the impairments. Therefore, the June 25, 2018 CSE recommended a 12-month program in 12:1+(3:1) special class in a district specialized school (Dist. Ex. 1 at pp. 10, 13-14). As for the student's significant management needs, the June 25, 2018 CSE noted a need for the use of hand splints and bilateral braces during weight bearing activities, a paraprofessional to attend to the student's highly intensive needs, which required a high degree of individualized attention, and 1:1 adult support for hand-over-hand and physical prompting for participation and access to the educational environment (id. at p. 5). In addition, the June 25, 2018 CSE recommended the student receive assistance with clothing management,

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<sup>14</sup> 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]). 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 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 through 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]).

toileting/toileting hygiene, adaptive feeding equipment, adaptive utensils, grips, switch-based toys, and additional time to complete fine motor/gross motor tasks and activities of daily living (id.). Further, the June 25, 2018 CSE recommended close monitoring for aspiration related to G-tube use and noted the student's need for wedge/pillows or a therapy ball to aid in positional changes when not seated in an adaptive stroller (id.).

Generally, the parties agree that the student required a significant amount of individualized attention and intervention throughout the school day to gain educational benefit but differ on the special class ratio required to meet the student's needs. 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.). The 12:1+(3:1) special class ratio provides for variety in the type of school personnel working in the 12:1+(3:1) and is reflective of the type of service providers this student needs and which may not be found in other special classes on the continuum designed to address the needs of a student with intensive management needs. Therefore, a review of the hearing record does not provide a rationale to depart from the IHO's finding that individualized attention and intervention "can be provided in a 12:1:4 classroom, where there is almost one adult for every two students" and as such the IHO's finding on that point will not be disturbed (IHO Decision at p. 23).

### **3. 1:1 Support and Monitoring for Safety Concerns**

The parent maintains that the IHO erred in finding that the district offered the student a FAPE despite its failure to recommend a 1:1 nurse for the student during the school day. The IHO found that the absence of 1:1 nursing services in the student's June 2018 IEP was the result of the parent's failure to attend the CSE meeting and that 1:1 nursing services did not comport with the social history update and the orientation and mobility evaluation report (IHO Decision at p. 24). The parent further asserts that the IHO relied on non-medical documents in reaching his conclusion that the student did not require 1:1 nursing services in order to receive a FAPE.

Here, the hearing record presents evidence of the student's complex medical history and the repeated recommendations in prior school years for 1:1 nursing services to address the student's complex medical needs (Parent Ex. B at p. 21; C at pp. 1, 11, 24-25). In the absence of evaluative information showing that the student's medical needs had lessened in nature to the extent that 1:1 nursing services were no longer necessary to support the student, the IHO's determination that the information contained in the social history and mobility report did not comport with the need for such services and was therefore not a denial of FAPE is not sufficiently reasoned. Appositely, both reports indicated that the student received nursing services (Dist. Ex. 24 at p. 1; 25 at p. 1). The social history update indicated that the student received "twenty-four hours of nursing" (Dist. Ex. 24 at p. 1). Additionally, according to the March 2018 orientation and mobility evaluation report, the student received 1:1 nursing services during the 2017-18 school year (Dist. Ex. 25 at p. 1).

In determining the student's need for 1:1 nursing a brief review of the relevant history provides the necessary framework for the discussion. The 2016-17 IEP developed by the district noted that the student had received multiple medical diagnoses including chronic lung disease, tracheobronchial malacia, dysphasia, hypotonia, bilateral optic nerve atrophy, and hypothyroidism and noted that the student was trachea dependent for breathing and G-tube dependent for nutrition (Parent Ex. B at p. 3).<sup>15</sup> According to the 2016-17 IEP the student was at risk for asthma and infections accompanied by subsequent hospitalizations, all of which required constant monitoring of her heart, oxygen levels, and lungs for aspiration (*id.* at pp. 3, 6). According to the 2016-17 IEP, a June 2016 doctor's note indicated that the student had received diagnoses of cerebral palsy, ineffective airway clearance, hypoxia, sleep apnea, growth hormone deficiency, hypertension, GERD, and global developmental delay (*id.* at pp. 3). The IEP noted that the student was followed by a neurologist, pulmonologist, endocrinologist, and gastroenterologist (*id.*). The IEP described student as fully dependent in all domains of mobility requiring 1:1 assistance in feeding, ADL's, and two-person assist for transfers (*id.* at p. 6). In addition, the 2016-17 IEP noted that due to the student's "complex medical history and diagnoses she require[d] a full-time nurse to attend to her highly intensive medical needs" (*id.*). In response, the CSE recommended a full time 1:1 nurse for the student both during the school day and for transportation as of December 6, 2016 (*id.* at p. 22).

The student began attending iHope in September 2016 (Parent Ex. C at p. 1). Similar to the district's IEP, a March 31, 2017 iHope IEP indicated that because of the student's complex medical history and diagnoses, she required a full-time nurse and paraprofessional to attend to her significant, highly intensive needs (*id.* at pp. 1, 11-12). The iHope IEP recommended that the student receive full-time 1:1 nursing services for the 2017-18 school year (*id.* at p. 25). The iHope IEP included an individualized healthcare plan that outlined possible nursing diagnoses and corresponding interventions (*id.* at p. 24). The healthcare plan indicated that the student needed to be monitored for ineffective airway clearance related to the student's tracheostomy, alteration in the student's breathing patterns due to asthma, aspiration related to the student's G-tube, injury related to the student's visual impairment, and impaired skin integrity related to the student's bladder and bowel incontinence (*id.*).

The September 2017 social history update and March 2018 orientation and mobility report, as well as the June 12 and 25, 2018 IEPs, reflect that the student's complex medical diagnoses and history, as described previously, remained a significant area of need for student (compare Dist. Exs. 1 at pp. 1, 4;3 at p. 1, with Parent Exs. B at pp. 3-5; C at pp. 11, 25). The June 25, 2018 IEP referenced the student's many medical diagnoses, specified the student's need for "constant monitoring of her heart and oxygen levels," and detailed the extensive list of medications the student required (Dist. Ex. 1 at pp. 1, 4). The June 25, 2018 IEP also

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<sup>15</sup> The exhibit entered into the hearing record as the district's August 17, 2016 IEP identifies the CSE meeting date as October 13, 2015; however, the present levels of performance include information from June 2, 2016 and August 5, 2016 (Parent Ex. B at pp. 2, 3, 24). In addition, the IEP reflects implementation dates of September 8, 2016 and December 6, 2016 (Parent Ex. B at p. 1). Therefore, despite the October 2015 meeting date listed on the IEP, it is presumed to be the district's IEP for 2016-17 school year.

acknowledged the student's need for close monitoring for aspiration due to her dependency on a G-tube for nutrition, hydration, and medications (*id.* at p. 5). The June 25, 2018 IEP included an annual health goal specifying that "[t]eachers, related service providers and [p]araprofessional staff [to] consistently consult with the school nurse regarding close monitoring of [the student's] needs" and, under special transportation, the IEP recommended that the student be provided adult supervision by a nurse during transport (*id.* at pp. 10, 13).

The CSE chairperson testified that according to the health record completed by the student's physician the student was deemed "Nurse-dependent, nurse must administer treatment" (Tr. pp. 216-217).<sup>16</sup> She opined that the physician's notation did not necessarily mean that the student required a 1:1 nurse assigned to her rather she explained that the student could be provided services by the school nurse depending on the treatment she required during the school day (Tr. pp. 217, 221-222). Further, the CSE chairperson testified that the decision as to whether the student's nursing services could be provided by the school building nurse or needed to be provided by a 1:1 nurse was determined by the Office of School Health and district physicians (Tr. p. 217). The CSE chairperson confirmed that the student had a tracheostomy and was G-tube dependent, and some students with similar profiles were provided services by a school building nurse and others, who required 24-hour care, needed an individual nurse; however, she reiterated that she did not make that decision (Tr. pp. 220-22).

The CSE chairperson's testimony that the decision regarding the student's need for nursing services is not made by the CSE is reminiscent of a district court case which involved allegations against the district pertaining to its failure to provide nursing, transportation, and/or porter services to students with disabilities as a result of the approval process for such services, involving district agencies, such as the Office of School Health and Office of Pupil Transportation, outside of the CSE process and which noted that "[t]here is a glaring disconnect among the agencies within DOE tasked with providing nursing, transportation, and porter services" (*J.L. v New York City Dep't of Educ.*, 324 F. Supp. 3d 455, 461-63, 465 [S.D.N.Y. 2018]).<sup>17</sup> Under these circumstances, it was the CSE's responsibility to make the determination as to whether the student required 1:1 nursing services during the school day, accordingly any

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<sup>16</sup> The medical form-transportation was admitted into evidence as a single page, yet the CSE chairperson testified to information located on additional pages of the document that further addressed the student's medical needs. (Tr. pp. 100, 216-217). The IHO indicated that the additional pages of the exhibit described the student's medical conditions and were not going to specify whether or not the student required 1:1 nursing services for the purposes of her education (Tr. pp. 98-99). The CSE chairperson testified that the medical forms for transportation were the forms completed by the student's physician and were not the recommendation from the office of school health and stated that the exhibit did not provide a specific recommendation for a nurse (Tr. pp. 215-217).

<sup>17</sup> While the District Court in *J.L.* did not reach the merits of the claims, the Court found that that parents sufficiently stated a cause of action under the IDEA to survive a motion to dismiss (324 F. Supp. 3d at 466-67).

attempt to push that responsibility onto another city agency is not proper (see Application of a Student with a Disability, Appeal No. 19-076).<sup>18</sup>

As described above, the student in this case has multiple medical diagnoses and is administered a number of medications. The student has a tracheostomy and requires constant monitoring of her heart and oxygen levels (Dist. Ex. 1 at p. 4). Additionally, the student is G-tube dependent for nutrition, hydration, and medication, which requires close monitoring for aspiration (Dist. Ex. 1 at p. 5). As presented in the aforementioned discussion the student's history indicates that to address these complex medical needs, the student was recommended for and received 1:1 nursing services over the past several years (see Parent Ex. B at p. 6; Dist. Exs. 24 at p. 2; 25 at p. 1).

Despite the IHO's determination that the student's social history and orientation and mobility evaluation report do not comport with the parent's assertion that the student requires 1:1 nursing services, as discussed above, both reports identified the student's complex medical needs and indicated she received nursing services (Dist. Exs. 24; 25). The March 2018 orientation and mobility report reiterated the student's multiple medical needs, and although it noted that the student had the visual skills necessary to navigate through her school environment, there is nothing that suggests the student's medical needs did not require 1:1 nursing intervention (Dist. Ex. 25). Likewise, the September 2017 social history update noted the student's multiple medication requirements and several of her diagnoses and indicated that the student received 24-hours of nursing care (Dist. Ex. 24 at p. 2). In the absence of documentary or testimonial evidence that the student's complex medical needs had changed to such a degree so that the student no longer required 1:1 nursing services, I find that district's failure to recommend those services for the 2018-19 school rises to the level of a denial of FAPE and therefore the IHO's determination to the contrary must be reversed.

### **C. Unilateral Placement for the 2018-19 School Year**

Having found that the district's failure to recommend 1:1 nursing services for the student resulted in a denial of a FAPE for the 2018-19 school year, and having found the other issues related to FAPE were addressed correctly, I need not consider the parent's additional allegations in detail but will proceed with the discussion as to the appropriateness of iBrain for the student for the 2018-19 school year. The student's needs have been identified above and need not be repeated here, rather the discussion will focus on whether or not iBrain provided the student with the necessary program and services to address those needs.

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

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<sup>18</sup> The CSE meeting minutes indicate "Nurse requires updating nursing orders and approvals; team awaiting this to be provided"; however, the minutes do not indicate any proactive steps taken by the CSE to obtain this necessary information (Dist. Ex. 4 at pp. 2, 4), nor does it indicate the extent of any discussions regarding the student's nursing services.



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

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

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

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

## 1. Description of iBrain

According to an iBrain program description, the school was founded to research, develop, and implement special education and related services for students ages 5 through 21 with brain injuries and brain-based disorders (Parent Ex. E at p. 2). The director of special education (director) at iBrain explained that the school had a 12-month extended school year calendar and offered all services during an extended school day that ran from 8:30 a.m. to 5:00 p.m. (Parent Ex. V at p. 1). According to the director, every student at iBrain required a 1:1 paraprofessional to assist with activities of daily living and to have access to and benefit from the educational program (*id.* at pp. 1-2). The iBrain program description stated that the curriculum at the school integrated the students' developmental needs with intellectual and physical skills attainment goals (*id.*) The classes at the school were small with student to teacher ratios of either 6:1+1 or 8:1+1 to ensure each student received the individualized care and attention they needed to engage in the learning process (Parent Ex. E at p. 4). The iBrain program description indicated that the school's educational program focused on the development of academic, cognitive, and social skills aligned with each students' IEP and all skills and strategies were taught through direct instruction (*id.*). According to the program description, iBrain provided push-in and pull-out related services including hearing, occupational, physical, and speech-language therapies, social work services, vision therapy, and educational services by licensed personnel utilizing a collaborative model with the students' teachers (*id.* at pp. 5, 9-12). iBrain also provided aquatic therapy, a continuum of assistive technology services, and conductive education which focused on improving the physical effects of a student's disability while encouraging motivation and active physical participation to become independent and increase self-esteem (*id.* at pp. 5-7). The description of iBrain indicated that the school provided health and nursing services including preventive health teaching, education, case management, and direct services (*id.* at pp. 7-8). Additional nursing services included the evaluation, and implementation of individual health and emergency care plans, administration of medications and treatments, supervision of and collaboration with 1:1 nurses, and providing in-service training (*id.* at pp. 7-8).

The hearing record indicates that while attending iBrain for the 2018-19 school year, the student was enrolled in a 12-month, 8:1+1 special class for an extended school day (Tr. p. 52; Parent Exs. D at p. 1; V at pp. 2-3). The student received individual OT, PT, and speech-language therapy for five 60-minute sessions each per week during the 2018-19 school year (Tr. p. 50; Parent Exs. D at p. 44; V at p. 2-3).<sup>19</sup> The student also received three 60-minute sessions of vision education services per week, and parent counseling and training once per month for 60 minutes, a 1:1 paraprofessional, and a "private duty nurse" (Tr. pp. 50-52; Parent Ex. D at p.

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<sup>19</sup> The iBrain director of special education testified that at the time of the hearing the student's speech-language therapy had been adjusted to four 60-minute sessions of individual speech-language therapy and one 60-minute session of group (no larger than two) speech-language therapy per week (Tr. p. 52). The iBrain IEP reflects the same (Parent Ex. D at p. 4). The iBrain IEP indicates that it is the IEP for 2018-19 school year but notes that the original report from iHope, dated April 25, 2018, was adopted by iBrain and updated at iBrain on February 13, 2018, which in incongruent (Tr. pp. 347, 363-64). The hearing record indicates a correction to Exhibit D noting that the actual date should have read February 13, 2019 (Tr. p. 105).

44).<sup>20, 21</sup> With respect to academics the student's schedule indicated she participated in academic activities for five and a half hours each week where the program focused on literacy goals of identifying letters in her name, identifying 15 words related to her daily activities or that were personally meaningful, and answering who, what, and where questions when presented with appropriate level books, pictures, and materials (Parent Exs. D at p. 2; F). With respect to mathematics, the iBrain IEP indicated the program addressed the student's needs related to counting manipulatives and identifying quantities for numbers up to ten (Parent Ex. D at p. 3). The student participated in conductive education once in a group and once individually for a total of two hours per week (Parent Exs. D at p. 3; F). According to the iBrain IEP, during the group session the student had the opportunity to practice social interactions and integrate social skills with physical and cognitive skills for participation in a variety of activities and during the individual session the student practiced strategies designed to make her more independent in all daily activities (Parent Ex. D at pp. 3-4). In addition, the IEP stated that the strategies used during conductive education had helped the student to continue to work toward achieving her motor goals (id. at p. 3).

To address the student's speech, language, and feeding needs iBrain provided the student with four individual and one group session of speech-language therapy for 60 minutes each session, which allowed for trials of various AAC access devices, breaks, redirection, paraprofessional education, prompting, repetition, and processing time (Parent Ex. D at p. 4). The iBrain IEP indicated the student received two 60-minute sessions of assistive technology which focused on the student using and integrating her communication device into all academic environments, communicating and participating in educational activities, and programming the necessary vocabulary to meet her communication needs during educational activities (id. at p. 8).

According to the iBrain IEP, speech-language therapy focused on providing the student with visual, auditory, and tactile prompts as well as exposure to language to enhance the student's overall communication ability and language understanding (Parent Ex. D at p. 4). The student was working on expressing herself more spontaneously and effectively in various contexts and expressing basic wants and needs through verbalizations and use of her communication device (id. at p. 9). The iBrain program targeted the student's use of a communication device for expressive communication (Parent Ex. D at pp. 6-7, 13). Aided language stimulation was utilized throughout the student's academic and therapeutic settings (id. at pp. 7-8). To address her oral motor mechanism and functioning/feeding the iBrain IEP indicated the student was working on increasing her awareness, strength, coordination, and mobility of her oral motor muscles to improve secretion management and feeding efficacy (id. at p. 8).

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<sup>20</sup> The director referred to the student's nurse as both a "private duty nurse" and a "1:1 nurse" (Tr. p. 50; Parent Ex. V at p. 3).

<sup>21</sup> Although the director of special education for iBrain testified that the student received assistive technology three times per week at iBrain, the iBrain IEP indicated that the student received three 60-minute sessions of vision education per week (compare Tr. p. 52, with Parent Ex. D at p. 44).

According to the iBrain IEP, the student received vision education services due to her diagnosis of cortical visual impairment and was working on integrating vision with function and resolving the remaining cortical visual impairment characteristics that remained active (Parent Ex. D at p. 10). The iBrain IEP noted that all the therapists and educators on the student's team were in close communication and collaboration in order to discuss the visual modifications and accommodations that might maximize the student's access to information throughout the day (*id.* at p. 11). Turning to the student's motor development, the iBrain IEP indicated that the student received five 60-minute sessions per week of both PT and OT (*id.* at pp. 15, 34,). The iBrain IEP described the student as demonstrating decreased overall strength, endurance, posture, and balance, with delays in motor planning and body and spatial awareness (*id.* at p. 15). The IEP indicated that in OT the student was working on improving her independence and participation in school-based activities including self-care, academic, pre-writing, and play skills (*id.* at p. 23).

The iBrain IEP also identified an extensive list of the student's management needs with respect to health and medical needs, special education, assistive technology, PT, OT, and speech-language therapies, and vision education (Parent Ex. D at pp. 23-25). The iBrain IEP identified the annual goals for the student, 17 in total, and accompanying benchmarks which targeted the student's needs in academics (literacy and mathematics), conductive education, speech-language skills, feeding/oral motor skills, fine and gross motor development, and visual skills, and detailed an individualized health care plan for the student (Parent Ex. D at pp. 26-43).<sup>22</sup>

## **2. Progress at iBrain**

Although not dispositive in determining the appropriateness of parent's placement of the student at iBrain for the 2018-19 school year, a review of the student's progress is a relevant inquiry. In its answer, the district argues that a comparison of the student's progress reports from iHope in January 2018 to iBrain in February 2019 show little to no improvement in academics, specifically math and literacy. However, a review of the progress reports shows some improvement across multiple areas as set forth below.

A finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at \*2 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2012 WL 6684585, at \*1 [2d Cir. Dec. 26, 2012]; L.K. v. Northeast Sch. Dist., 2013 WL 1149065, at \*15 [S.D.N.Y. Mar. 19, 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F.Supp.2d 26, 34 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at \*3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch.

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<sup>22</sup> The parent testified that the student was returned to iHope for the 2019-20 school year after spending only one school year at iBrain (Tr. pp. 332-33). She further testified that iBrain moved and the student was not doing well, as the student did not adapt to new places and she was not sure iBrain was going to stay at that location, she moved the student back to iHope (Tr. pp. 332-33).

Dist., 2009 WL 904077, at \*22-\*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364).<sup>6</sup> However, a finding of progress is nevertheless a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

An iBrain February 2019 quarterly academic progress report indicated that the student had achieved or partially achieved several short-term instructional objectives by mid-way through the 2018-19 school year (Parent Ex. H). More specifically, with respect to literacy, the progress report indicated that the student had partially achieved objectives or benchmarks related to letter identification for letters A-N (id. at p. 1). In addition, the student had achieved an objective related to identifying personally meaningful words (id. at p. 2). In OT, the progress report showed that the student had partially achieved an objective related to donning her shirt and achieved an objective related to using a switch to turn pages in a digital book (id. at pp. 5, 6). Turning to the student's speech and language development, the February 2019 progress report indicated that the student partially achieved objectives related to locating target vocabulary on her device and providing attributes to common nouns (id. at pp. 7-8). In addition, the student achieved a benchmark related to participating in a turn-taking game with a peer (id. at p. 9). With respect to her visual skills, the progress report indicated that the student had partially achieved objectives related to visually locating multicolored objects against a complex background and visually locating familiar objects three inches or smaller, presented against a black background (id.). In addition, the student partially achieved an objective related to visually locating three objects in an array of ten (id. at p. 10). According to the progress report, the student's ability to master several other objectives was emerging or developing (id. at pp. 2-9).

### **3. Conclusion on the Appropriateness of iBrain**

Overall, while the parent did not present direct testimony regarding the appropriateness of iBrain for the 2018-19 school year, the iBrain IEP set forth significant evidence regarding the student's needs, how the needs were addressed and as discussed above, the February 2019 progress report provided some perspective regarding how the student benefited from the program at iBrain. As demonstrated by the hearing record, and as described in detail above, the student had multiple needs related to cognition, communication, motor skills, and social interactions that were addressed in an 8:1+1 special class with five and half hours of academic time each week. To address the student's fine and gross motor needs the student participated in conductive education activities and five hours a week of both OT and PT services. To address the student's speech-language needs the student received five hours of speech-language therapy that included activities related to speech development, feeding/oral motor needs, and receptive and expression language, as well as assistive technology intervention to support expressive communication. The student had a 1:1 paraprofessional to provide support for the student's academic program, related services, and health needs and a 1:1 nurse to manage her complex medical needs. (Parent Ex. D at p. 38). The iBrain program detailed an individualized health care plan to address the student's medical needs and provided vision education services to address the student's visual needs (id. at pp. 36-38). The iBrain IEP identified the resources needed to address the student's management needs to support the student across academic, social, and motor domains. Lastly, the hearing record demonstrates that the student made some progress toward achieving the annual goals

established by iBrain. The student presents with detailed and complex needs—medical, therapeutic, developmental, academic, social, and physical—that required a coordinated and extensive program to address and the iBrain program included collaboration between the student's teachers and related service providers and utilized push in as well as pull out therapy.

On appeal, the district's sole objection to the appropriateness of iBrain is the alleged lack of progress in literacy and mathematics. However, as discussed above, although the program offered to the student at iBrain had limited time set aside for academic instruction, the program as presented in the iBrain IEP reflected the components necessary to address the student's multiple needs and, as such, the program offered to the student was reasonably calculated to confer educational benefit and was therefore an appropriate unilateral placement (Tr. pp. 81-82; Parent Exs. D: F). Additionally, the student showed some progress in multiple areas (see Parent Ex. H). Accordingly, as a whole, the student's placement at iBrain for the 2018-19 school year was appropriate.

#### **D. Equitable Considerations and Relief**

The parent asserts that the IHO erred in finding that equitable considerations weigh against awarding the parent tuition reimbursement at iBrain for the 2018-19 school year. The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public

expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

In addressing equitable considerations the IHO determined that the parent did not make a good faith effort to cooperate with the district, "or to give fair consideration to the IEP that was produced despite the Parent's self-imposed lack of participation" (IHO Decision at p. 22). The parent asserts that the IHO based his finding on evidence that was not in the hearing record or information that he gained from other proceedings. As support for this, the parent references some factual errors contained in the IHO decision and, more relevantly, points to the IHO's statement that this matter "mirrors that of so many other former iHope students who are now attending the iBrain school [as] evidenc[ing] an orchestrated campaign to stymie the DOE's efforts to create valid IEPs for these students" (see IHO Decision at p. 22). The parent concludes by generally stating that "[b]ased on the totality of the record evidence, the Parent did not obstruct or prevent the DOE in its efforts to meet their obligations under the IDEA."

In order to address the parent's argument and the weight of equitable considerations in this matter, a review of the events leading up to the June 12, 2018 and June 25, 2018 CSE meetings and the parties' arguments regarding those events is necessary.

Initially, this student has been the subject of a prior administrative hearing and state level review regarding the 2017-18 school year (Application of a Student with a Disability, Appeal No. 18-087). In that appeal, the parties presented arguments as to equitable considerations and an award of tuition reimbursement at iHope for the 2017-18 school year was reduced by twenty-five (25%) percent "based on the parent's conduct, most specifically her failure to participate in the evaluative process" (id.).

With respect to the process leading up to the CSE meetings for the 2018-19 school year, the IHO noted that the meeting notice for the May 9, 2018 CSE meeting was sent out on March 1, 2018 and the parent cancelled the meeting on May 4, 2018, five days prior to the scheduled CSE meeting (IHO Decision at p. 15). The IHO stated that the parent and the non-public school received notices regarding the meeting by email and phone requesting their attendance and forwarding of appropriate educational documents for the CSE's consideration (IHO Decision at p. 15). Lastly, the IHO noted that the parent conceded that she was aware of the June 12, 2018 meeting but was unable to attend because the student was in the hospital (IHO Decision at pp. 15-16).

The parent's assert that the meeting notices were procedurally flawed because they did not list the mandated CSE team members, the IHO determined the student's CSE meeting had the required members present as the IEPs themselves indicated that the CSE teams were duly composed; he noted that "throughout the scheduling and actual conduct of the CSE meetings, the [p]arent was represented by counsel who sent letters to the [district] on at least May 4, 2018 and June 8, 2018" (IHO Decision at pp. 16-17). The IHO determined that "I know of no support for the [p]arent's proposition that her concern over who would attend the meetings vitiated her responsibility to attend the meetings, even if those alleged 'errors and omissions' would render the resulting IEPs flawed. The better course of action is to attend the meeting and if inclined, object to the resulting IEP by filing a DPC" (IHO Decision at p. 17). Ultimately the IHO determined that the parent did not make a "good faith effort" to cooperate with the district (IHO Decision at p. 22).

The district sent the parent a CSE meeting notice dated January 19, 2018, that indicated a CSE meeting was scheduled for February 7, 2018 at 11:30 a.m. (Tr. p. 136; Dist. Ex. 5 at p. 1). The CSE meeting notice included the name and title of three individuals who would be in attendance including a special education teacher/related service provider, a district representative, and the parent (Dist. Ex. 5 at p. 2). The CSE meeting notice also advised the parent that an additional parent member and school physician could be present upon written request at least 72 hours prior to the scheduled meeting (*id.* at p. 2).<sup>23</sup> The CSE chairperson testified that soon after the January 2018 CSE meeting notice was created it was forwarded to the director at iHope who replied in an email that the meeting needed to be moved to another date (Tr. pp. 136, 143-44).<sup>24</sup>

In response, the CSE chairperson testified that the district rescheduled the CSE meeting for May 9, 2018 and "immediately proceeded to create" a CSE meeting notice that was sent to the parent and iHope via email (Tr. pp. 143-44).<sup>25</sup> A CSE meeting notice dated March 1, 2018, notified the parent that a CSE meeting had been scheduled for May 9, 2018 at 10:00 a.m. for the same purpose as the previous meeting and indicated by name and title the attendees including a special education teacher, general education teacher, district representative, school psychologist,

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<sup>23</sup> The CSE chairperson testified that in January 2018 the district held a meeting with representatives from iHope—the student's then current non-public school placement—to "plan for the IEP season" and to begin to establish a relationship with the school with the intent of fostering collaborative meetings for the development of IEPs for the 2018-19 school year (Tr. pp. 120-121).

<sup>24</sup> The CSE chairperson testified that the request to change the date of the February 7, 2018 CSE meeting was likely recorded in the district's events log (Tr. pp. 136-37).

<sup>25</sup> The CSE chairperson testified that when the district creates meeting notices its automated system immediately sends an email to the parent and the school alerting them of the CSE meeting notice and requesting their assistance in obtaining progress reports, student attendance records, and any new assessments (Tr. pp. 146-148). She stated that the notice also provides a fax number and an email address where documents can be sent (Tr. p. 147). The CSE chairperson further testified that the district did not receive any documentation regarding the student in response the March 2018 CSE meeting notice (Tr. pp. 148-49).



and the parent (Tr. pp. 150-151; Dist. Ex 6 at pp. 1-2).<sup>26</sup> The March 2018 CSE meeting notice also reiterated that the parent could request in writing at least 72 hours prior to the meeting to have an additional parent member and a school physician to be in attendance (Dist. Ex. 6 at p. 2).<sup>27</sup>

In testimony, the CSE chairperson stated that the parent emailed her on the Friday before the May 9, 2018 CSE meeting to indicate that she was not able to participate in the scheduled meeting and that she would follow up within the week to find a mutually agreeable date and time to reschedule the meeting (Tr. pp. 151-52).

By letter dated May 4, 2018, received by the district on May 10, 2018, the parent requested that the rescheduled "Meeting be a Full Committee Meeting as well as a DOE School Physician participate in person" and identified the student's providers at iHope including a special education teacher, physical therapist, occupational therapist, speech-language therapist and assistive technology provider who she wanted notified of the meeting (Tr. pp. 151-52; Parent Ex. M at p. 1; see Dist. Ex. 20). The parent indicated her availability on Tuesdays and Fridays after 10:00 a.m. and requested that the CSE meeting take place at iHope (Parent Ex. M at p. 1). Additionally, the parent requested that the CSE consider a non-public school placement and "conduct the necessary evaluations for such consideration and any other evaluations prior to scheduling the meeting" (id.). The parent asked that "a few" proposed dates and times be sent in writing via email or mail to the address contained in the letterhead and noted her preference not to schedule any meetings by telephone (id. at p. 2). The parent indicated that once a mutually agreeable date and time were established she would provide the student's most recent progress reports and any other documents for the CSE's consideration (id.). In addition, the parent requested that the CSE meeting be recorded (id.).<sup>28</sup>

The district sent a notice dated May 21, 2018 to the parent, advising her that a CSE meeting was scheduled for June 12, 2018 at 4:00 p.m. at a district office for the purpose of establishing the student's eligibility for special education services and developing an IEP for the 2018-19 school year (Tr. pp. 157-58, 226-27, 280; Dist. Ex. 8 at p. 1). The notice listed the anticipated meeting attendees, including a special education teacher/related service provider, school psychologist, the parent, the student's providers at iHope (a special education teacher, physical therapist, occupational therapist, and assistive technology provider), and a not yet specified school physician (Tr. p. 158; Dist. Ex. 8 at p. 1). The CSE chairperson testified that the

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<sup>26</sup> The CSE chairperson testified that in addition to being mailed, the CSE notices are emailed to parents to ensure that families receive all the notifications (Tr. pp. 274-75).

<sup>27</sup> The CSE chairperson testified that the district's events log indicated that a second notice was sent regarding the CSE meeting scheduled for May 9, 2018 (Tr. p. 150).

<sup>28</sup> The CSE chairperson testified that the parent's letter dated May 4, 2018 was actually emailed to her on May 10, 2018 and was a follow up to the email received four days prior (Tr. pp. 151-52). According to the CSE chairperson a log entry indicated an email was received on May 4, 2018 at 8:40 a.m. (Tr. pp. 154, 224-25).

date and time of the May 2018 CSE meeting complied with the parent's request to hold the meeting on a Tuesday or Friday after 10:00 a.m. (Tr. p. 227).

On May 22, 2018, the district sent the parent a prior written notice in response to her requests, granting a reschedule of the CSE meeting and the parent's request for the school physician to participate in the CSE meeting, as well as her request to hold the meeting on Tuesday or Friday after 10:00 a.m. (Dist. Ex. 10 at p. 1). The prior written notice indicated that the parent had requested that the CSE propose three alternative dates and times for the CSE meeting and the district indicated that to ensure appropriate and timely services for the 2018-19 school year it must proceed with scheduling the CSE meeting, noting that it would be holding the student's meeting on June 12 at 4:00 p.m. (*id.* at p. 2). The prior written notice indicated that the CSE meeting would be held at a location that was physically accessible and convenient for all participants and therefore, the district could not agree to the parent's request to hold the CSE meeting at iHope without further information regarding the request (*id.*). The prior written notice further indicated that the CSE reviewed several documents including CSE meeting notices issued on January 19, 2018 and March 1, 2018 and the parents email's dated May 4, 2018 and May 13, 2018 (*id.*). The prior written notice again reiterated the district's intention to convene the CSE on June 12, 2018 at 4:00 p.m. to review all updated assessments and teachers/providers progress reports with the purpose of determining the student's current functioning levels and educational needs (*id.*).<sup>29</sup>

The district corresponded with the parent and the director of iHope via several emails on May 23, 2018 (Dist. Exs. 7 at pp. 1-2; 17). The emails indicated that the district attached documentation regarding the rescheduled CSE meeting, including the May 22, 2018 prior written notice and the notice of the CSE meeting (Dist. Ex. 7). Later the same day, the district sent an email to the director at iHope, copied to the parent, notifying the school of the new CSE meeting date and included a request that the school submit all updated progress reports and other relevant educational records to the CSE prior to the meeting (*id.* at p. 2). On June 4, 2018, as a reminder to both the parent and the director at iHope, the district emailed both parties and again requested that all updated progress reports and any other relevant educational records be forwarded to the district (Tr. p. 166; Dist. Ex. 17 at p. 1).

The district chairperson testified that a review of the district's events log indicated the district attempted to contact the parent by telephone on June 9, 2018 to remind her of the upcoming CSE meeting; however, the call went to the parent's voicemail and her voice mailbox was full. (Tr p. 167). She further testified that the events log indicated a district social worker was successful in reaching the parent by telephone on June 10, 2018 and reminded her of the June 12, 2018 CSE meeting (Tr. p. 168).

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<sup>29</sup> The May 22, 2018 prior written notice indicated that the CSE attached a copy of the CSE meeting appointment letter for the June 12, 2018 CSE meeting and enclosed a copy of the procedural safeguards notice (Dist. Ex. 10 at p. 2).

By letter dated June 8, 2018, the parent's attorney informed the district that the proposed June 12, 2018 CSE meeting could not proceed because the meeting notice did not include all of the required members, specifically, a parent member, a district school physician, and a social worker (Dist. Ex. 19 at pp. 1-2).<sup>30</sup> The letter further stated that the CSE meeting notice did not indicate that the school physician would attend the CSE meeting in person, which the parent requested, and suggested that the district should only propose dates when the school physician could attend in person (*id.* at p. 2). The parent requested that the district confirm in writing in a new meeting notice the names and in-person attendance of the parent member and school physician (*id.*). The parent included a further request that the CSE conduct any evaluations necessary when considering a non-public school placement referencing the district's standard operating procedures manual and, lastly suggested the district should send a draft agenda in writing at least seven days prior to the CSE meeting to ensure an efficient and effective meeting for the student (*id.*).

The CSE chairperson testified that on June 12, 2018, she responded to the email from the parent's counsel indicating that the student's scheduled June 12, 2018 CSE meeting at 4:00 p.m. must proceed to "ensure timely and appropriate services for [the student]. Please let us know if the parent wish[es] to participate via telephone, or require[s] any other accommodation" (Tr. p. 238).

The hearing record describes several additional attempts made on June 12, 2018 by the district, by email and phone, to contact the parent in an effort to gain the parent's participation in the meeting as well as that of the student's providers at iHope (Tr. pp. 164-65, 169, 171, 229-30; Dist. Ex. 4 at p. 1). According to the CSE meeting minutes, shortly after the CSE meeting was scheduled to commence the school psychologist called the parent and left a voice mail message reminding the parent of the CSE meeting and requested the parent to return the call (Dist. Ex. 4 at p. 1; *see* Tr. pp. 238-39). A second call was made, this time to the director at iHope, who indicated that the since the school had not heard from the parent, they were unable to participate in the CSE meeting (Dist. Ex. 4 at p. 1; *see* Tr. pp. 170, 234, 239). A third call reached the parent who indicated she was unable to participate because she was at the hospital with the student but asked that the team call back in two hours, which the team agreed to do (Dist. Ex. 4 at p. 1; Tr. pp. 230, 239). Finally, the minutes indicated that outreach to the parent and school were noted in the district's events log (Dist. Ex. 4 at p. 4).

The CSE chairperson reviewed the district's events log during her testimony and testified that the log indicated multiple contacts in addition to the above (Tr. pp. 165, 170, 232-33). On the morning of June 12, 2018, the school psychologist called the director at iHope to request school reports and confirm the school's participation at the meeting leaving a voice mail message (Tr. pp. 165, 232). According to the CSE chairperson, the school psychologist again reached out to iHope by email requesting the student's records and reminding them of the CSE meeting

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<sup>30</sup> The CSE chairperson testified that on June 11, 2018 at 6:04 p.m., the parent's counsel wrote to the chairperson indicating he was attaching a letter in response to the prior written notice and she replied to his email on June 12, 2018 (Tr. pp. 236-238).

scheduled for that day and requesting the names of those who would be participating (Tr. pp. 170, 233). The district chairperson further testified that, as agreed, the school psychologist called the parent two hours after the district learned the parent was at the hospital, but the call went to voice mail, so she left a message to please return the call (Tr. pp. 231, 240). Three minutes later another call was made to the parent leaving a voice message as the parent did not take the call, requesting the parent to return the call (Tr. pp. 231, 240).

As presented in the aforementioned discussion, there were repeated attempts to reach the parent to ensure her participation in the June 12, 2018 CSE meeting. However, the parent did not avail herself of the opportunity and the CSE proceeded in her absence (Dist. Ex. 3 at p. 14).

As discussed above, there was a second CSE meeting on June 25, 2018 (Dist. Ex. 1). An IHO decision regarding the student's 2017-18 school year dated June 20, 2018, ordered the CSE to reconvene before the end of the 2017-18 school year and directed the parent to attend the reconvened meeting and provide all the necessary documentation required by the CSE to make a well-informed decision as to the student's placement and program (Interim IHO Decision Dist. Ex. 6). The CSE chairperson testified regarding the information contained in the district's events log, which indicated that on the morning of June 20, 2018, the district sent the parent an email regarding the IHO decision that ordered the CSE to reconvene before the end of the 2017-18 school year (Tr. pp. 243-44). The email indicated the district was reaching out to establish the parent's availability to meet prior to June 26, 2018 which was the end of the school year. (Tr. pp. 243-44). The CSE chairperson testified that she called the parent on June 20, 2018 to follow up and left a message requesting that the parent return the call to the district (Tr. p. 244). The CSE chairperson testified that she followed up the phone call in writing indicating that the CSE needed updated teacher/provider progress reports and any other appropriate documentation prior to the CSE meeting (Tr. p. 245). She also indicated that she included the director of iHope on the communication to assist in complying with the IHO's directive requesting the parent to release the required reports (Tr. p. 245). On the same day, later in the evening, the CSE chairperson again emailed the parent and the director of iHope to follow up on her earlier email (Tr. p. 246). The following morning, June 21, 2018, the CSE chairperson attempted to call the parent regarding making the arrangements for the mandated CSE meeting and left a message that she would be mailing the parent and iHope an appointment letter for the CSE meeting (Tr. p. 247). The district sent the parent a notice of meeting notifying the parent that a CSE meeting was scheduled for June 25, 2018 at 10:30 a.m. and identified the individuals who would be in attendance including a special education teacher, district representative, school psychologist, and the parent (Dist. Ex. 9 at pp. 1-2).<sup>31</sup> On the same day, June 21, 2018, the CSE chairperson emailed the parent and the iHope director and attached the CSE meeting notice and requested that the parent provide the necessary updated progress reports prior to the meeting (Tr. p. 249).

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<sup>31</sup> The notice of meeting is dated June 18, 2018; however, the hearing record does not explain how a notice of CSE meeting dated June 18, 2018 could have been drafted in response to a decision dated June 20, 2018 (compare Dist. Ex. 9 at p. 1, with Interim IHO Decision Dist. Ex. 6 at p. 19). Rather, it appears from the CSE chairperson's testimony that the notice of meeting was created and emailed to the parent on June 21, 2018 (Tr. pp. 248-49).

The CSE chairperson testified that she followed up her email by attempting to reach the parent via phone and left a message to inform her about the scheduled CSE meeting (Tr. p. 250).

The June 25, 2018 IEP took place as scheduled at 11:30 a.m. but without the participation of the parent or the student's providers (Tr. pp. 251-252; Dist. Ex. 1 at p. 16). The hearing record indicates that at 10:34 the parent was called, and the call went to voice mail which was full (Tr. p. 252; Dist. Ex. 1 at p. 16). At 10:39 a.m. the CSE called iHope and the iHope director indicated she did not have parental consent to participate (Tr. pp. 252-254; Dist. Ex. 1 at p. 16). The CSE chairperson testified that the iHope director indicated during several conversations that the attorney representing the students was not consenting for the school to release any records (Tr. p. 254).<sup>32</sup> Subsequently, the CSE made two more attempts to contact the parent by phone but the voice mail box was full (Tr. pp. 252-254; Dist. Ex. 1 at p. 16).

Based on the above, the hearing record supports finding that the district provided sufficiently detailed records of its attempts to ensure the parents' involvement in the CSE process and to arrange a mutually agreed upon time and place for the June 12, 2018 and June 25, 2018 CSE meetings. Accordingly, the district's actions under these circumstances were appropriate and would not result in a denial of FAPE. Federal and State regulations require school districts to take steps to ensure parent participation in CSE meetings, including: notifying the parent prior to the meeting, scheduling the meeting at a mutually agreed upon time and place, and "[i]f neither parent can attend an [CSE] meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls" (34 CFR 300.322[a], [c]; 8 NYCRR 200.5[d][1][iii]). A district may conduct a CSE meeting without a parent in attendance if it is unable to convince the parents that they should attend; however, in such instances, the district is required to maintain detailed records of its attempts to ensure the parents' involvement and its attempts to arrange a mutually agreed upon time and place for the meeting (34 CFR 300.322[d]; 8 NYCRR 200.5[d][3], [4]).

However, with respect to equitable considerations, the district's actions are only one factor as tuition may be reduced or denied based on the parent's actions surrounding her attendance at CSE meetings if those actions were unreasonable (see 20 U.S.C. § 1412[a][10][C][iii][II]; 34 CFR 300.148[d][2]; Application of a Student with a Disability, Appeal No. 18-087).

With respect her participation in the student's CSE meetings the parent testified that for the June 12, 2018 CSE meeting she believed she could not attend because the student was sick in the hospital, therefore she was unable to participate even by phone (Tr. pp. 330-31, 340). Regarding the June 25, 2018 CSE meeting, the parent stated she was unable to attend because "they didn't give me enough time to attend" (Tr. pp. 331-32, 340). The parent indicated that she was unable to recall how many CSE meetings she was unable to attend and, in particular, she

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<sup>32</sup> The director from iBrain testified that in creating the student's 2018-19 IEP, the parent provided them with the reports from iHope (Tr. pp. 361-62).

could not recall the reasons for not being able to attend the CSE meetings scheduled for February or May 2018 (Tr. pp. 340-41).

As discussed above, the district has certainly had difficulties in scheduling CSE meetings for this student, and the district has shown that it attempted to ensure the parents' involvement in the CSE process; however, given that the parent needed to attend to her daughter during the June 12, 2018 CSE meeting, and the shortened notice of the June 25, 2018 CSE meeting, I do not find that the parent's nonattendance at either CSE meeting weighs against her on equitable considerations.

However, of particular concern regarding the parent's reasons for cancelling and not attending the scheduled CSE meetings was the parent's refusal to provide the district with updated progress reports and other information for the district's consideration until the district acceded to the parent's demands regarding the scheduling of the CSE meeting (see Parent Ex. M at p. 2). Even after the district scheduled the June 12, 2018 CSE meeting at a time and place as requested by the parent (see Parent Ex. M at p. 1; Dist. Ex. 8 at p. 1), the hearing record indicates that the parent still refused to permit staff from the student's nonpublic school to participate in the development of the IEP or provide the district with updated progress reports (see Tr. pp. 170, 235-36, 252-54; Dist. Ex. 4 at p. 1). The parent's refusal is especially difficult to understand given that the iHope report that was used to create the student's IEP at iBrain for the 2018-19 school year was originally completed in April 2018, months prior to the June 2018 CSE meetings (see Parent Ex. D at pp. 1, 46). The iBrain director testified that the parent provided iBrain with the student's progress reports from iHope, including iHope's proposed IEP for 2018-19 school year and a 2017-18 second quarter progress report, and she further testified that iBrain used the iHope proposed IEP at the start of the 2018-19 school year (Tr. pp. 361-64). In refusing to allow the district access to the information regarding the student's progress during the 2017-18 school year, but delivering that same relevant information to iBrain to be used as part of the student's educational program, the parent impeded the district's ability to develop an appropriate IEP for the student. This was not reasonable and warrants a reduction in the award of tuition reimbursement.

## **VII. Conclusion**

Based on the above, I find that the district did not present sufficient evidence to show that it offered the student a FAPE for the 2018-19 school year and the parent established that iBrain was an appropriate educational placement for the student. I further find that upon consideration of equitable factors and the parent's conduct, reimbursement for tuition and related services at iBrain should be reduced by twenty-five (25%) percent (see E.M., 758 F.3d at 461; C.L., 744 F.3d at 840).

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

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED**

**IT IS ORDERED** that the IHO decision dated June 9, 2020 is modified by reversing that portion that found that the district offered the student a FAPE for the 2018-19 school year; and

**IT IS FURTHER ORDERED** that the portion of the IHO decision dated June 9, 2020, which found that equitable considerations barred the parent from an award of tuition reimbursement is modified consistent with the discussion above so that the award of tuition reimbursement is reduced by twenty-five (25%) percent due to the parent's lack of cooperation with the district; and

**IT IS FURTHER ORDERED** that upon submission of proof of payment by the parent, the district shall reimburse the parent for seventy-five (75%) percent of the costs of the student's tuition and related services at iBrain for the 2018-19 school year.

**Dated: Albany, New York  
October 26, 2020**

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**STEVEN KROLAK  
STATE REVIEW OFFICER**