The University of the State of New York

The State Education Department
State Review Officer
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No. 21-012

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

Appearances:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Brian J. Reimels, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to directly fund the cost of the student's tuition at the International Institute for the Brain (iBrain) for the 2019-20 school year.[1] The appeal must be sustained.

II. Overview—Administrative Procedures

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

[1] The student's grandmother is the student's legal guardian; therefore, consistent with State regulation, the grandmother will be referred to as the "parent" throughout this decision (see Parent Ex. J at p. 1; Dist. Ex. 6 at p. 2; see also 8 NYCRR 200.1[ii][1]).

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

For the 2018-19 school year, the parent unilaterally placed the student at iBrain (Parent Exs. C at p. 1; L at p. 1; Dist. Exs. 6 at p. 2; 12 at p. 1).[2] The CSE's program and placement

[2] The Commissioner of Education has not approved iBrain as a school with which school districts may contract

recommendations for the student for the 2018-19 school year and the parent's unilateral placement of the student at iBrain was the subject of a prior impartial hearing and State-level administrative appeal (review of which is pending before a district court) (see Application of a Student with a Disability, Appeal No. 19-060). Accordingly, the parties' familiarity with the facts and procedural history preceding the current matter—as well as the student's educational history—is presumed, and they will not be repeated here.

In February 2019, the district requested from the parent scheduling preferences for the student's upcoming CSE meeting (Dist. Ex. 15 at p. 20). In a February 19, 2019 letter, the parent informed the district that she was in receipt of district email correspondence regarding efforts to schedule a CSE meeting for the 2019-20 school year and requested a full committee meeting (including the in-person participation of a district school psychologist, district social worker, a district physician, and an additional parent member) and that meeting notices be sent to staff at iBrain (Parent Ex. H at p. 1).

The district conducted a classroom observation of the student in March 2019 (Dist. Ex. 5 at pp. 1-5). On April 24, 2019 the district conducted a social history update with the student's parent as the primary informant participating via telephone (Dist. Exs. 6 at pp. 1-3; 15 at p. 13).

On June 5, 2019, the iBrain director of special education (director) provided the district with a summary of the student's then-current programming for the 2018-19 school year, a draft agenda for the annual review meeting, a proposed 2019-20 IEP, and a letter from the student's doctor along with medical and transportation forms (Parent Ex. L at pp. 1-2; Dist. Ex. 12 at pp. 1-2; see Parent Exs. C at pp. 1-44; K at pp. 1-6; M at pp. 1-2; Dist. Ex. 12 at pp. 3-4).[3] Within the proposed 2019-20 IEP, iBrain recommended a 12-month school year program in a 6:1+1 special class placement with a full-time 1:1 paraprofessional, and related services of five 60-minute sessions per week of individual PT, three 60-minute sessions per week of individual OT, three 60-minute sessions per week of individual vision education services, five 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of individual assistive technology services, and one 60-minute session per month of individual parent counseling and training (Parent Ex. C at pp. 26, 29, 30-31, 33, 34, 36, 42-43).

CSE meetings were originally scheduled for May 1 and 21, and June 6, 2019, but ultimately, on June 5, 2019, the CSE convened to conduct the student's annual review and develop his IEP for the 2019-20 school year (Dist. Ex. 13 at pp. 1-28; see Parent Ex. I at pp. 1-3; Dist. Exs. 7 at pp. 2-4; 8 at p. 1; 9 at p. 1; 10 at p. 1; 11 at p. 1; 15 at pp. 7-10, 14, 15, 20, 23-24; 16 at pp. 1, 5-7, 12, 69-71). The June 2019 IEP stated that the student was dependent in all areas of activities of daily living; used a jellybean switch connected to a Big Mack (voice output device) by using the left or right side of his head to express greetings, request activities, express yes/no, socialize with peers and adults, express target words or actions, and to participate in shared reading activities

to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] The hearing record shows that this material was also submitted to the district in advance of a previously scheduled May 2019 CSE meeting (Dist. Ex. 15 at pp. 6-7, 10-11).

and other therapeutic activities; and was currently nothing by mouth (NPO) and received all means of nutrition, hydration, and medication through a gastric tube (Dist. Ex. 13 at pp. 1, 3, 4).

Finding that the student continued to be eligible for special education and related services as a student with multiple disabilities, the June 2019 CSE recommended for the student a 12-month school year program consisting of a 12:1+(3:1) special class placement in a district specialized school and related services of three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, three 30-minute session per week of individual speech-language therapy, three 30-minute session per week of speech-language therapy in a group, and one 30-minute session per week of vision education services (Dist. Ex. 13 at pp. 1, 19-21, 25; see Dist. Ex. 19 at p. 4).[4, 5] The June 2019 IEP also provided for the support of a full-time health/ambulation paraprofessional daily and special transportation services and accommodations including a full-time transportation paraprofessional daily, a lift bus, air conditioning, travel time limited to no longer than 60 minutes, and a regular size wheelchair (Dist. Ex. 13 at pp. 20, 23). The June 2019 IEP indicated that the parent did not participate in the scheduled CSE meeting despite several previously scheduled meetings at mutually agreed upon times and that iBrain staff also did not participate in the scheduled CSE meeting (id. at pp. 1, 28).

In a school location letter dated June 17, 2019, the district identified the particular public school site to which it assigned the student to attend for the 2019-20 school year (Dist. Ex. 14 at p. 5).

The parent executed an enrollment contract with iBrain for the 2019-20 school year on June 20, 2019 (Parent Ex. D at pp. 1-7). On June 21, 2019 the parent provided the district notice of her intention to unilaterally place the student at iBrain for the 2019-20 school year and seek public funding for that placement, citing the district's failure to properly respond to the parent's request for a full committee meeting (including a district physician) to develop an appropriate IEP for the 2019-20 school year (Parent Ex. J).

A. Due Process Complaint Notice

By due process complaint notice dated July 9, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year, and requested an interim order of pendency, asserting that the basis for pendency during the instant matter was an unappealed IHO order on pendency issued on July 27, 2018 as part of an impartial hearing concerning the 2018-19 school year (Parent Ex. A at pp. 1-2). Specifically, the parent's pendency request was that the district prospectively pay for the student's full tuition at iBrain that included academics, therapies, and a 1:1 professional, as well as special transportation

[4] While the student's eligibility for special education and related services is not in dispute, the parent alleged that multiple disabilities was not the most appropriate disability category for the student (see 8 NYCRR 200.1[zz][8]; see also Parent Ex. A at p. 2).

[5] Within his written testimony the school psychologist explained that the June 2019 IEP mistakenly noted that the student was to receive six sessions of individual speech-language therapy rather than three sessions individually and three sessions in a group (Dist. Ex. 19 at p. 4; see Dist. Ex. 13 at p. 20).

accommodations including limited travel time, a wheelchair accessible vehicle, air conditioning, flexible pick-up and drop off schedule, and a 1:1 transportation paraprofessional (id. at p. 2).

Regarding the issue of the district's offer of a FAPE, the parent asserted that the district committed "many substantive and procedural errors" in the development of the June 2019 IEP and regarding the "subsequent placement recommendation" at the assigned public school site (Parent Ex. A at p. 2). The parent noted that she rejected both the June 2019 IEP and the assigned public school site "in their entirety" (id.). The parent alleged that the June 2019 CSE failed to hold the "annual review meeting at a time that was mutually agreeable" with the parent and that complied with the parent's request for a "Full Committee" meeting that included a district school physician and parent member participating in person to discuss the student's needs for the "extended school year" (id.). Next, the parent asserted that the student would be "expose[d]" to substantial regression as a result of the "significant and unsubstantiated reduction in the related services mandates" in the IEP (id.). With respect to the "recommended program and placement," the parent alleged that it failed to meet the student's "highly intensive management needs [that] requir[ed] a high degree of individualized attention and intervention," it did not constitute the student's least restrictive environment (LRE), and the student-to-teacher ratio of the special class placement—here, "12:1+(3:1)"—was "too large a ratio to ensure the constant 1:1 support and monitoring" the student required to "remain safe" (id. at pp. 2-3). The parent also alleged that the student-to-teacher ratio did not "offer the 1:1 direct instruction and support" the student required to make progress (id. at p. 3). The parent further asserted that the June 2019 IEP was not based upon "any individualized assessment" of all of the student's needs and, thus, would fail to "confer any meaningful educational benefit" to the student during the 2019-20 school year (id. at p. 2).

In addition, the parent alleged that the June 2019 IEP was not appropriate because it failed to identify the student's eligibility category as traumatic brain injury (TBI) (see Parent Ex. A at p. 2). The parent also alleged that the June 2019 IEP failed to adequately describe the student's present levels of performance and management needs and also failed to include measurable annual goals (id.). As a result, the parent contended that the June 2019 IEP did not reflect the student's "individual needs" (id.). The parent further asserted that the district's "specialized program" did not offer an "extended school day" that was "necessary" for the student "to make meaningful progress" (id. at p. 3). Finally, the parent alleged that the assigned public school recommendation was "identical" to the site assigned to the student the year prior, which the parent had "investigated and determined to be inappropriate to address" the student's needs (id.).

As relief, the parent requested an order directing the district to directly pay iBrain for the costs of the student's full tuition for the 2019-20 extended school year, to pay the student's transportation costs that included the costs of a 1:1 travel paraprofessional, and to reconvene a CSE meeting for the student (see Parent Ex. A at p. 3).

B. Impartial Hearing Officer Decision

The parties participated in a prehearing conference on January 24, 2020 and proceeded to an impartial hearing on May 18, 2020 and May 27, 2020 (see Tr. pp. 1-354). In a decision dated December 1, 2020, the IHO found that the "IEP meeting" for the 2019-20 school year "was held without new evaluations, other than a new social history," and that the student's eligibility "classification was changed to multiply disabled" (IHO Decision at p. 6). Additionally, the IHO

determined that the meeting was held "without a school physician despite the parent having made clear that a school physician was requested and needed" (id.). The IHO cited district witness testimony that the student was "medically fragile" "with intensive management needs, requiring a high degree of individualized attention and intervention" and that State "regulations require a maximum class size of eight students for such students" (id.). Accordingly, the IHO determined that the 12:1+4 special class placement recommendation was not appropriate and further, that although the CSE had previously recommended a 6:1+1 special class placement for the student, the CSE had "failed to even consider such a program" (id.).

Turning to the CSE's recommendations for related services, the IHO found that "it was clear" that the CSE had not considered sessions of longer duration than the 30 minutes it had recommended, although it "appear[ed] that a longer session of 60 minutes [was] appropriate, as is offered at iBrain" (IHO Decision at p. 6). The IHO continued that both parties were in agreement that the student needed assistive technology, and while "iBrain's IEP therefore recommended assistive technology devices and services, the [district's] official IEP recommended neither, which was another failure to provide an appropriate program, given the severe management needs of [the student]" (id. at p. 7). Regarding the student's medical needs, the IHO stated that the CSE had "failed to recommend a school nurse," which he determined to be "another serious problem" with the CSE's recommendations and which "call[ed] into question the appropriateness of the recommended program" noting that at iBrain the student "was provided with a 1:1 nurse" (id.). According to the IHO, had the student "been placed in what the [district] offered, not only would it have likely not provided the intensity and individualization sufficient to meet this very disabled student's needs, but I wonder if this medically fragile student would have also faced risk to his life, given his fragility" (id. at p. 9). The IHO concluded that the district had "failed to recommend an appropriate program, as can be seen by the class size that was too large, with related services in sessions that were too short, without the benefit of assistive technology or needed nursing services" (id. at p. 7).[6]

Next, regarding the parent's unilateral placement at iBrain, the IHO contrasted the aforementioned failures of the district and determined that "[a]ll of these [special class ratio, duration of related services sessions, assistive technology, and nursing services] were provided properly at iBrain" such that "iBrain provided an appropriate program, addressing [the student's] unique learning needs" (IHO Decision at p. 7). According to the IHO, "[t]he iBrain IEP provide[d] a detailed picture of the complex needs" of the student in many areas, the level of the student's skill, and how many areas of functioning were addressed (id. at p. 8). Regarding the district's assertion that iBrain spent "too little time with academics" the IHO determined that "what [was] being addressed at iBrain appear[ed] to be targeted to [the student's] unique learning needs as a low functioning individual with disabilities across many domains" (id.). Additionally, the IHO recounted testimony regarding the progress that the student had made at iBrain (id. at p. 7).

As for equitable considerations, the IHO addressed the district's questions regarding the "high cost for attendance at iBrain" and its contention that "separate billing for related services" was "contrary to iBrain's status as a not-for-profit New York State corporation" (IHO Decision at

[6] On the issue of eligibility classifications, the IHO determined that the district school psychologist's explanation of why "multiple disabilities [was] a more appropriate classification" "seem[ed] reasonable" and he declined to order the CSE to change the student's classification category (IHO Decision at p. 8).

p. 8). First, the IHO indicated that he did "not see . . . how separating billing for related services means that the school is not a nonprofit" (id.). Next, the IHO acknowledged that while the total cost of tuition at iBrain including related services was "a great deal of money," iBrain "provide[d] individualized nursing, individualized instruction, a paraprofessional and an extended school day to accommodate 60 minute related services sessions" (id.). Therefore, the IHO opined that the as the district had failed to offer the student an appropriate program, "the parent should not be faulted for placing this student, who has multiple disabilities and is medically fragile, in a program that provide[d] intensity of instruction and services that appear[ed] to be addressing the complexity of [the student's] learning needs, even if this result[ed] in a large bill" (id. at p. 9). In addressing the district's contention that the cost of the transportation services arranged by iBrain were excessive, the IHO determined that the district had not "provided evidence that there was anything untoward about this charge nor did the [district] show that there were reasonable and less costly transportation alternatives available" (id. at pp. 9-10). He continued that as he did "not see that the [district] offered to the parent another form of appropriate but less costly transportation" it would be "unfair to deny funding for the transportation to the parent under these circumstances" (id. at p. 10).

Turning to the issue of the parent's cooperation, the IHO acknowledged the district's evidence regarding "a lack of cooperation by the parent, with regard to cooperation with new testing, timely submission of materials and appearance at scheduled meetings" such that "this record as laid out raise[d] a legitimate question" about the parent's cooperation (IHO Decision at p. 9). However, ultimately the IHO found that the parent did give consent for evaluation, iBrain sent relevant documents to the CSE, and it would have been "unjust" to "penalize" the student for the district's failure to offer an appropriate program (id.).

As relief, the IHO ordered the district to directly fund the cost of tuition, related services and transportation for the student at iBrain for the 2019-20 school year and reimburse the parent for any costs incurred upon presentation of proof of payment (IHO Decision at p. 11).

IV. Appeal for State-Level Review

The district appeals and argues the IHO erred by finding that it did not offer the student a FAPE for the 2019-20 school year. Initially, the district contends that the IHO made two determinations on issues that the parent had not raised in the due process complaint notice, specifically, the lack of a recommendations for an assistive technology device and a nurse. Next, the district asserts that the IHO's determination that the CSE did not have new evaluations at the CSE meeting was belied by the hearing record, as the CSE utilized a social history, classroom observation, 2017 psychoeducational evaluation report, and "recent iBrain progress reports" such that it had sufficient evaluative material. Contrary to the IHO's finding that the CSE failed to consider a more restrictive program for the student, the district argues that the CSE had considered 6:1+1 special class and State approved nonpublic school placements before concluding the 12:1+4 special class was appropriate. The district also argues that the IHO erred in determining that given the student's needs State regulations "required" placement in a program with no more than eight students; rather, the district contends that, because the student was nonverbal, non-ambulatory, required the use of a gastronomy tube and assistance for self-care tasks, and had intensive management needs, the CSE's 12:1+(3:1) special class recommendation was not '"too large"' and would have provided him with classroom supports not afforded in other programs such as a 6:1+1

class. Regarding the IHO's determination that it was "'clear"' that the district had failed to consider longer session durations for related services and that 60-minute sessions were appropriate, the district argues to the contrary. As to the IHO's finding that the CSE convened without a school physician as the parent had requested, the district asserts that for the stated reasons the lack of a physician did not rise to the level of a denial of a FAPE and the IHO's conclusion on that issue should be reversed. Further, on appeal the district argues that the IHO improperly compared the program and recommendations offered at iBrain as a reason to fault the CSE's recommendation (i.e., references to iBrain's provision of a 1:1 nurse, 60-minute related service sessions, specific assistive technology device recommendations), which also included retrospective evidence. Finally, the district asserts that the IHO's decision should be reversed due to his "extreme and inflammatory" opinion about the student's "risk to his life, given his fragility" in the CSE's recommended program as there was "simply no support in the record to even possibly suggest" that the student's life would in any way be at risk.

The district also appeals the IHO's finding that equitable considerations did not warrant a bar to relief. Although the district agrees with the IHO that the parent's actions in the months leading up to the CSE meeting demonstrated an unwillingness to fully cooperate, the district argues that the IHO misapplied the law when he also determined that, because the district had failed to offer the student a FAPE, to reduce or bar relief would penalize the student. As such, the district requests that an SRO reverse that IHO determination and "reduce the award of relief by at least 25 [percent] if not 33 [percent]."

In an answer, the parent responds to the district's allegations and argues that the IHO properly found that the district denied the student a FAPE for the 2019-20 school year based on the June 2019 CSE's failure to recommend an appropriate class size, failure to recommend related services of appropriate frequency and duration, and failure to recommend appropriate assistive technology and nursing services. Regarding the district's argument that the IHO sua sponte reached issues related to nursing services and assistive technology, the parent contends that the district waived this defense by not objecting to "discussion" of these issues during the impartial hearing. Lastly, the parent argues that the IHO correctly found that the equities support a full award of tuition and related services for the student at iBrain during the 2019-20 school year. With her answer, the parent submits additional evidence and requests that it be considered.

In a reply, the district argues that the parent's answer and memorandum of law do not comply with relevant State regulations and, therefore, should not be considered.[7] The district also argues that the additional evidence submitted with the parent's answer should not be considered.[8]

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

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[7] The district correctly notes that the notarization of the parent's verification was improper (see 8 NYCRR 279.7[b]; "Guidance to Notaries Concerning Executive Order 202.7" available at https://www.dos.ny.gov/licensing/notary/DOS_COVID19_RemoteNotaryGuidance.pdf) and that the parent's memorandum of law lacked a table of contents in contravention of State regulation (see 8 NYCRR 279.8[d]). Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]). In this instance, the failure of the notary public to discharge her duty to properly date and endorse the affidavit of verification will not be held against the parent as a matter within my discretion. Further, there is no indication that the district suffered prejudice due to the deficiencies in the parent's memorandum of law. Accordingly, I decline to reject the parent's answer or memorandum of law based on the district's contentions. Nevertheless, I strongly caution the parent's attorney to ensure that future submissions to the Office of State Review comply with State regulations and with the appropriate modified procedures permitted to address difficulties related to the COVID-19 pandemic.

[8] The additional evidence included with the parent's request for review consists of a copy of an IEP developed for the student on May 19, 2020 with an implementation date of June 3, 2020. Generally documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO'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 a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the proffered document was available at the time of the impartial hearing and, in any event, is not necessary to resolve the issues presented on appeal (see F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]). Therefore, I decline to exercise my discretion to consider the document as additional evidence.

(Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the 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]).[9]

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. Scope of the Impartial Hearing

Initially, the district asserts that the IHO erred in sua sponte raising issues that the parent did not include in the due process complaint notice, specifically relating to the lack of recommendations for an assistive technology device or nurse services in the June 2019 IEP. The district further argues that it did not open the door to these allegations. The parent contends that the district failed to object to "any discussion" during the impartial hearing regarding the student's need for nursing services or assistive technology and that the parent clearly noted in her due process complaint notice that the district failed to offer an appropriate school program and placement even if the "full picture" of the district's failures was only later identified in the record, evidence, and testimony.

[9] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original 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[i][7][i][a]; [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 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][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]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

Here, the parent's due process complaint notice does not include any specific allegations related to nursing services or assistive technology (see Parent Ex. A). Further, despite the parent's claim that "the full picture of the [district's] failures" only became apparent during the impartial hearing, there is no indication that the parent sought to amend the due process complaint notice during the impartial hearing or that the district agreed to expand the scope of the impartial hearing.

Further, to the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see B.M., 569 Fed. App'x at 59; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]), here, the question of nursing services and assistive technology on the June 2019 IEP was first addressed during the impartial hearing as part of the parent's attorney's cross-examination of the district witnesses. Specifically, during cross examination the parent's attorney questioned the school psychologist with respect to the student's medical needs and the recommendation of a school nurse (Tr. pp. 90-92). The parent's attorney also initiated questioning with respect to nursing services and the medical condition of the students at the district's proposed placement (Tr. pp. 195-96, 199-201). Similarly, the parent's attorney introduced a line of questioning regarding assistive technology (Tr. pp. 118-19). The district, in contrast, did not initially present testimony regarding nursing services or assistive technology in the witnesses' direct affidavit testimony (see Dist. Exs. 19 at pp. 1-5; 20 at pp. 1-8; 21 at pp. 1-2).

Only on redirect examination of the school psychologist does the district inquire with respect to assistive technology (Tr. pp. 121-23). Therefore, the district could not be deemed to have "opened the door," under the holding of M.H., to the issues relating to nursing services or assistive technology on which the IHO, in part, based his determinations that the district had failed to offer the student with a FAPE for the 2019-20 school year (see B.M., 569 Fed. App'x at 59; A.M., 964 F. Supp. 2d at 283; J.C.S., 2013 WL 3975942, at *9). Accordingly, the IHO erred in reaching the issues of the June 2019 CSE's purported failure to recommend nursing services or assistive technology (IHO Decision at p. 7).

B. June 2019 CSE Process

1. CSE Composition

On appeal the district argues that the IHO erred in finding that the district failed to offer the student a FAPE and specifically asserts that the lack of a district physician at the June 2019 CSE meeting, despite the parent's request for one to be present, does not rise to the level of a denial of a FAPE. The parent disagrees and contends that the district believed having the physician at the meeting was important enough to reschedule the meeting for a date and time when one would be available.

State regulation requires, in pertinent part, that a CSE must be composed of the following persons: the parents or persons in parental relationship to the student; not less than one regular education teacher of the student whenever the student is or may be participating in the regular education environment; not less than one special education teacher of the student, or, if appropriate, not less than one special education provider of the student; a school psychologist; a district representative who shall serve as the CSE chairperson; an individual who can interpret the instructional implications of evaluation results; a school physician if requested in writing 72 hours prior to the meeting; an additional parent member if requested in writing 72 hours prior to the meeting; other persons having knowledge or special expertise regarding the student, and if appropriate, the student (8 NYCRR 200.3[a][1]).

As detailed above, in a February 2019 letter to the district, the parent requested in writing a full committee meeting to include, among other members, a district physician to participate in person at the meeting (Parent Ex. H at p. 1). The record demonstrates that the district made efforts to conduct the CSE meeting with a district physician present and that a district events log entry indicated that at one point the CSE meeting was rescheduled to accommodate the attendance of a district physician (Dist. Exs. 9 at p. 1; 10 at p. 1; 11 at p. 1, 15 at p. 8). The notice for the June 5, 2019 CSE meeting listed a physician as one of the individuals who would be attending the meeting (Dist. Ex. 11 at p. 1).

The hearing record shows that the June 2019 CSE participants included a related service provider/special education teacher, a school psychologist who also served as the district representative, a school social worker, an additional parent member, and the supervisor of school psychologists, but no district physician (Dist. Exs. 13 at p. 28; 19 at pp. 1-2). Further, neither the parent nor staff from iBrain attended the meeting (Dist. Exs. 13 at pp. 1, 28; 19 at pp. 1-2).[10] The

[10] The nonattendance of the parent and iBrain staff at the June 2019 CSE meeting was not an issue raised for

school psychologist acknowledged that the parent had requested a physician be present at the CSE meeting and that the June 2019 CSE produced the IEP without the participation of a district physician (Tr. pp. 74-75, 112, 119-20; see Dist. Exs. 13 at p. 28; 19 at pp. 1-2).

Nevertheless, a procedural violation related to the composition of the June 2019 CSE would only result in a finding that the student did not receive a FAPE if the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

The school psychologist testified that if there was some severe medical need possibly it would be helpful for the CSE team to include a doctor but in the student's case the school psychologist did not believe it would have been helpful or necessary in making a recommendation (Tr. pp. 109, 120). Further, the hearing record reveals that the June 2019 CSE had available information with respect to the student's medical condition (see Dist. Ex. 12 at pp. 1-2, 5, 41-44, 50-55). The school psychologist testified that the proposed iBrain IEP provided a description of the student's medical condition and his needs with respect to that medical condition (Tr. pp. 85-86; see Parent Ex. C at p. 1, 37-40). In addition, the social worker testified that the June 2019 CSE had available "new" medical documentation (Tr. pp. 165-66; see Parent Ex. K at pp. 1-6; Dist. Ex. 12 at pp. 50-55). In addition, the parent who requested the participation of the physician did not attend the June 2019 CSE meeting (see Dist. Ex. 13 at p. 28), making the physician's nonattendance of lesser consequence.

In sum, even if the district committed a procedural violation in conducting the June 2019 CSE meeting without a physician in attendance, in this case the violation does not rise to the level of a denial of a FAPE.

2. Sufficiency of Evaluative Information

The district alleges that the IHO "clearly overlook[ed]" the evidence in the hearing record concerning the evaluative information that was available to the June 2019 CSE. The district asserts that the IHO's determination that the CSE did not have new evaluations at the CSE meeting was belied by the hearing record, as the CSE utilized a social history, a classroom observation, a 2017 psychoeducational evaluation report, and "recent iBrain progress reports" such that it had sufficient evaluative material.

Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in

consideration during the impartial hearing and the IHO did not address it (see generally IHO Decision; Parent Ex. A).

order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

First, the IHO's determination that the June 2019 CSE meeting was held without new evaluations of the student other than the social history update was factually inaccurate, as the hearing record reveals that, in addition to reviewing the April 2019 social history update, the CSE reviewed a March 2019 classroom observation report, the May 2019 iBrain comprehensive teacher report—also referred to by the district school psychologist as the student's iBrain IEP—and the student's May 2018 IEP (compare IHO Decision at p. 6, with Tr. pp. 70-71; Dist. Ex. 13 at p. 1; see Parent Ex. C; Dist. Exs. 5; 6; 18). In addition, the school psychologist testified that prior to the June 2019 CSE meeting the members of the CSE had reviewed those documents as well as the student's February 2017 psychoeducational evaluation report (Tr. pp. 64-66; Dist. Ex. 19 at p. 2). The June 2019 IEP's present levels of performance included current functioning levels and areas of need provided by the student's then-current teachers and related service providers from iBrain (compare Dist. Ex. 13 at pp. 1-10, with Parent Ex. C at pp. 1-20).

The district made repeated efforts to conduct a "new" psychoeducational evaluation, however, for reasons which included the student undergoing a surgery and that the student "did not show" to scheduled appointments, the evaluation was never completed (Dist. Exs. 3 at p. 1; 4 at p. 1; 15 at pp. 11, 18, 19, 21, 22). Ultimately, however, the February 2017 psychoeducational evaluation remained timely and review of the hearing record does not show that the student's needs warranted re-evaluation or that the parent requested re-evaluation (see Dist. Ex. 17 at pp. 1-3).

Based on the foregoing, the hearing record supports a finding that the June 2019 CSE used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student and ensured that a student was appropriately assessed in all areas related to his suspected disability, and that the June 2019 CSE had evaluative information sufficiently comprehensive to identify all of the student's special education and related services needs.

C. June 2019 IEP

1. 12:1+(3:1) Special Class Placement

Initially, the IHO found that "the [district] had previously recommended a 6-1-1 class for [the student]" (IHO Decision at p. 6); however, this is not supported by the evidence in the hearing record. The IHO cites the pendency determination from the proceedings for the 2018-19 school (id., citing Parent Ex. B), but the pendency determination from the prior proceedings referenced the class ratios at the nonpublic schools the student attended for the 2017-18 and 2018-19 school years, not a special class ratio recommended on an IEP (see Parent Ex. B at p. 4). In contrast, the IEP developed by the May 2018 CSE for the student for the 2018-19 school year included a recommendation for a 12:1+(3:1) special class (see Dist. Ex. 18 at p. 19).[11] To the extent the IHO compared the June 2019 CSE's recommendations to the program the student received at iBrain during the 2018-19 school year, this was error. Comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE; rather, an IHO must determine whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint, and whether the IEP developed by its CSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (Rowley, 458 U.S. at 189, 206-07; R.E, 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "'the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent'"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at *8 [S.D. Cal. Feb. 14, 2013] [noting that "'[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits'"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at *5 [S.D. Cal. Mar. 14, 2011]).[12]

[11] Likewise, although the IHO found that the CSE "changed" the eligibility category for the student from TBI to multiple disabilities (IHO Decision at p. 6), review of the student's IEP from the previous school year reflects that the CSE deemed eligible for special education as a student with multiple disabilities for the 2018-19 school year as well (compare Dist. Ex. 18 at p. 1, with Dist. Ex. 13 at p. 1).

[12] However, where, as in this case, the student is attending a unilateral private placement, some reference to a student's performance at a nonpublic school may be necessary if preparing a new or revised IEP while the student is attending the nonpublic school.

Next, the district asserts on appeal that the IHO erred in finding that the CSE's 12:1+(3:1) special class recommendation was not appropriate because State regulations required placement of the student in a class with no more than eight students.

State regulation provides that the maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students (see 8 NYCRR 200.6[h][4][iii]). In addition to the teacher, the staff/student ratio shall be one staff person to three students (id.). The additional staff may be teachers, supplementary school personnel, and/or related service providers (id.). State regulation also indicates that the maximum class size for special classes containing students whose management needs are determined to be intensive and requiring a significant degree of individualized attention and intervention, shall not exceed eight students, with one or more supplementary school personnel assigned to each class during periods of instruction (see 8 NYCRR 200.6[h][4][ii][b]). 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]).

The student exhibits significant, global cognitive, communication, physical, and health-related needs (see Parent Ex. C; Dist. Ex. 13). The June 2019 IEP reflected that the student was "dependent in all areas of the activities of daily living" and was nonverbal, depending on vocalizations and augmentative and alternative communication to participate in the school day (Dist. Ex. 13 at pp. 1-4, 9). The IEP also described the student's motor limitations and vision difficulties, including his oral motor weaknesses (id. at pp. 2, 4). Specifically, the IEP described that the student "present[ed] with instability in his trunk, shoulder girdle, head, and neck and relie[d] on support from his wheelchair and head rest for postural control, head control and upright positioning" (id. at pp. 4, 7). The student used a manual wheelchair as his primary form of mobility and was dependent with all functional transfers (id. at pp. 7, 9). The IEP reflected that the student received all nutrition via a gastric tube (id. at pp. 4, 8-9). The IEP also reported that the student had a seizure disorder and was on anticonvulsant medications, "which require[d] close monitoring to prevent injury, aspiration, and constipation" (id. at p. 6).

As for supports for the student's management needs, the IEP stated that the student needed "continual 1:1 adult support for redirection and repetition of directions and for physical or verbal prompting for participation and access to the educational environment" (Dist. Ex. 13 at pp. 6, 10). In addition, the IEP indicated that the student benefited from: small group instruction; direct instruction; a multi-modal approach for academic tasks; simplified directions; shields from visual or sound distractors; the opportunity to make choices; use of 3D objects to support choices; use of visually adapted instructional materials; use of switch and voice output devices and reinforcement of the use of a communication system across instructional environments; and school nurse services (id.). The IEP also described that the student benefited from sensory tactile and proprioceptive

input prior to activities and from "frequent verbal/visual/ tactile cues to keep head/neck upright while seated in his wheelchair during the school day" (id. at p. 9).[13]

To address these needs, the June 2019 CSE recommended a 12:1+(3:1) special class in a specialized school with the support of a full-time 1:1 paraprofessional and related services including OT, PT, speech-language therapy, vision education services, and parent counseling and training (Dist. Ex. 13 at pp. 19-20). The June 2019 CSE considered but rejected a 6:1+1 special class in a specialized school (id. at p. 26).[14] The school psychologist stated in his written testimony that he had reviewed the proposed IEP from iBrain with its recommendation of a 6:1+1 class placement but that in his clinical opinion the 12:1+(3:1) special class placement was appropriate and reasonably calculated to enable the student to meet his goals and make educational progress during the 2019-20 school year (Dist. Ex. 19 at pp. 4-5). Although the school psychologist agreed that the student was medically fragile with highly intensive management needs requiring a high degree of individualized attention and intervention (see Tr. pp. 87-88), the school psychologist also testified that a 6:1+1 class only had two adults in the room and that that would not have provided enough support for the student's level of physical and medical need and the amount of monitoring that the student would need during the course of the day in helping him with daily living skills and engaging in academic tasks (Tr. pp. 77-78).

It is no mistake that the adult-to-student ratio required in a 6:1+1 special class and a 12:1+(3:1) special class is similar; however, the 12:1+(3:1) special class ratio provides for variety in the type of school personnel working with the student 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. Generally, while the student may exhibit intensive or highly intensive management needs and require a high or significant degree of individualized attention and intervention (see 8 NYCRR 200.6[h][4][ii][a]-[b]), the parent's (and the IHO's) strict adherence to the language in State regulation guiding 8:1+1 or 6:1+1 special class placements to the exclusion of other appropriate placement options is reductive and overlooks the evidence in the hearing record: that the student's highly intensive needs

[13] To the extent the parent argues in her memorandum of law that the June 2019 IEP failed to properly identify the student's highly intensive management needs (see Parent Mem. of Law at pp. 11-12), even if this issue was sufficiently raised for review, it is belied by the evidence in the hearing record. The June 2019 IEP incorporated the majority of the supports for the student's management needs identified in the iBrain proposed IEP for the 2019-20 school year and identified and described supports appropriate to address the student's identified academic, social, and physical needs (compare Dist. Ex. 13 at pp. 6, 9-10, with Parent Ex. C at pp. 17-19).

[14] While the school psychologist's testimony varied as to whether the CSE discussed the option of a State-approved nonpublic school for the student (compare Dist. Ex. 19 at p. 2, with Tr. p. 82), once the June 2019 CSE determined an appropriate class placement for the student, the district was not obligated to consider a more restrictive setting, such as a nonpublic school (see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19, 2013] [explaining that "under the law, once [the district] determined . . . the [LRE] in which [the student] could be educated, it was not obligated to consider a more restrictive environment"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the [LRE] that could meet the [s]tudent's needs and did not need to inquire into more restrictive options"]).

are due to his severe multiple disabilities, and that a program consisting of habilitation and treatment was appropriate to meet the student's needs (see 8 NYCRR 200.6[h][4][iii]).[15] Therefore, the hearing record supports the district's position that the recommendation of a 12:1+(3:1) special class placement was appropriate to address this student's unique needs.[16]

2. Duration of Related Services

The district alleges that the IHO erred in determining that the June 2019 CSE did not consider longer related service sessions and that the recommended 30-minute sessions were not appropriate.

The iBrain director stated in her written testimony that all related therapy services were provided to students at iBrain, as needed, usually in 60-minute intervals noting that the students generally required 60-minute sessions because of transferring and re-positioning needs, additional transition time and rest, and repetition needs to foster neuroplasticity (Parent Ex. O at p. 2).

The iBrain IEP included recommendations for 60-minute sessions for related services of vision education services, speech-language therapy, OT, and PT (Parent Ex. C at pp. 26-33). With respect to vision education, the iBrain IEP stated that the student required an extensive amount of

[15] Further, to the extent the parent argues in her memorandum of law that the 12:1+(3:1) special class was not the student's LRE as compared to a 6:1+1 special class (see Parent Mem. of Law at p. 13), I note that class size and the level of adult support are, generally speaking, unrelated to the IDEA's LRE requirement (34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; R.B. v. New York Dep't of Educ., 603 Fed App'x 36, 40 [2d Cir. Mar. 19, 2015] [stating that "[t]he requirement that students be educated in the [LRE] applies to the type of classroom setting, not the level of additional support a student receives within a placement"]; see T.C. v. New York City Dep't of Educ., 2016 WL 1261137 at *13 [S.D.N.Y. Mar. 30, 2016] [stating that "[a] less restrictive environment refers to the ratio of special education to general education students in the same classroom, not the ratio of special education students to teachers"]). As neither party disputes that the student should not attend a general education class setting or otherwise participate in school programs with nondisabled students, there is no basis for a finding that the June 2019 CSE's recommendations ran afoul of LRE requirements.

[16] In addition, the parent asserts that the 12:1+(3:1) special class would have been inappropriate given that the students in the classroom in which the student would have been placed had he attended the program recommended in the June 2019 IEP presented with needs dissimilar to that of the student. In this instance, the district sent the parent a school location letter dated June 17, 2019 identifying the public school to which the student was assigned (Dist. Ex. 14 at p. 5). The parent did not visit the public school site (see Tr. pp. 292-93, 336-39). Accordingly, the parent was not aware of how the student would have been grouped at the public school for the 2019-20 school year at the time she placed the student at iBrain. Any evidence about how the student would have been grouped if he had attended the public school is necessarily retrospective. The Second Circuit has held that "our precedent bars us from considering such retrospective evidence" (J.C. v New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016] [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible" where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP"], quoting R.E., 694 F.3d at 195). Various district courts have followed this precedent (G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at *4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"]). Accordingly, the parent's argument regarding the grouping of the students in the special class is without merit and will not be further discussed.

time in order to visually process all items presented to him, to adapt to changes in the environment, and enable the student to have adequate visual processing time and transition time (id. at p. 26). Regarding speech-language therapy, the IEP stated that the student benefitted "greatly" from a high frequency and duration mandate and without it was at risk for regression in the form of lowered ability to meaningfully access his switch to participate in communication tasks and activities (id. at p. 29). The iBrain IEP stated that during the 2018-19 school year the student benefited from a mandate of 60-minute speech-language therapy sessions and that it was "imperative" that the student continued to receive a mandate of intensive frequency and duration to support his progression toward his speech-language goals (id. at pp. 2-3). In the area of PT, the iBrain IEP noted that that the student required increased rest breaks throughout therapy sessions and increased time for motor planning and processing and that the 60-minute mandate was very important to help the student improve his ability to carry over and participate in functional activities with his peers at school (id. at pp. 30-31). The iBrain IEP also stated that the student "tolerate[d] the 60-minute sessions well" (id.). With respect to OT, the iBrain IEP stated that the student benefitted from 60-minute sessions to assist with transition time, transfers, rest breaks during physically demanding activities, positional changes, and extra time to initiate tasks, look at objects and process directions (id. at p. 33).

The school psychologist did not agree with the idea that, given the student's need for rest breaks throughout therapy sessions and increased time for completion of tasks, it would make sense to allot the student that additional time through 60-minute sessions (Tr. p. 101). The school psychologist testified that considering the student's level of development, 60-minute sessions would "tire him out" and that what the district had seen in terms of best practices was that with 60-minute sessions "the students . . . lose focus" and that the longer sessions were "not helping them . . . and may be hurting them" (Tr. pp. 100-101). The school psychologist also stated that especially for a student who had hip surgery, "60-minute sessions would be a very long time" (Tr. p. 101).[17]

The school psychologist testified that he had reviewed the iBrain recommendations and that he believed that 30-minute related services sessions were an adequate period of time to address the student's needs (Tr. pp. 120-21; Dist. Ex. 19 at p. 4). With respect to OT, the school psychologist stated that 30-minute sessions were clinically appropriate for the student based on his level of cognition, executive functioning, and stamina evident throughout the classroom observation and school reports (Dist. Ex. 19 at p. 3; see Parent Ex. C at pp. 7-8, 31-33; Dist. Ex. 5 at pp. 1-5). The school psychologist, in his written testimony, stated that PT sessions of 30-minutes in length were clinically appropriate for the student as he required frequent rest breaks and additional response time when completing tasks and became distracted around other children and adults (Dist. Ex. 19 at p. 3). He also noted that the student fatigued quickly while working on anti-gravity positions and that this indicated that he was unable to attend for a 60-minute session (id. at pp. 3-4). Regarding speech-language therapy sessions of 30-minute duration, the school

[17] On or about February 27, 2019 the student "underwent a bilateral femoral osteotomies and a left pelvic osteotomy to correct bilateral hip dislocations" (Parent Ex. C at p. 7; Dist. Exs. 6 at p. 2; 15 at p. 19). Reportedly the student returned to school on March 11, 2019 in a spica (body) cast, and would have to remain in the cast for the next four to six weeks, and resumed OT on March 19, 2019 (Parent Ex. C at p. 7; Dist. Ex. 15 at p. 18).

psychologist stated they were clinically appropriate for the student because of the nature of his brain-based disability and his demonstrated social skills and that for his overall well-being he required frequent breaks and redirection (id. at p. 4). With respect to vision education services, the school psychologist stated that 30-minute sessions were a clinically appropriate period of time for the student's instruction because the sessions were designed to maximize the student's visual access to curricular materials and that the student may begin to experience visual fatigue (id.). Further, the school psychologist stated that based upon the student's cognitive, physical, social and communicative abilities, vision therapy sessions should not exceed 30 minutes in order to maximize his ability to attend to therapy specific tasks and provide him with the opportunity to participate in an academic program (id.).

While the director of iBrain testified that the student did not tend to experience fatigue and had "a high energy level" (see Tr. p. 273), the information available to the CSE, including the iBrain IEP, documented the student's fatigue and alertness level. Regarding speech-language therapy, the iBrain IEP stated that the use of session time was dependent on the goals targeted and the student's state of alertness and physical comfort and that on a typical day session time was spent achieving optimal positioning, providing frequent breaks between activities to maintain attention and alertness, providing increased response time, and intermittently incorporating regulation techniques to the student to calm if he became upset of involuntary movements began to impact on his ability to participate (Parent Ex. C at pp. 2-3). The iBrain IEP noted that the student benefitted from "necessary" redirection strategies to keep him on task (id. at p. 3).

With respect to OT, the iBrain IEP stated that the student continued to work on developing sustained attention for academic tasks and that when fatigued he did better with increased cues for focus (Parent Ex. C at p. 8). The March 2019 classroom observation indicated that the student could be tired during OT sessions and that once in a while "doze[d]" for a minute of two (Dist. Ex. 5 at pp. 2, 3). In the area of PT, the iBrain IEP noted that on his best days the student was "very alert" and engaged with the therapist throughout the 60-minute session, yet on typical days the student required more prompting to remain engaged and required more time to process motor prompts, and that on the most challenging days the student seemed distressed, even cried, and that he was able to participate in the session with more frequent rest breaks and with calming techniques (Parent Ex. C at p. 9). The iBrain IEP further stated that the student's braces were "doffed for preparatory work" on a mat or therapy ball/bolster which could take an extended time of up to 30 minutes due to the student's joint and muscle tightness and contractures and that the student fatigued quickly while working in anti-gravity positions and required increased time to perform multiple repetitions of a task for motor learning (id.).

While the CSE's determination departs from the opinion of iBrain and the parent, the hearing record provides a basis for the district's concerns about the student's ability to benefit from related service sessions longer than 30-minutes.

Next, as to the parent's argument that the iBrain program and goals were developed for the student based on his receiving 60-minute related service sessions (Answer at p. 6), a determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8

NYCRR 200.4[d][2][iii]). To hold otherwise would suggest that CSEs or CPSEs should pre-select an educational setting on the continuum of alternative placements and/or related services and then draft annual goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010] [stating, among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the [LRE]" [emphasis added], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf).

Finally, insofar as the parent faults the district for not matching the program iBrain provided with 60-minute related services sessions as part of an extended school day that runs from 8:30 a.m to 5:00 p.m. (Parent Exs. L at p. 1; O at pp. 1-2), as noted above, the CSE was not required to duplicate the program at the unilateral placement, and, further, the IDEA ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132 [citations omitted], quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989]; 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).

Based on the above, and in particular due to the student's documented difficulties with fatigue and alertness levels and his need for breaks, the hearing record supports a conclusion that the 30-minute therapy sessions as recommended in the student's June 2019 IEP were appropriate for the student and designed to allow him to make progress towards his annual goals.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's determination that the district failed to offer the student a FAPE for the 2019-20 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether iBrain was an appropriate unilateral placement for the student or whether equitable considerations support the parent's request for relief (Burlington, 471 U.S. at 370).

I have considered the parties' remaining contentions and find they need not be addressed in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated December 1, 2020, is modified by reversing that portion which found that the district failed to offer the student a FAPE and ordered the district to fund the costs of the student's tuition at iBrain for the 2019-20 school year.

Dated: **Albany, New York**
February 10, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER