The University of the State of New York

The State Education Department
State Review Officer
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No. 24-432

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

Appearances:
Liberty & Freedom Legal Group, attorneys for petitioner, by Peter G. Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 a decision of an impartial hearing officer (IHO) which dismissed her claims and denied her request to be reimbursed for her son's tuition costs at the International Academy for the Brain (iBrain) for the 12-month 2023-24 and 2024-25 school years. Respondent (the district) cross-appeals from the IHO's decision to the extent the IHO did not find that the parent's unilateral placement at iBrain was inappropriate for the 12-month 2023-24 and 2024-25 school years. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has received diagnoses of cerebral palsy and aphasia, exhibiting speech-language, motor, and cognitive delays (Parent Exs. E at p. 1; U ¶ 2). The hearing record reflects that the student had been referred for services through the Early Intervention Program (EIP) as of his date of birth (Parent Ex. R). On July 10, 2021, the parent completed a form on EIP letterhead

for a parental referral to the Committee on Preschool Special Education (CPSE) (id.).[1] The parent had checked off a box that stated she was "referring [the student] to the CPSE . . . for an evaluation to determine whether s/he [wa]s eligible for preschool special education programs and services" and which also gave permission to the EIP service coordinator to send the form to the CPSE (id.). The form was completed in full and included the name of the CPSE chairperson, the student and parent's names, home address and telephone number (id.). The form did not include a space for the parent's email address (id.).

According to the district, a written notice for initial evaluation was sent to the parent on November 17, 2021 (Dist. Ex. 5 at ¶ 7). The student began attending iBrain in August 2023 when he was four years and four months old (Parent Ex. U at ¶ 8).[2]

On March 25, 2024, the parent, through her previous attorneys, provided the district with 10-day written notice of her intention "to remove the [s]tudent from the [district]'s public school placement because of the [district]'s failure to offer or provide the [s]tudent with a . . . [FAPE] for the 2023-2024 extended school year" (Parent Ex. B at p. 1). The notice further stated that the parent "intends" to place the student at iBrain for the 12-month 2023-24 school year and that the parent would "seek public funding for this placement" (id.). The notice also indicated that the district's CPSE had not convened and had not developed an IEP for the student for the 12-month 2023-24 school year. The 10-day notice letter also stated that the district had not provided the parent with an IEP, prior written notice, or a school location letter for the 12-month 2023-24 school year (id. at pp. 1-2). The letter also reflected that the parent objected to the district's "recommendation[s]," disagreed with the "lack of evaluations by the [district]" and requested independent educational evaluations (IEEs) in all areas of the [s]tudent's needs" (id. at p. 2). In conclusion, the letter indicated that the parent "remain[ed] willing to entertain an appropriate [district] program" and requested that the CSE "reconvene for this purpose" (id.).

In a form entitled "Withdrawal Notification"—which was addressed to the parent and dated April 12, 2024—the district had checked a box indicating that the referral to the CPSE had been withdrawn prior to the selection of an evaluation site (Parent Ex. S). The notification also included a statement that "[r]ecently, your child was referred for evaluation to determine if there was a need for special education services or a modification in his/her [IEP]. As of this time, you have either not responded or you have refused to consent to the evaluation. Therefore, we will withdraw the referral" (id.). The notification indicated that a procedural safeguards notice was attached (id.).

Entries in the student's Special Education Student Information System (SESIS) log reflect that the status of documents related to preschool referral were changed from draft to final on April 26, 2024 and that the CPSE administrator had mailed the parent a withdrawal notification on April

[1] In its answer and cross-appeal, the district asserted that the referral form was incorrectly dated with the student's date of birth, rather than with the date the form was completed (Answer and Cr.-Appeal ¶ 1). Review of the form indicates that the student was referred to the EIP ("Date of Referral to the EIP") as of his date of birth. Contrary to the district's claim the form does not reflect that the student was referred to the CPSE as of his date of birth in error (Parent Ex. R).

[2] iBrain has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

12, 2024 (Dist. Ex. 3 at pp. 1-2). The entry related to the withdrawal notification also stated that "since the phone number '[wa]s not in service'" and "[t]he parent did not respond as of" April 26, 2024, "[t]he case w[ould] be closed per parental nonresponse" (id. at p. 1).

On June 17, 2024, the parent, through her current attorneys, provided the district with 10-day written notice of her intention to unilaterally enroll the student at iBrain for the 12-month 2024-25 school year and to seek public funding for the placement (Parent Ex. M at p. 1). The 10-day notice further indicated that the district had failed to propose an IEP or placement for the student and failed to provide a school location letter (id.). The letter invoked pendency at iBrain and noted that the parent "remain[ed] willing and ready to entertain an appropriate public or approved non-public school placement" and requested that the CSE "convene for this purpose once the IEEs have been completed" (id. at p. 2).

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated June 25, 2024, the parent alleged that the district failed to "make all reasonable efforts to identify and locate" the student and failed to convene a CSE to develop an IEP within 30 days of determining his eligibility (Parent Ex. A at p. 2). The parent asserted the student's pendency placement was at iBrain, arguing that the district failed to propose a placement for the 2023-24 school year, and that iBrain was the student's operative placement (id.). The parent further alleged that the district committed procedural violations of the IDEA "for all of the years the [district] was required to provide a FAPE for th[e s]tudent," which rose to the level of a denial of a FAPE to the student (id. at p. 4). The parent then set forth numerous alleged violations by the district (id.). Specifically, the parent alleged that the district failed to convene a CPSE and failed to develop an IEP, failed to timely recommend an appropriate public school location, failed to recommend appropriate related services and supports, and failed to evaluate the student for the 12-month 2023-24 school year (id. at pp. 6-7). The parent further asserted that iBrain was an appropriate unilateral placement and that equitable considerations favored full funding of tuition and related services (id. at p. 7).

As relief, the parent sought an interim order on pendency, a finding that the district denied the student a FAPE for the 2023-24 school year "and all previous years the [district] had an obligation to provide a FAPE," findings that iBrain was an appropriate unilateral placement and that equitable considerations supported full funding, compensatory education "as extended eligibility equal to the years of deprivation of FAPE," and an order for direct payment for specialized transportation with a 1:1 transportation paraprofessional, IEEs in "educational and transition," psychological, neuropsychological and an educational needs assessment, a district evaluation of the student's assistive technology needs and provision of assistive technology services and devices, and for the CSE to convene a meeting (Parent Ex. A at pp. 8-9).

An entry in the student's SESIS log dated June 27, 2024 indicated that the parent's attorney had provided the district with the parent's email address (Dist. Ex. 3 at p. 1).

On July 2, 2024, the parent filed a second due process complaint notice alleging the district failed to offer the student a FAPE for the 12-month 2024-25 school year (Parent Ex. L at p. 1). Similar in theme to the first due process complaint notice, the parent alleged that the district had failed to convene a CSE meeting or develop an IEP for the student for the 2024-25 and prior school

years (id. at pp. 5-6). The parent sought consolidation with the matter filed on June 25, 2024, and reasserted nearly identical claims related to the 12-month 2024-25 school year (id. at pp. 2, 3, 5-8).

An entry in the student's SESIS log dated July 8, 2024, reflected that the status of an initial referral for the student was changed from draft to final (Dist. Ex. 3 at p. 1).

B. Motion to Dismiss, Request for Pendency and Consolidation

The parties convened for a status conference before an IHO from the Office of Administrative Trials and Hearings (OATH) on July 11, 2024, in response to a request from the parent to "end the resolution period early and to begin the due process hearing timeline" (Tr. pp. 1, 14; see Tr. p. 2). During the conference, the district's attorney indicated that he would be filing a motion to dismiss the parent's June 25, 2024 due process complaint notice and that the district opposed pendency (Tr. pp. 5-6). The parties also discussed the parent's then-recent filing of a second due process complaint notice challenging the 2024-25 school year, and the district's attorney further stated that the district would oppose consolidation of the parent's due process complaint notices (Tr. pp. 10-11). The IHO then scheduled a prehearing conference (Tr. pp. 8, 12).

On July 11, 2024, the parent filed a memorandum of law in support of her request for pendency (Pendency Parent Ex. A at pp. 1-30). By written motion to dismiss dated July 15, 2024, the district asserted that the IHO lacked jurisdiction to review the parent's claims as the student had not been identified as a student with a disability because the parent had failed to consent to an initial evaluation (Pendency Dist. Ex. 1 at pp. 1, 6-8).[3, 4] In the motion to dismiss, the district further argued that the student was not entitled to pendency (id. at pp. 2, 8-10). On July 18, 2024, the parent filed a memorandum of law in opposition to the district's motion to dismiss (Pendency Parent Ex. B at pp. 1-5).

The parties reconvened for a prehearing conference on July 22, 2024 (Tr. pp. 15-37). The IHO acknowledged receipt of the district's motion to dismiss, and the parent's request for pendency

[3] The documents related to the district's motion to dismiss and the parent's request for pendency were admitted into the hearing record as District Exhibit 1 and Parent Exhibits A-B and were listed as such in the IHO's interim decision dated July 29. 2024. The documents later entered into the hearing record during the impartial hearing on the merits were marked by the parties in a duplicative fashion rather than continuing on in consecutive manner, thus, for example the hearing record contains two Parent Exhibit "A" . Therefore, the exhibits related to the motion to dismiss and to pendency will be cited as "Pendency" exhibits to distinguish the different aspects of the proceeding.

[4] According to the hearing record, the district's motion to dismiss included five appendices (IHO Interim Decision on Pendency and Motion to Dismiss at p. 5). The copy of the district's motion to dismiss filed with the Office of State Review omitted appendix 1, purported to be the parent's referral form to the CPSE (Pendency Dist. Ex. 1 at pp. 6, 10-11). However, the hearing record otherwise includes the referral form submitted by the parent as a parent exhibit and also includes the district's copy of the referral (see Parent Ex. R; Dist. Ex. 1). With regard to the parent's referral form, the parent's signature overlaps with the handwritten date on the form (Parent Ex. R). The date of the referral is alternately referenced in the hearing record as having been signed on July 10, 2021 and on September 10, 2021 (compare Parent Ex. R, with Pendency Dist. Ex. 1 at p. 6; Dist. Ex. 5 at ¶ 6). Upon review, the IHO correctly found the date of the parent's referral was July 10, 2021 (IHO Decision at p. 3).

and opposition to the district's motion (Tr. p. 25). The parties reasserted their respective arguments to the IHO, and the district opposed consolidation of the parent's due process complaint notices (Tr. pp. 26-27, 34).

In an interim decision dated July 29, 2024, the IHO denied the parent's request for pendency and denied the district's motion to dismiss (July 29, 2024 Interim IHO Decision at pp. 1, 3). In another interim decision dated August 5, 2024, the IHO consolidated the parent's due process complaint notices into a single proceeding (Aug. 5, 2024 Interim IHO Decision at p. 3).

C. Impartial Hearing Officer Decision

The parties reconvened for an impartial hearing on the merits of the parent's claims on August 19, 2024, and August 21, 2024 (Tr. pp. 38-122). Following a question from the IHO on the meaning of reasonable efforts, the parties argued their respective positions and the IHO gave the parties an opportunity to brief the issue (Tr. pp. 110-19). The district provided an undated written response and the parent responded on August 22, 2024 (IHO Exs. IV; V).

In a final decision dated August 28, 2024, the IHO found that the parent was precluded from asserting a denial of a FAPE for the 2023-24 and 2024-25 school years, as a result of her withholding consent for an initial evaluation of the student from the district (IHO Decision at p. 8). The IHO alternatively found that the district's untimely request for parental consent to conduct an initial evaluation of the student did not rise to the level of a denial of a FAPE for the 2023-24 and 2024-25 school years (id.).

In finding that the district "appropriately identified the [s]tudent as a child with a disability" the IHO determined that "the [s]tudent was a child known to the school district as a child with a disability as the [s]tudent had been receiving [EIP] services from the school district since 2021" and that "the [p]arent had referred the [s]tudent for special education services by sending the school district the [r]eferral [f]orm" (IHO Decision at p. 5). The IHO then determined that the "the school district complied with its obligation to identify the [s]tudent as a child with a disability for the school years at issue" (id.).

The IHO next discussed whether the district had demonstrated that it made reasonable efforts to obtain written informed consent from the parent to conduct an initial evaluation (IHO Decision at pp. 5-6). The IHO found that the hearing record established that the initial referral packet sent to the parent by the district was not timely (id. at p. 6). The IHO then determined that although the district did not comply with its obligation to timely request parental consent, "the [p]arent would have, more likely than not, withheld consent" (id.). The IHO noted that the parent had sent several notices to the district and "at no point ha[d] the [p]arent provided consent to evaluate" and therefore, the IHO determined that the parent withheld consent for an initial evaluation since November 2021 (id.).

Next, the IHO addressed the parent's claims that the district failed to identify and provide the student with a program for the 2023-24 and 2024-25 school years (IHO Decision at p. 6). The IHO found that "[t]he failure to provide [a] timely request for initial evaluations occurred in the 2021-2022 school year and [wa]s not alleged in the [p]arent's" due process complaint notice and was therefore "beyond the scope of the [p]arent's" due process complaint notice (id.). The IHO

further found that even if the claim was properly within the scope of the due process complaint notice, the parent had "chosen to withhold consent" and the district could not be held liable for a denial of a FAPE (id.). The IHO further found that the district was precluded from exercising consent override procedures because the student had been parentally placed at iBrain (id.).

The IHO then analyzed in the alternative, whether or not the district's failure to timely request consent to evaluate the student rose to the level of a denial of a FAPE (IHO Decision at pp. 6-7). The IHO determined that the student's right to a FAPE was not impeded by the district's failure and that it was the parent's withholding of consent that precluded the district from evaluating the student and developing a program (id. at p. 7). The IHO also found that the parent's opportunity to participate in the decision-making process was not significantly impeded because the student was receiving EIP services at the time of the referral and was not eligible for preschool in 2021 (id.). The IHO further stated "[i]t was not until 2023, that the [s]tudent would have been eligible for pre-school services and, then, the [s]tudent was already attending" iBrain and that by withholding consent, the parent "elected not to participate in the decision-making process" (id.). The IHO then found that the student was not deprived of educational benefit, stating that until the parent provided consent "the only educational benefit the [s]tudent was entitled to at the time" was an evaluation and that the parent had "elected not to pursue that educational benefit" (id.).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in finding that the parent withheld consent for the initial evaluation of the student from the district and that the parent was precluded from alleging a denial of a FAPE for the 2023-24 and 2024-25 school years. The parent further asserts that the IHO erred in finding that the district's failure to timely request parental consent to evaluate did not rise to the level of a denial of a FAPE. In addition, the parent asserts that the IHO erred in excluding all of the parent's witness testimony from the hearing record and argues that the parent's due process rights were violated. The parent also contends that the IHO made conflicting findings relative to the admissibility of the parent's proposed Exhibit N. The parent further alleges that the IHO correctly found the district failed to timely request parental consent but erred in determining that the procedural violation did not rise to the level of a denial of a FAPE. The parent asserts that the IHO erred in finding that the district was precluded from exercising consent override procedures after the student was enrolled at iBrain.

Next the parent contends that the IHO erred in failing to determine that iBrain was an appropriate unilateral placement for the 2023-24 and 2024-25 school years and failing to find that equitable considerations favored direct funding of the costs of the student's attendance. As relief, the parent requests reversal of the IHO's findings that the parent was precluded from asserting a denial of a FAPE and that the failure to timely request consent to evaluate did not rise to the level of a denial of a FAPE. The parent also requests findings that iBrain was an appropriate unilateral placement for the 2023-24 and 2024-25 school years and that equitable considerations favor full funding. The parent has also submitted three documents with the request for review and requests that they be considered as additional evidence.

In an answer and cross-appeal, the district asserts that the IHO correctly dismissed the parent's claims. The district further argues that even if the district never responded to the parent's referral form, that would only give rise to a claim for the 2021-22 school year and would not

constitute an ongoing violation that would extend to the 2023-24 and 2024-25 school years. The district further contends that the IHO correctly found that it complied with its child find obligations and that although the IHO did not reach the issue, the district demonstrated that it made reasonable efforts to obtain the parent's consent to evaluate the student. Additionally, the district conceded that the request to obtain parental consent was untimely and argues that the IHO correctly determined that it was a procedural violation that did not rise to the level of a denial of a FAPE to the student. The district contends that the delay in sending the initial referral packet to the student did not cause any educational harm to the student or deprive the student of a FAPE because the student was receiving EIP services at the time.

Next, the district asserts that the IHO correctly rejected the parent's proposed Exhibits N and T. The district claims that the parent failed to identify how the exhibits would have altered the IHO's FAPE determination and that the IHO provided notice to the parties that she required witness affidavits to be notarized. The district concedes that the parent's affidavit in lieu of direct testimony was admitted into evidence. The district also argues that equitable considerations indicate that the parent was not cooperative and that the IHO correctly found that the parent never intended to consent to a district evaluation of the student. The district annexed an exhibit to its answer and cross-appeal and requests that it be considered as additional evidence. [5] As relief, the district requests that the parent's request for review be dismissed and the district's cross-appeal be sustained.

The parent interposed a reply and answer to the district's answer and cross-appeal.

[5] Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068]). Both parties have submitted additional documents for consideration. With regard to the parent's request that her proposed exhibits N, T, and U be considered, the IHO's decision states that the parent's exhibits A-M, O-S and U were admitted into the hearing record (IHO Decision at p. 2). The IHO's exhibit list annexed to her decision indicates that parent's exhibits A-T were admitted into evidence and that the parent's affidavit in lieu of direct testimony (exhibit U) was not admitted (id. at p. 11). However, the IHO cited to the parent's affidavit in her decision (id. at p. 3 n.8, 11, 17). Further, the transcript reflects that the parent's affidavit was admitted, and the district concedes in its answer and cross-appeal that parent exhibit U was admitted (Tr. pp. 82, 83). Thus, I find that parent exhibit U was admitted into the hearing record and does not constitute additional evidence. Turning to the IHO's exclusion of parent exhibit T, the IHO stated during the prehearing conference that she would not accept affirmations on the record and that all affidavits were required to be signed and notarized (Tr. p. 32). The IHO further memorialized this requirement in her preconference interim order (IHO Ex. I at p. 4). I find that the IHO did not violate due process by excluding parent's exhibit T. With regard to exhibit N, which is the district's July 10, 2024 email receipt of the parent's June 17, 2024 10-day written notice, I find it is not necessary in order to render a decision in this matter. Turning to the district's proposed exhibit, the district argues that although the exhibit was available at the time of the hearing, it could not be offered because it needed to be redacted. I find that the proposed exhibit is duplicative of testimony that was found credible by the IHO and therefore it is not necessary in order to render a decision (see Dist. Ex. 5 at ¶ 7; IHO Decision at pp. 3, 6).

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. 386, 399 [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., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations

omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [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]).[6]

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. Parental Consent for Initial Evaluation

In the request for review the parent alleges that the IHO incorrectly found that she withheld consent from the district to conduct an initial evaluation of the student and that she was therefore precluded from asserting that the district denied the student a FAPE to the student for the 12-month 2023-24 and 2024-25 school years. The parent argues that regulations required the district to make reasonable efforts to obtain written informed consent from the parents and keep detailed records of its attempts to obtain consent. The parent further argues that the IHO erred in determining that the district's failure to timely request consent did not rise to the level of a denial of a FAPE. In its answer, the district contends that the IHO's determination that the district did not deny the student

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

a FAPE should be upheld and alleges that the district made "reasonable efforts" to obtain parental consent.

In this case, the parties do not dispute that the parent referred the student to the district's CPSE to determine whether the student was eligible for special education and related services. The hearing record reflects that the parent completed a written referral form to the CPSE on July 10, 2021 (Parent Ex. R). The form stated that the parent was "referring [the student] to the CPSE . . . for an evaluation to determine whether s/he [wa]s eligible for preschool special education programs and services" (id.). The form also indicated that in order for the student to continue receiving services after his third birthday, he must be referred to the CPSE and found eligible for services by the "local school district" (id.). The form further stated that after the student turned three, he would no longer be eligible for services unless he was found eligible for services under § 4410 of the Education law and that the student's EIP services would end the day before the student turned three years old (id.). Review of the referral form indicated that it was a New York State Department of Health Bureau of EIP form for parent referral to the CPSE, that the form had been completed in full and included the name of the CPSE chairperson, the student and parent's names, home address and telephone number (id.). The form did not include a space for the parent's email address and the parent did not include an email address on the form (id.).

Upon written request by a preschool student's parent, a district must initiate an individual evaluation of a student by an approved evaluator (see Educ. Law § 4410[4][a]; 8 NYCRR; see also 20 U.S.C. § 1414[a][1][B]; 34 CFR 300.301[b]). Specifically, once a referral is received by the CPSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (id.).[7] In addition, the CPSE chairperson must immediately notify the parent that the referral has been received and request consent for evaluation of the preschool student (see 8 NYCRR 200.16[b][1]; see also 34 CFR 300.300[a]).

In this case, the evidence shows that the district's CPSE administrator that on or around September 10, 2021, she received the parent's referral form (Dist. Ex. 5 at ¶ 6). The CPSE administrator further testified that she sent a written notice for initial evaluation on November 17, 2021 (id. at ¶ 7). Additionally, the district concedes and the IHO correctly found that the district

[7] For preschool students, State regulations further specify that the district shall provide a prior written notice of an initial evaluation and

> the notice shall, for parents of preschool students referred to the committee for the first time, request parental consent to the proposed evaluation and advise the parent of the right to consent or withhold consent to an initial evaluation of the student or to the initial provision of special education services to a student who has not been previously identified as having a disability. Such notice shall also:
>
> > (i) include a list containing a description of each preschool program which has been approved by the commissioner to provide evaluations, and is located within the county in which the preschool student resides and adjoining counties, or, for students residing in the City of New York, within the City of New York and adjoining counties, and the procedures which the parent should follow to select an available program to conduct a timely evaluation.

(8 NYCRR 200.16[h][1]-[2]).

did not timely respond to the referral and that the request for parental consent was untimely (IHO Decision at p. 6).

However, regardless of whether the request was timely during the 2021-22 school year, more central to the dispute is whether the district at that point, or any point since then, made sufficient effort to obtain the parent's consent.[8] Federal and State regulations also require the district to document in "a detailed record" its "reasonable efforts" to obtain the parent's written informed consent (8 NYCRR 200.5[b][1]; see 34 CFR 300.300[a][1][iii], [c][1], [d][5]), which requires that the district keep a record of attempts to secure such consent through "detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent to the parent and any responses received; and detailed records of visits made to the parent's home or place of employment and the results of those visits" (34 CFR 300.300[b][2], [d][5]; 300.322[d] [emphasis added]; see 8 NYCRR 200.5[b][1]; Parental Consent for Services, 71 Fed. Reg. 46633-34 [Aug. 14, 2006]).[9] When a parent fails to respond to a request for consent or refuses to consent to the provision of special education and related services, the district will not be considered to be in violation of the requirement to make a FAPE available to the student because of the failure of the district to provide the student with the special education and related services for which district sought consent (20 U.S.C. § 1414 [a][1][D][ii][III][aa]; 34 CFR 300.300[b][3][ii]; 8 NYCRR 200.5[b][4][i]).

The district does not dispute that it received the referral form and that it did not respond until November 17, 2021. The district's CPSE administrator testified that the parent did not provide consent to an initial evaluation on the referral form and did not include an email address (Dist. Ex. 5 at ¶ 6). She further testified that "when the CPSE tried calling [the parent], [she] learned that the phone number [the parent] provided was not in service" (id.). Assuming the that the phone number was, in fact, not in service, it may be excusable that the district did not successfully contact the parent by telephone. Notably however, the CPSE administrator testified that the only other documentation of attempted contact with the parent was one entry in a "spreadsheet" that indicated when the written notice for initial evaluation was mailed to the parent's home address (id. at ¶ 7). The initial referral packet offered into evidence by the district does not contain any of the parent's information (the forms are blank) and some of the attachments post-date the date of mailing, thus it is not a copy of the request for consent mailed to the parent (Dist. Ex. 4). There was no evidence of subsequent attempts by the CPSE to contact the parent by mail, or conduct a visit to the parent's home address. Further, the first entry in the student's SESIS log

[8] Consent is defined in federal and State regulations as meaning that the parents have been informed of all relevant information in their native language or other mode of communication, that they understand and agree in writing to the activity for which consent is sought, that the written consent form fully describes the activity for which consent is sought, lists any records that will be released and the people to whom any records will be released, and further that the parent must be aware that the consent is voluntary, may be revoked at any time, and if revoked, that revocation is not retroactive (34 CFR 300.9; 8 NYCRR 200.1[l]).

[9] With regard to consent for an initial evaluation, federal regulation specifies that "[t]o meet the reasonable efforts requirement in paragraphs (a)(1)(iii), (a)(2)(i), (b)(2), and (c)(2)(i) of this section, the public agency must document its attempts to obtain parental consent using the procedures in § 300.322(d)" (34 CFR 300.300[d][5] [emphasis added]).

offered into evidence was from over two years later on April 26, 2024 (Dist. Ex. 3 at pp. 1-2).[10] Based on the foregoing, the district failed to show that it made reasonable efforts to obtain the parent's written informed consent, or maintain detailed records of the same. As such, the IHO erred in finding that the district was under no obligation to offer the student a FAPE because the parent withheld consent.

Next, the district argues that the parent's claim that the district did not respond to her referral "would only give rise to an allegation of a FAPE deprivation for the 2021-2022 school year" and that "[s]uch a claim, however, cannot continue to remain valid two and three school years later." However, there is no evidence that the parent ever withdrew the referral and the district's argument fails to recognize that child find is a "continuing obligation" and, as part of that continuing duty, a district may be required to complete another initial evaluation of a student (P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 738 [3d Cir. 2009]; Kruvant v. District of Columbia, 2005 WL 3276300, at *8 [D.D.C. Aug. 10, 2005] [noting that there is no federal regulation that limits a district's obligation to conduct "an 'initial evaluation' to a single occurrence that forever fulfills its 'child find' obligations," and that such an interpretation would be at odds with other provisions that recognize a child's disability status is subject to change]; but see J.G. v. Oakland Unified Sch. Dist., 2014 WL 12576617, at *10 [N.D. Cal. Sept. 19, 2014] [relying on expert testimony that reassessment for the particular disorder at issue would be unnecessary absent a material change in circumstances]). Review of the hearing does not support the IHO's determinations. The district failed to make reasonable efforts to obtain the parent's consent for an initial evaluation and failed to take any further action on the referral for more than two years. The district makes no argument that the student would not have been found eligible for special education services had it completed an initial evaluation or that such eligibility would not have continued during the 2023-24 and 2024-25 school years. Given the student's significant diagnoses and deficits that are further described below, one would be hard pressed to believe the student would not have been found eligible for special education services. Thus the IHO's determination that it was merely a procedural violation without harm was error and I find that the district failed to offer the student a FAPE for the 2023-24 and 2024-25 school years.

B. Unilateral Placement

The IHO dismissed the parent's due process complaint notice after finding that the student was not entitled to a FAPE based on a flawed determination that the parent withheld consent to evaluate. As a result, the IHO did not consider the parent's request for tuition funding for the 2023-24 and 2024-25 school years. In its answer and cross-appeal, the district asserts that the IHO did not reach the second or third portions of a Burlington/Carter analysis and otherwise makes no

[10] The district also argues that it cannot be considered to be in violation of the requirement to make FAPE available to the child, due to the parent's failure to respond to its request for consent to evaluate, pursuant to federal and State regulations (see 34 CFR 300.300[b][3][ii]; 8 NYCRR 200.5[b][4][i]). The district's reliance on these sections of the regulations is misplaced. The hearing record does not establish that the parent received the initial evaluation packet, and the parent did not participate in completing the withdrawal form (Parent Ex. S; Dist. Exs. 3 at pp. 1-2; 5 at ¶¶ 6-8). In cases where the district was not required to pursue an initial evaluation to establish that it complied with the requirements of Child Find, the district was able to demonstrate that the parent engaged with the district in some fashion and either overtly refused to consent and later withdrew the referral, or failed to respond to several documented requests for consent (see Application of Student with a Disability, Appeal No. 24-090; Application of the New York City Dep't of Educ., Appeal No. 22-078).

mention of the appropriateness of the parent's unilateral placement of the student at iBrain for the 2023-24 and 2024-25 school years. The district asserts that the parent's conduct is relative to equitable considerations and will be discussed below. Thus, the parent's claims in her request for review that iBrain was an appropriate unilateral placement that addressed the student's unique needs and enabled him to make progress are unrebutted.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 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 (id. 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., 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). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

> need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

As indicated above the student's needs are not in dispute, but a brief discussion thereof provides context to determine whether the student's unilateral placement at iBrain provided specially designed instruction to address his deficits during the 2023-24 and 2024-25 12-month school years.

At the start of the 2023-24 school year, the student was four years old and had received diagnoses of cerebral palsy and aphasia, exhibiting speech-language, motor, and cognitive delays (Parent Exs. E at p. 1; U at ¶ 2). The student communicated his wants and needs through vocalizations, eye contact, smiling, reaching, facial expressions, and word approximations, and was working with assistive technology to improve communication (Parent Exs. E at pp. 1, 19-24; U at ¶ 3). He had limited mobility and required adult support for completion of all activities of daily living (ADLs) (Parent Exs. E at pp. 1, 9; U at ¶ 2). During the 2023-24 school year, the student attended 12-month programming at iBrain in a 6:1+1 class with 1:1 paraprofessional services, OT, PT, speech-language therapy, assistive technology services, and music therapy (Parent Exs. E at pp. 1, 9, 14, 19, 21, 24, 27, 30; U at ¶¶ 8, 9, 10). iBrain developed annual goals for the student to address his academic and cognitive, assistive technology and communication, gross and fine motor, and ADL needs (see Parent Ex. E at pp. 39-52). Additionally, iBrain developed an individualized health plan describing the student's diagnoses, interventions, and outcome indicators (id. at pp. 33-37). During the 2023-24 school year, iBrain staff prepared reports describing the student's then-current level of functioning and progress (see Parent Exs. F; G; H; I).

In June 2024, iBrain staff developed the student's iBrain education plan (Parent Ex. Q). The student continued to exhibit communication, motor, and cognitive delays, and his 2024-25 iBrain plan provided similar descriptions of the student's levels of performance and needs, included annual goals to address those needs, and recommended similar services on a 12-month basis as the student received the prior school year (compare Parent Ex. E, with Parent Ex. Q). According to the parent, the student's programming at iBrain was appropriately tailored to his needs and he has made progress since attending iBrain (Parent Ex. U ¶¶ 12, 13).

As noted above, the district has not rebutted or set forth arguments to refute the parent's evidence that iBrain identified the student's needs and delivered special education and related services that were specially designed to address those needs during the 2023-24 and 2024-25 12-month school years. Therefore, the parent has met her burden to show that the iBrain was an appropriate unilateral placement for the student for those school years.

Based on the foregoing, the evidence in the hearing record leads me to conclude that iBrain provided specially designed instruction to the student during the 2023-24 and 2024-25 extended school years and was an appropriate unilateral placement to address his special education needs.

C. Equitable Considerations

The parent also argues that the IHO erred in failing to address equitable considerations and asserts that the parent made repeated attempts to contact the district to have the student evaluated. The district argues that although the IHO did not reach the issue of equitable considerations, she found that the parent had no intention of having the student evaluated by the district. The district further asserts that the IHO's finding demonstrates that the parent was uncooperative in the school district's efforts to meet its obligations under the IDEA.

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).

While the district correctly noted that the IHO's finding that the parent had no intention of providing consent to the district to conduct an initial evaluation was more properly weighed as an

equitable consideration (see A.P. v. New York City Dep't of Educ., 2024 WL 763386, at *2 [2d Cir. Feb. 26, 2024]), the IHO's determination that the parent withheld consent for an initial evaluation since November 2021 was not consistent with the requirements for seeking consent and is not a sufficient basis to deny reimbursement.

As discussed above, the district failed to demonstrate that the parent received the initial evaluation packet that was mailed November 17, 2021. Further the district did not cross-examine the parent and thus failed to rebut her written testimony that she never received any communication from the district after she completed the referral to the CPSE form (Parent Ex. U at ¶¶ 4-5; see Tr. p. 92). The district's evidence does not establish that the parent received a procedural safeguards notice before April 12, 2024, when the district mailed a withdrawal notification to the parent (Parent Ex. S; Dist. Ex. 3 at p. 1).[11] Therefore, the parent was not informed of her rights and obligations under the IDEA until April of the 2023-24 school year.

Under the unique circumstances of this matter and in my discretion, I find that equitable considerations do not support a reduction of the award of funding to the parent.

VII. Conclusion

Having found that the IHO erred in failing to find that the district failed to offer the student a FAPE for the 2023-24 and 2024-25 12-month school years, that iBrain constituted an appropriate unilateral placement for the 2023-24 and 2024-25 12-month school years, and that equitable considerations do not weigh against the parent's request for relief, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find they are unnecessary to address in light of my above determinations.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that that the portion of the IHO's decision dated August 28, 2024, finding that the district satisfied its obligations related to obtaining parental consent to conduct an initial evaluation of the student is reversed; and

IT IS FURTHER ORDERED that the district shall directly fund the cost of the student's attendance for the 12-month 2023-24 and 12-month 2024-25 school years in accordance with the enrollment contracts; and

[11] Review of the hearing record indicates that the district's response to the parent's July 10, 2021 referral in April 2024 was not as coincidental as described in the CPSE administrator's written testimony (Dist. Ex. 5 at ¶ 8). It appears more likely that the entries in SESIS and mailing of the withdrawal notice were in precipitated by the parent's March 25, 2024 10-day notice letter (compare Dist. Exs. 2; 3 at pp. 1-2, with Parent Ex. B at p. 1).

IT IS FURTHER ORDERED that the district shall directly fund the cost of the student's transportation for the12-month 2023-24 and 12-month 2024-25 school years in accordance with the transportation contracts; and

IT IS FURTHER ORDERED that the district shall, if it has not already done so, convene a CSE meeting, obtain parental consent for an initial evaluation of the student or sufficiently document the parent's refusal to attend a CSE meeting and/or failure to provide consent to conduct an initial evaluation.

Dated: **Albany, New York**
December 4, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER