The University of the State of New York

The State Education Department
State Review Officer
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No. 21-082

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 Hae Jin Liu, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondents, by Nicholas A. Marricco, 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 respondents' (the parents') son and ordered it to directly fund the cost of the student's tuition at the International Institute for the Brain (iBrain) for the 2018-19 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

As discussed below, the student has been the subject of prior administrative proceedings. For the 2018-19 school year, the parents unilaterally enrolled the student at the International Institute for the Brain (iBrain), a nonpublic school (Parent Exs. E; N).[1] Prior to the student attending iBrain, he attended an approved nonpublic program from approximately kindergarten

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

until he enrolled in the International Academy of Hope (iHope) for the 2016-17 school year (see Tr. pp. 469-70; Parent Ex. I).

The student has a complex medical history resulting from an acquired brain injury that significantly impacts his cognitive, academic, fine motor, gross motor, pragmatic, social/emotional, daily living, and speech-language skills (see Parent Exs. D at p. 1; J; S). Additionally, the student has received several diagnoses including seizure disorder and cortical vision impairment (CVI) (Parent Exs. D at p. 1; W at p. 6).

On February 28, 2018, the district sent the parents a notice of a CSE meeting scheduled for March 7, 2018 at 10:00 a.m. (Dist. Ex. 9). The district sent a second notice to the parents, also dated February 28, 2018, updating the names and titles of the persons attending the meeting and included the student (Dist. Ex. 10). The district sent another updated meeting notice on February 28, 2018, changing the time of the CSE meeting to 1:00 p.m. on the same date (Dist. Ex. 11). On March 1, 2018, the district sent another CSE meeting notice changing the names and titles of the persons attending the meeting and removing the student from the list of attendees (Dist. Ex. 12).

The CSE convened on March 7, 2018, to develop the student's IEP for the 2018-19 school year (Dist. Ex. 1 at pp. 20, 23). Finding the student was eligible for special education as a student with multiple disabilities, the CSE recommended a 12-month program in a 12:1+(3:1) special class placement together with four 40-minute sessions of individual occupational therapy (OT) per week, five 40-minute sessions of individual physical therapy (PT) per week, five 40-minute sessions of individual speech-language therapy per week, and three 40-minute sessions of individual vision education services per week (id. at pp. 20-21, 23). The CSE also recommended full time 1:1 paraprofessional services for health and transportation (id. at p. 20). In addition, the CSE recommended one 60-minute session per month of parent counseling and training (id.).

In a letter dated May 4, 2018, to the district, the parents requested a reconvene of the CSE to discuss the student's IEPs for the 2017-18 and 2018-19 school years (Parent Ex. M at p. 1).[2] The parents expressed concern about the manner in which the March 2018 CSE meeting was conducted and opined that the CSE had relied upon an improperly developed IEP from the 2017-18 school year to develop the student's IEP for the 2018-19 school year, noting that the prior IEP had been invalidated by a previous IHO Decision (id. at p. 1).[3] In particular, the parents objected to the conduct of the district's supervising school psychologist and requested that she not be permitted to participate in a reconvene of the CSE meeting (id. at pp. 1-2). Additionally, the parents requested the reconvened meeting include the in person participation of a parent member and a district school physician (id.). The parents further requested that the student's special education teacher and related service providers be included on the meeting notice and that the meeting take place at iHope (id. at p. 2). Finally, the parents requested that the CSE consider a

[2] In the May 2018 letter, the parents asserted that an IHO decision resulting from an impartial hearing concerning the 2017-18 school year directed the district to reconvene a CSE to address the student's 2017-18 school year IEP (Parent Ex. M at p. 1).

[3] This letter also appears in the hearing record as an email attachment sent to the district on May 4, 2018 (Dist. Ex. 15).

placement at a nonpublic school and to conduct the necessary evaluations for such consideration prior to scheduling the meeting (id.).

The district responded in a prior written notice dated May 14, 2018, which indicated that the parents' request to reconvene the CSE was refused for the following reasons: the CSE meeting, held on March 7, 2018, was duly constituted; the March 2018 CSE had reviewed and considered all updated information at that time including the iHope IEP for the 2018-19 school year; the parents had participated in this meeting and their concerns were listed under "Parent Concerns of the IEP"; the parents had signed indicating they received the document; the CSE had reviewed the March 1, 2018 IEP meeting notice, the recommended 2018-19 iHope IEP, March 2018 IEP meeting minutes, and the May 2017 psychoeducational evaluation and there was no updated information for consideration at that time (Dist. Ex. 13 at pp. 1-2).

In June 2018, the parents entered into an enrollment contract with iBrain for the student to attend iBrain for the 2018-19 school year (Parent Ex. E at pp. 1-6). In a letter dated June 21, 2018, the parents notified the district that they believed the district had not conducted an annual review meeting for the student because it had not reconvened a full committee including the district physician (Parent Ex. N at p. 1). The parents reiterated their request to reconvene the CSE at a mutually agreeable date and indicated that they intended to unilaterally place the student at iBrain for the 2018-19 school year and would seek public funding for that placement (id.).[4]

A. Due Process Complaint Notice

By due process complaint notice dated July 9, 2018, the parents asserted that the student was denied a free appropriate public education (FAPE) for the 2018-19 school year and generally contended that the district committed "several substantive and procedural errors under the IDEA and state law while developing the IEP" dated March 7, 2018 (Parent Ex. A at p. 2).[5] The parents argued that the district impeded the student's right to a FAPE and significantly impeded their opportunity to participate in the decision-making process (id.).

Specifically, the parents asserted that the CSE was not properly composed, as the district did not comply with their request for a full committee meeting and failed to hold the meeting at a mutually agreeable time (Parent Ex A at p. 2). The parents argued that the district failed to develop an appropriate IEP as the CSE only "feigned interest in the independent evaluations and reports" provided by the parents (id.). Also, the parents alleged that the district failed to consider their May 4, 2018, request to reconvene the CSE (id.).

[4] iBrain created an IEP for the student for the 2018-19 school year on February 11, 2019 and recommended a 6:1:1 special class placement with five 60-minute sessions of individual PT per week, four 60-minute sessions of individual OT per week, three 60-minute sessions of individual vision education services per week, two 60-minute sessions of individual hearing education services per week, and five 60-minute sessions of individual speech-language therapy per week (Parent Ex. D at pp. 1, 49). The iBrain IEP also reflected recommendations that the student receive 12-month services and the services of a full-time 1:1 paraprofessional (id. at p. 50).

[5] The parents requested an order of pendency that directed the district to "prospectively pay for the student's [f]ull [t]uition at iBrain" (Parent Ex. A at pp. 1-2).

Next, the parents argued that the proposed March 2018 IEP would "expose [the student] to substantial regression due to the significant and unsubstantiated reduction in the related services mandates and student-to-teacher ratio of the recommended class size" (Parent Ex. A at p. 2). Additionally, the parents asserted that the IEP was "not the product of any individualized assessment of all" of the student's needs and would "not confer any meaningful educational benefit for" the 2018-19 school year (id.).

Further, the parents contended that the March 2018 IEP was inappropriate, as it did not properly classify the student as having a traumatic brain injury (TBI) and inadequately described the student's present levels of performance, as well as management needs (Parent Ex. A at pp. 2-3). Moreover, the parents alleged that the IEP annual goals were immeasurable (id. at p. 3). Regarding the CSE's recommendations, the parents asserted that the district failed to offer the student "an appropriate school program and placement that meets [the student's] highly intensive management needs," which required "a high degree of individualized attention and intervention" (id.). The parents contended that the district's recommended program was not in the least restrictive environment (LRE) (id.). They argued that the recommended class ratio of 12:1+(3:1) was insufficient to address the student's needs and too large "to ensure the constant 1:1 support and monitoring [the student] require[d] in order to remain safe" (id.). The parents also asserted that the district's recommended program did not offer the student an extended school day, which they opined was necessary to implement the student's related services (id.) For relief, the parents requested direct payment to iBrain for the costs of the student's program and placement for the 2018-19 school year, including the cost of transportation and a 1:1 travel aide (id.). Lastly, the parents requested that the CSE reconvene to reconsider the recommendations made at the student's annual review (id.).

B. Procedural History Subsequent to Due Process Complaint Notice

The parties proceeded to an impartial hearing and after two hearing dates an IHO (IHO 1) rendered an order on pendency (see Tr. pp. 1-60; see also Parent Ex. B1). In the October 3, 2018, interim order, IHO 1 held that the student was entitled to pendency at iBrain because the student's program at iBrain for the 2018-19 school year was substantially similar to his 2017-18 program at iHope (Parent Ex. B1 at p. 3). The district appealed IHO 1's order on pendency and the order on pendency was overturned by an SRO in a decision dated December 31, 2018 (Application of the Dep't of Educ., Appeal No. 18-127). In that decision, an SRO held that, although substantial similarity was the correct standard to apply, the programs at iBrain and iHope were not substantially similar (id.). More specifically, the decision noted that the lack of vision services at iBrain resulted in a change of placement; however, the decision also noted that in the event iBrain began providing the student with vision services, the issue of pendency could be revisited (id.). According to that decision, the student's then-current placement for the purposes of pendency was the placement offered by iHope for the 2017-18 school year (id.). The parents appealed from the decision in Application of the Dep't of Educ., Appeal No. 18-127 to district court. In the interim, the Second Circuit rendered a decision, which is now controlling authority regarding the application of the substantial similarity test used by IHO 1 and the prior SRO (see Ventura de Paulino v. New York City Dep't of Educ., 2020 WL 2516650 [2d Cir. May 18, 2020]). In the decision, the Second Circuit held that parents are not entitled to pendency after they unilaterally place their child in a new school regardless of whether the programs are substantially similar (id. at *3, *12). Specifically, the Second Circuit held that parents cannot determine a student's

pendency placement and should parents unilaterally move a student from the agreed pendency placement, they do so at their own financial risk (id. at *11).

The parties proceeded to an impartial hearing on the merits of the claims raised in the due process complaint notice on July 24, 2019, in front of a second IHO (IHO 2) and the hearing concluded after three hearing dates on December 11, 2019 (Tr. pp. 61-228).[6] In a decision dated March 15, 2020, IHO 2 found that the October 2018 pendency order rendered the matter moot (IHO 2 Decision at pp. 15-16). IHO 2 indicated that the October 2018 pendency order granted the parents' request for pendency and although the SRO's decision modified the pendency decision, it did not change the relief awarded to the parents (id. at p. 4). IHO 2 held that due to IHO 1's October 2018 order on pendency, the matter was "effectively moot, because the Parent is entitled to, and must receive, all of the money that she was awarded under" the pendency order (id. at p. 5). Specifically, IHO 2 determined that the pendency order granted the parent "all of the relief she sought at the impartial hearing," in that "regardless of the merits of a decision concerning whether the [district] offered the student a FAPE for the 2018-2019 school year, no further meaningful relief may be granted to the Parent because she is entitled to all of the relief sought pursuant to 'pendency,' and thus, the Parent's case has now been rendered moot" (id.). IHO 2 held that there was "no longer any live controversy relating to the parties' dispute over the placement or program offered by the [district] for the 2018-2019 school year" because a determination that the district did not offer the student a FAPE for that school year "would have no actual effect on the parties because the 2018-2019 school year expired" (id. at p. 10). Finally, IHO 2 determined that the matter was not capable of repetition and would not evade review (id. at pp. 13-14).[7]

The parents appealed and the district cross-appealed IHO 2's determination that the matter was moot. In Application of a Student with a Disability, Appeal No. 20-068, an SRO found that IHO 2 erred by finding that the parents had received all of their requested relief by operation of pendency and further erred by determining that the matter was moot. The SRO remanded the matter for an impartial hearing on the merits, noting that the hearing record was insufficient to determine whether the district offered the student a FAPE for the 2018-19 school year, whether iBrain was an appropriate unilateral placement for the 2018-19 school year, and whether equitable considerations favored reimbursement.

The SRO further instructed that on remand, the IHO should determine whether additional evidence was required in order to make the necessary findings of fact and of law relative to the parents' claims and/or whether the parties should submit further evidence to otherwise fully develop the hearing record. Additionally, the SRO counseled that the IHO on remand may find it

[6] The December 11, 2019 hearing date was set for the parents to present their case; however, following the opening statement made by the parents' attorney, IHO 2 rendered a decision on the record and ended the hearing without the parents calling any witnesses (Tr. pp. 219-230).

[7] IHO 2 also ordered the district to "immediately re-evaluate the student in all areas of his suspected disabilities not evaluated within the last two years" and ordered the district upon completion of the evaluations to reconvene and produce a new IEP for the student for the 2020-21 school year (IHO 2 Decision at p. 16).

appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues to be resolved (see 8 NYCRR 200.5[j][3][xi][a]).[8]

C. Impartial Hearing Officer Decision and Procedural History Following Remand

Following remand, the parties participated in a prehearing conference on July 23, 2020, and the parties submitted letter briefs on July 31, 2020, regarding the issue of the scope of the impartial hearing (see Tr. pp. 238-279; IHO Ex. III at p. 3).[9] In an interim decision dated September 10, 2020, the IHO (IHO 3) determined that the parents' due process complaint notice challenged the reduction in the duration of related services and therefore included a claim for the failure to recommend assistive technology (IHO Ex. III at p. 5). IHO 3 further determined that the parents' due process complaint notice did not include a claim for the failure to recommend a 1:1 nurse but did include claims "related to the need for a 1:1 paraprofessional or aide for health management supported by daily individual nursing services" as needed (id. at p. 7). The parties reconvened on September 10, 2020 for a status conference and the impartial hearing began on September 14, 2020, and concluded on September 23, 2020, after two days of proceedings (see Tr. pp. 280-514). Post-hearing briefs were submitted on November 9, 2020 (IHO Exs. I; II). In a decision dated February 17, 2021, IHO 3 declined to make a pendency finding for the 2018-19 school year and determined that the district denied the student a FAPE for the 2018-19 school year on several grounds (IHO 3 Decision at pp. 15, 16-34).[10]

IHO 3 found that the March 2018 IEP and the school placement recommended for the 2018-19 school year were not appropriate (IHO 3 Decision at p. 15). IHO 3 determined that the

[8] The SRO noted that it was clear from the district's answer with cross-appeal and the parents' answer to the cross-appeal in Application of a Student with a Disability, Appeal No. 20-068, that there was a dispute as to the scope of the impartial hearing relative to what issues were properly raised by the parents in the due process complaint notice and relative to whether the district opened the door to additional issues when presenting its case. The SRO stated that on remand, the IHO was strongly encouraged to conduct a prehearing conference for the purpose of identifying agreed upon facts between the parties and to narrow the issues that remained outstanding (8 NYCRR 200.5[j][3][xi]).

[9] The parties' letter briefs were not initially submitted with the hearing record. The district subsequently provided them and certified the hearing record accordingly.

[10] The hearing record indicates that post-hearing briefs were filed in November 2020 (IHO Exs. I; II). IHO 3 identified November 17, 2020 as the record close date and issued her decision 61 days after the stated record close date on February 17, 2021 (see IHO 3 Decision at pp. 1, 45). The final case extension indicated the purpose was for post-hearing briefs, extended IHO 3's time to render her decision to February 17, 2021 and reflected that there was "no harm to child." It is unclear from the hearing record why IHO 3 granted any extensions after the parties submitted their post-hearing briefs. While an IHO determines when the record is closed, guidance from the State Education Department's Office of Special Education explains that "[a] record is closed when all post-hearing submissions are received by the IHO" and that "[o]nce a record is closed, there may be no further extensions to the hearing timelines. . . . [and] the decision must be rendered and mailed no later than 14 days from the date the IHO closes the record" ("Requirements Related to Special Education Impartial Hearings," at p. 5, Office of Special Educ. [Sept. 2017], available at http://www.p12.nysed.gov/specialed/publications/2017-memos/documents/requirements-impartial-hearings-september-2017.pdf; see 8 NYCRR 200.5[j][5][iii]). Additionally, the reasons stated by IHO 3 for extending the decision timeline appear to be unrelated to the actual circumstances of this matter or to consideration of the cumulative impact of the factors set forth in State regulation (i.e., effect on student's "educational interest or well-being," the parties' opportunity to present their cases, "any adverse financial or other detrimental consequences" to a party, and any delay in the proceeding thus far) (8 NCYRR 200.5[j][5][ii]).

parents were denied meaningful participation in the development of the program and placement and that the district predetermined the student's program by recommending the same program that was invalidated by a March 5, 2018 prior unappealed IHO decision ("March 5, 2018 IHO decision") (id. at pp. 16-19). IHO 3 further found that the district's "failure to truly use the [March 5, 2018 IHO decision] as an evaluative tool to assess [the student's] needs impeded the student's right to a [FAPE]" (id. at p. 19). IHO 3 opined that the testimony of the district's school psychologist was inconsistent, unreliable and not credible "regarding critical issues" related to the offer of a FAPE to the student (id. at p. 20). IHO 3 determined that the CSE's failure to reconvene at the parents' request resulted in a denial of a FAPE (id. at pp. 23, 24-25). Next IHO 3 found that the omission of assistive technology and health services denied the student a FAPE (id. at pp. 25-26, 28, 31). IHO 3 also determined that the program and placements recommended by the March 2018 CSE were inappropriate and denied the student a FAPE (id. at pp. 26-34). IHO 3 found that the district failed to explain the reduction in the duration of related services, failed to consider the student's highly intensive management needs, failed to explain how the goals created by iHope would be implemented at the district's recommended assigned school site, and improperly changed the student's classification (id.). IHO 3 determined that each of these failures denied the student a FAPE (id.). Regarding the scope of the impartial hearing, IHO 3 determined that any issues regarding the appropriateness of the public school the student was assigned to attend were within the scope of the proceeding (id. at p. 34). IHO 3 also stated that the parents were not required to specify how an assigned school site was deficient in meeting the student's needs in their due process complaint notice (id.). In addition, IHO 3 found that the district opened the door to the student's mother's testimony about what she observed at the assigned school (id.). The IHO then found that the assigned school was not appropriate for the student (id.).

Next, regarding the parents' unilateral placement at iBrain, IHO 3 found that the program was appropriate and sufficiently tailored to the student's needs, and the staffing issues at the start of the school year and the student's limited progress at iBrain did not render iBrain inappropriate (IHO 3 Decision at pp. 35-42). IHO 3 also found that the student's transportation services were appropriate and that the "IDEA does not obligate parents to show need for direct payment" with respect to tuition for iBrain (id. at pp. 40-41). Lastly, IHO 3 found that equitable considerations favored the parents (id. at pp. 42-43). IHO 3 ordered the district to pay full tuition and all related services for the 12-month 2018-19 school year less the cost of 1:1 nursing services (id. 44-45). IHO 3 further ordered the district to pay the student's full transportation costs and to immediately reconvene the CSE and include the district physician in a meeting to determine the student's classification for the 2018-19 school year (id. at p. 45).

After IHO 3 rendered her decision in this matter, the district court issued its decision in the parents' appeal of the student's pendency (Cohen v. New York City Dep't of Educ., 2021 WL 1198565 [S.D.N.Y. Mar. 30, 2021]). Consistent with the Second Circuit's ruling in Ventura de Paulino, the district court found that the SRO, in Application of the Dep't of Educ., Appeal No. 18-127, erred in her application of the substantial similarity standard but found the SRO correctly determined that the parents were not entitled to pendency at iBrain (Cohen, 2021 WL 1198565 *3, *4-*5).

IV. Appeal for State-Level Review

The district appeals and argues that IHO 3 erred by finding that it did not offer the student a FAPE for the 2018-19 school year, by finding iBrain was an appropriate unilateral placement, and by finding that equitable considerations favored the parents. The district also requests reversal of IHO 3's award of direct payment of tuition and transportation costs to iBrain and of IHO 3's order directing the CSE to reconvene to develop an IEP for the 2018-19 school year.[11] Initially, the district contends that IHO 3 erred by finding the district failed to offer the student a FAPE for the 2018-19 school year on grounds the parents had not raised in the due process complaint notice. The district argues that IHO 3 incorrectly found that the district impeded the parents' ability to participate in the development of the student's IEP based on the district's failure to use the March 5, 2018 IHO decision concerning the 2017-18 school year as an evaluative tool. The district further argues that the March 5, 2018 IHO decision pertained to the 2017-18 school year and whether or not the district implemented the March 5, 2018 IHO decision was not relevant to the 2018-19 school year. The district contends that IHO 3's attempt to "effectuate" the March 5, 2018 IHO decision in this matter exceeded her authority as an IHO because she lacked the power to enforce a prior administrative order. The district also challenges IHO 3's determination that the student was denied a FAPE based on the CSE's failure to classify the student as having a traumatic brain injury, failure to recommend a 6:1+1 special class, and failure to recommend related services with a duration of 60 minutes for each session. The district also contends that IHO 3's credibility determinations regarding the testimony of the district school psychologist should be overturned as this witness appeared before IHO 2 and IHO 3 did not personally observe the witness' demeanor or hear her live testimony and because the witness did not lie during her testimony. The district also contends that IHO 3 erred by finding that a member of the CSE who allegedly behaved unprofessionally during the CSE meeting impeded the parents' participation in the development of the IEP and by finding that the CSE predetermined the recommendations set forth on the student's IEP. The district alleges that these findings were unsupported by the hearing record.

Next, the district argues that the student was not denied a FAPE as a result of the district's failure to reconvene the CSE at the request of the parents because there was no evidence that the student's needs had changed in the months since the student's annual review.

Regarding IHO 3's findings related to inadequate recommendations for assistive technology and health or school nursing needs, the district asserts that these claims were not raised in the parents' due process complaint notice. Additionally, the district alleges that IHO 3 also erred by finding the district's assigned school site was not appropriate based on grounds not raised in the due process complaint notice and that IHO 3 incorrectly determined that the district opened the door to these issues. The district further argues that IHO 3 erred as a matter of law because IHO 3's findings were not based on the assigned school site's capacity to implement the student's IEP.

[11] As there does not appear in the parties' arguments on appeal or in the hearing record to be any benefit in having the CSE reconvene to develop or amend an IEP developed for the 2018-19 school year, a school year that concluded almost two years ago, the portion of the IHO's decision that directed the CSE to reconvene and "make an appropriate determination as to the Student's disability classification for the 2018 -2019 school year" will be reversed without further discussion.

Concerning the appropriateness of iBrain, the district alleges that IHO 3 erred by finding the parents' unilateral placement was appropriate. The district argues that iBrain did not immediately implement the student's program and did not have a vision provider or social worker on staff when the school opened. The district also contends that the purpose of extended school hours at iBrain was to maximize the student's potential and that the amount of tuition should be reduced by two and one-half hours per day. Next, the district challenges IHO 3's award of direct payment to iBrain in the absence of evidence of the parents' inability to pay tuition. The district also asserts that equitable considerations favored the district and that IHO 3 erred by finding the district acted in bad faith. The district further contends that the issue of the student's classification became moot at the end of the school year and that it is not necessary for the CSE to reconvene as the parents have already challenged the recommendations for the 2019-20 and 2020-21 school years. As relief, the district requests that IHO 3's decision be reversed and requests a finding that the district offered the student a FAPE for the 2018-19 school year. In an answer, the parents respond to the district's allegations and argue that IHO 3 properly found that the district denied the student a FAPE for the 2018-19 school year, properly found that iBrain was an appropriate unilateral placement, and properly found that equitable considerations favored the parents. The parents argue that IHO 3 did not address claims that were not raised in the parents' due process complaint notice. The parents also allege that the March 5, 2018 IHO decision was to serve as a roadmap for the CSE moving forward and the district should be precluded from arguing that the decision was irrelevant because it was cited in the student's IEP. The parents further argue that the district did not object to questions about the implementation of the March 5, 2018 IHO decision. The parents assert that IHO 3 correctly found that the district denied the student a FAPE by failing to properly classify the student, failing to consider the student's highly intensive management needs and recommending an inappropriate class size, and by reducing the duration of the student's related services. The parents contend that IHO 3 correctly found that a member of the CSE behaved unprofessionally and that the district's failure to reconvene the CSE denied the student a FAPE. The parents also assert that IHO 3 correctly found that the district failed to recommend an assistive technology device and a Rifton chair and that the district's assigned school site was not appropriate. Next, the parents contend that IHO 3 correctly determined that iBrain was an appropriate unilateral placement and that the district conceded this by challenging iBrain's extended school day. The parents also assert that they were not required to demonstrate financial hardship in order to receive an award of direct payment of tuition and transportation costs. Lastly, the parents argue that IHO 3 correctly determined that equitable considerations were in their favor and that IHO 3's decision should be upheld in its entirety.

In a reply, the district argues that the parents' answer does not comply with relevant State regulations and, therefore, the answer and the parents' memorandum of law should not be considered. The district contends that the parents' answer exceeds the page limitation and should be rejected. Next, the district argues that the parents' claim that the district failed to issue proper meeting notices should be disregarded because the parents did not cross-appeal IHO 3's finding.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

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

2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[12]

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 IHO 3 incorrectly addressed issues that were not raised by the parents in their due process complaint notice. In an interim order, IHO 3 determined that the parents' due process complaint notice could be read to include claims related to the failure to recommend assistive technology and claims related to the need for a 1:1 paraprofessional or aide

[12] 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).

for health management supported by daily individual nursing services but did not include a claim related to the failure to recommend a 1:1 nurse (IHO Ex. III at p. 7; see Tr. pp. 282-87). The district argues that IHO 3 erred by allowing these claims and further erred by addressing claims related to the district's proposed assigned school sites in her final decision. The district further contends that it did not open the door to these allegations. The parents contend that IHO 3 properly determined these issues were within the scope of the impartial hearing.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (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 parents' due process complaint notice does not include any specific allegations related to the district's capacity to implement the student's IEP at the proposed assigned school sites, health or school nursing needs, or assistive technology (see Parent Ex. A).

The parents' due process complaint notice does include an allegation that the recommended 12:1+(3:1) special class was "too large a ratio to ensure the constant 1: 1 support and monitoring [the student] require[d] in order to remain safe" (Parent Ex. A at p. 3). However, as asserted by the district, the March 2018 IEP recommended a full-time health paraprofessional, including consultation with the school nurse and monitoring of the student's medical needs (Dist. Ex. 1 at pp. 19, 20). Accordingly, given the narrow allegation raised in the due process complaint notice regarding the student's health and safety, and considering that the recommendations contained in the IEP directly addressed that allegation, the IHO's finding that "the lack of reference to the existence of related health services or school nursing needs [wa]s a denial of FAPE" appears to be outside the scope of the impartial hearing.

Additionally, in Application of a Student with a Disability, Appeal No. 20-068, the SRO remanded this matter for an impartial hearing on the merits and directed the IHO who would hear the case (IHO 3) to determine if additional evidence was required to fully develop the hearing record. The SRO also encouraged IHO 3 to conduct a prehearing conference to identify agreed upon facts and to narrow the issues. Although IHO 3 admitted additional evidence and held a prehearing conference regarding the scope of the impartial hearing, IHO 3 did not identify agreed upon facts or narrow the issues; rather, it appears she permitted additional disputed facts to be raised and expanded the scope of the impartial hearing. There is no indication in the hearing record that the parents sought to amend the due process complaint notice during the prehearing conference, status conference or 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 subject of a 1:1 nurse or nursing services and assistive technology was first addressed during the impartial hearing as part of the parents' attorney's cross-examination of the district witnesses. Specifically, during cross-examination the parents' attorney questioned the district's parent coordinator with respect to the number of students utilizing assistive technology at one of the district's proposed assigned school sites (Tr. p. 107). The parents' attorney also questioned the district's school psychologist on whether or not she knew if the student utilized assistive technology and whether the district recommended assistive technology for the student on the March 2018 IEP (Tr. pp. 180-81). Assistive technology was also discussed during the parents' case in chief during direct testimony and during cross-examination by the district's attorney (Tr. pp. 345, 350, 387-92, 421).

Regarding claims related to the district's proposed assigned school sites, IHO 3 stated "any issues regarding the appropriateness of the placement of the student at [an assigned school site] are within the scope of review (id. at p. 34). IHO 3 also stated that the parents were not required to specify how an assigned school site was deficient in meeting the student's needs in their due process complaint notice (id.). The parents' due process complaint notice alleged that the district's CSE committed several substantive and procedural errors of the IDEA and State law while developing the March 2018 IEP "and subsequent placement recommendations… in a 12:1+(3:1) classroom, both of which my client reject in their entirety" (Parent Ex. A at p. 2). The due process complaint notice further alleges that the district failed to offer an appropriate program and placement and that the recommended placement was not in the student's least restrictive environment (id. at p. 3). Contrary to IHO 3's statement in her decision, parents are required to state all of the alleged deficiencies in the IEP in their initial due process complaint notice 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). Accordingly, this issue was raised for the first time on appeal and is outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO

. . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]).

As IHO 3 made a determination on this issue notwithstanding the fact that the parents' due process complaint notice did not include this claim, the next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education, (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [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, *9 [S.D.N.Y. Aug. 5, 2013]).

The district offered testimony from the parent coordinator of one of the proposed assigned school sites (Tr. pp. 98-111). The district's parent coordinator testified that she provided a tour to the student's mother on July 9, 2018, and discussed the assigned school site with the student's mother (Tr. pp. 102-03). The parent coordinator testified that she told the parent that the student could be enrolled at any time and that the assigned school site had an available seat for the student (Tr. pp. 103-04). Accordingly, the hearing record demonstrates that the district did not open the door to any specific challenges to the assigned school sites (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9).

In addition to improperly addressing claims not raised in the due process complaint notice, IHO 3 did not apply the correct legal standard in finding that the two proposed assigned school sites were inappropriate and resulted in a denial of a FAPE to the student as the IHO's finding was solely based on the parent coordinator not providing information about the appropriateness of the assigned school site (IHO 3 Decision at pp. 32-33).

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y., 584 F.3d at 419; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O., 793 F.3d at 244; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Permissible prospective challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally,

the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 222 F. Supp. 3d 326, 338 [S.D.N.Y. 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Reviewing the parents' due process complaint notice in light of the foregoing, the parents did not allege any prospective, non-speculative challenges to the district's capacity to implement the March 2018 IEP at any of the proposed assigned school sites (see Parent Ex. A). As a result, the district's burden to present testimony about the capacity of its proposed assigned school sites to implement every aspect of the March 2018 IEP was never triggered (see J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [finding that a district did not have a burden to produce evidence demonstrating the adequacy of the assigned public school site absent non-speculative allegations about the school's ability to implement the IEP]; N.K., 2016 WL 590234, at *6 [noting that "[t]o be a cognizable claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP"]; see also M.B. v New York City Dep't of Educ., 2017 WL 384352, at *6 [S.D.N.Y. Jan. 25, 2017] [noting that the parent in that matter did "not allege that the placement school did not have the ability to satisfy the IEP" but instead sought "to require the District to prove in advance that it w[ould] properly implement the IEP," which "M.O. does not require"]).

Based on the foregoing, IHO 3 erred by addressing claims related to the failure to recommend assistive technology, claims related to the need for a 1:1 paraprofessional or aide for health management supported by daily individual nursing services, and claims related to the assigned school sites.

B. March 2018 IEP - Duration of Related Services

Turning to the parents' specific challenges to the March 2018 CSE's recommendations, the parents asserted that the March 2018 IEP would expose the student "to substantial regression due to the significant and unsubstantiated reduction in the related services mandates" (Parent Ex. A at p. 2). IHO 3 found that the district failed to explain the recommendation to reduce the student's related services from 60-minute sessions to 40-minute sessions (IHO 3 Decision at p. 28). The district argues that the student was not able "to sit for 60 minute [sic] sessions" (Req. for Rev. ¶ 9). Review of the evidence in the hearing record supports IHO 3's determination.

As noted above, a CSE convened on March 7, 2018, to conduct the student's annual review for the student's 2018-19 school year (Dist. Exs. 1 at pp. 20, 23; 2 at p. 1). According to the district school psychologist, who also served as the district representative during the March 7, 2018 CSE meeting, the CSE reviewed a social history report, a May 2017 psychoeducational evaluation report, a December 2017 classroom observation, and an iHope progress report (Tr. pp. 114, 136; Dist. Exs. 1 at p. 26; 5; 6; 8). She further explained that the CSE used the information contained in the iHope progress report regarding the student's speech-language, vision, special education, feeding, oral motor, eye condition and acuity, and PT progress (Tr. pp. 136-37). The March 2018 CSE found the student continued to be eligible for special education and related services as a student with multiple disabilities and recommended a 12-month program in a 12:1+(3:1) special class placement together with four 40-minute sessions of individual occupational therapy (OT) per week, five 40-minute sessions of individual physical therapy (PT) per week, five 40-minute sessions of individual speech-language therapy per week, and three 40-minute sessions of individual vision education services per week (Dist. Ex. 1 at pp. 20-21, 23). In addition, the CSE recommended one 60-minute session per month of parent counseling and training (id.). Further, the March 2018 CSE recommended the student receive the services of a 1:1 full-time health paraprofessional daily and a 1:1 transportation paraprofessional daily, along with special transportation accommodations of a lift bus, air conditioning, travel time not more than 60 minutes and a wheelchair (id. at pp. 20, 23). Here the parties do not dispute that the student required the related services of OT, PT, speech-language therapy and vision education services to address his specific needs during the 2018-19 school year.

An IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" and includes speech-language therapy, PT, OT, including orientation and mobility services, parent counseling and training, school health services, school nurse services, assistive technology services, and other appropriate developmental or corrective support services (20 U.S.C. § 1401[26][A] [emphasis added]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]). State regulation provides that the CSE must base its recommendations for related services as well as the frequency, duration, and location of the provision of related services on the specific needs of a student with a disability and those recommendations must be set forth on the student's IEP (8 NYCRR 200.6[e][1]).

The hearing record shows that during the 2017-18 school year, while the student was at iHope, he received five 60-minute sessions per week each of individual PT and individual speech-language therapy, and three 60-minute sessions per week each of individual OT and individual vision education services (Parent Ex. C at p. 36).

When drafting the student's 2018-19 IEP, the March 2018 CSE relied heavily on the present levels of performance contained in the recommended iHope IEP for the 2018-19 school year such that the March 2018 IEP present levels of performance contained a majority of the iHope recommended IEP verbatim (compare Parent Ex. W at pp. 13-22 with Dist. Ex. 1 at pp. 2-7). A detailed discussion of the student's present levels of performance is provided as background for the substantive discussion of the March 2018 IEP related services recommendations.

With regard to academics, the March 2018 IEP present levels of academic performance indicated that the student had made progress in many academic areas including literacy and math; however, he continued to require constant redirection with maximal to moderate assistance in order to complete a task (Dist. Ex. 1 at p. 2). Additionally, the March 2018 IEP reflected that the student would benefit from addressing pre-literacy skills such as phonemic awareness using direct instruction and that the activities should capitalize on the student's strength of producing a variety of vocalizations (id. at p. 3). In math, the student was working on correctly identifying less/more in a field of two with prompting, and the IEP indicated that he would benefit from continued work on prerequisite skills (id.).

In the domain of communication, the March 2018 IEP reflected that the student would benefit from continued practice using one and two panel switches with fading prompts to improve his concept of cause and effect and make the connection between augmentative and alternative communication (AAC) devices and communication with others (Dist. Ex. 1 at p. 2). Additionally, the March 2018 IEP indicated that the student should be provided with tactile cues such as textural supports or three-dimensional object symbols when using a switch due to his visual impairment (id. at pp. 1-2). The March 2018 IEP further indicated that the student was beginning to learn simple sign language such as "hello", "goodbye," "yes," "no," and "milk," and recommended that those signs be implemented within his daily schedule for the purpose of repetition (id. at p. 2). Additionally, the March 2018 IEP indicated that the student was beginning to follow simple directives within familiar routines and activities with the use of hand over hand tactile sign language; however, he had difficulty understanding that symbols (e.g., signs, verbal words, and tactile signs) represent ideas and that it was difficult to determine how much the student understood verbally (id. at p. 3). According to the March 2018 IEP, the student communicated best through facial expression and body language, protested by pushing away objects he was not interested in or turning away from items of low appeal, and his ability to reach towards an object was emerging (id.). Finally, the IEP indicated that the student exhibited strengths in his ability to communicate his wants and needs and interact with others using vocalizations, gestures, and body movements (id.). The March 2018 IEP also indicated that access trials of AAC included using the student's hand, foot, knee, and head to access switches for low tech AAC systems; however, he was inconsistent with the use of switches as his primary means of communication (id.).

According to the present level of social development included on the March 2018 IEP, the student was described as a happy boy who interacted playfully and affectionately with preferred adults (Dist. Ex. 1 at p. 4). The IEP stated that while the student had improved in his ability to demonstrate appropriate social behaviors over the past year, he had difficulty initiating interactions with peers during group activities (id.). Additionally, he could take turns appropriately during morning meetings given the appropriate cues and supports by his paraprofessional or teacher (id.). When frustrated, it was reported that the student may continue to scream, cry, bite, or pinch himself and others; however, he was often soothed by being held, rocking in an adaptive chair, or by engaging in a sensory break involving being pushed back and forth in his wheelchair (id.). The March 2018 IEP reflected reports from the school that the student benefitted from a small group setting that allowed him to practice appropriate communication skills and increased the opportunity for socialization with same age peers (id.). Additionally, the student benefitted from a highly structured environment that had an adapted social skills program with continual adult supervision to meet his "very specific" needs and to teach and practice his strengths (id.).

With regard to feeding, the March 2018 IEP indicated that the student was bottle-fed for nutrition and was given a thin liquid consistency; however, based on professional observation, collaboration with team, and professional clinical opinion, the student was showing progression to drinking from a cup (Dist. Ex. 1 at p. 5). Additionally, the IEP reflected reports that the student was able to safely consume pureed soft solids with a spoon but required full physical prompting (id.). Furthermore, the student needed fleeting verbal prompts to close his mouth while managing liquids and foods due to losing food from his mouth throughout a meal and showing little to no awareness of such food loss (id.).

In the area of vision, the March 2018 IEP reflected that the student had a diagnosis of cortical visual impairment which impacted his ability to attend to, perceive, and remember what he saw (Dist. Ex. 1 at p. 5). Additionally, in order to construct meaning from his environment, the student needed to "deeply internalize what he [wa]s seeing so that he w[ould] be able to remember it and attend to it in the future" (id.). The March 2018 IEP included information on the condition of the student's eyes from his retina specialists detailing the student's retinal detachment and subsequent eye surgeries during the fall 2017 and winter 2018 due to glaucoma and cataracts (id.). The IEP indicated that due to glaucoma, the student exhibited sensitivity to light and did his best when seated properly in his wheelchair (id.). During vision education, the student was able to look at items in his left visual field for up to 45 seconds (id.). The student utilized his vision better when items were moved intermittently and presented individually from approximately one foot away (id.). The student could also attend to objects with more than one color such as balls and drums (id.). Finally, the March 2018 IEP noted that the student performed the looking and reaching skills as two separate actions and that he would typically look away before reaching (id.).

The March 2018 IEP present levels of performance in PT indicated that the student's overall muscle strength and range of motion had improved and he was able to: transition from sitting on the floor to standing with minimal assistance when support was given from the front with his hands held; follow simple commands from standing to sit on a bench under close supervision; maintain standing with contact guard assist for 15 minutes; ambulate 100 feet with moderate support at his trunk when facilitated with at least two rest periods; ambulate with partial weight bearing gait trainer taking four steps using his left and right extremity and alternate patterns with maximum assistance to steer the gait trainer; nod his head sometimes in response to questions; and follow one step commands (Dist. Ex. 1 at p. 5). The March 2018 IEP further indicated that the student continued to have difficulty taking consecutive steps with moderate assistance when facilitated at his trunk and that he continued to rock his body but maintained an upright sitting posture when siting in his personal wheelchair (id.).

The March 2018 IEP reflected that the student used a single switch placed on a table or tray on his left side to activate toys that provide auditory feedback such as a switch activated cause and effect toy, and noted that he enjoyed a drum, musical toy, or adaptive scissors (Dist. Ex. 1 at p. 6).[13] According to the IEP, the student benefitted from initial assistance to locate the switch before he reached for it to activate the toy he was interested in; however, he initially had difficulty with organization of the task and would slap or bang the switch repeatedly or became focused on

[13] This section of the student's IEP does not appear to be related to a specific related service; however, it is included verbatim from the 2018-19 recommended iHope IEP under the subheading "Assistive Technology" listed below the heading "Occupational Therapy" (compare Parent Ex. W at p. 16; with Dist. Ex. 1 at p. 6).

the cord connected to the switch (id.). The March 2018 IEP indicated that the student required maximum assistance for upper and lower body dressing; was beginning to work on doffing his own socks, shoes and jacket; held and drank from his bottle using his left hand with close supervision to prevent him from throwing the bottle; was working on placing the cup down when finished; and held a hair brush and toothbrush for short periods, but was "dependent to thoroughly perform the task" (id.). The IEP noted that he was working towards transitioning from a bottle to a cup (id.). Additional information about the student's gross motor skills repeated from the 2018-19 iHope IEP indicated that the student sat in ring sitting, tailored sitting, and bench sitting positions with close supervision; however, he was provided with minimal to moderate assistance to maintain these positions (e.g., moderate tactile cues or assist or a positioning wedge) depending on his levels of fatigue and motivation (compare Parent Ex. W at p. 17 with Dist. Ex. 1 at p. 6). Additionally, the March 2018 IEP indicated that he tolerated placement in a variety of developmental positions (e.g., prone over wedge and quadruped over peanut ball) without distress (Dist. Ex. 1 at p. 6). The student also tolerated weight bearing through bilateral upper extremities while over a peanut ball for several minutes with minimal assistance and demonstrated a decrease in tactile defensiveness holding a variety of objects made of different materials, allowing his hands under running water, engaging in "messy play activities" and allowing hand in hand tactile signs (id.).

The March 2018 IEP indicated that the student demonstrated the ability to roll over from supine to prone and back again over both sides but preferred to do it over the left side (Dist. Ex. 1 at p. 6). Additionally, he showed the ability to sit from supine using the momentum when lifting his pelvis and legs to sit when bringing his legs down and could maintain a sitting position on the floor independently (id.). Finally, when wearing ankle-foot orthotics, the student tolerated bearing weight on both feet for a few seconds in supported standing and had been able to initiate steps using the left foot when wearing knee immobilizers and to pedal an adaptive tricycle using the left foot (id.). Furthermore, the March 2018 IEP reflected reports from the school that the student demonstrated difficulty using his arms to push himself off the ground and to perform transitions; he did not show the ability to reach kneeling or standing positions independently or to maintain standing; he did not tolerate weight bearing on his feet when barefoot; he required maximal assistance to take steps with his right foot; and he showed difficulty with posture and postural control, balance, and coordination, and he showed decreased overall strength (id.). The IEP also indicated that the student functioned best with structured routines and intermittent sensory breaks and that he continued to work on developing sustained attention for academic tasks to be able to follow multi-step direction (id.). According to the March 2018 IEP, the student required maximal positioning to maintain trunk and extremity alignment in order to prevent deformity, contracture, or malalignment (id.).

With regard to play and leisure activities, the March 2018 IEP indicated that the student loved to listen to music and played instruments along to the rhythm of the music (Dist. Ex. 1 at p. 6). Additionally, the student participated in adapted sport activities such as bowling and basketball by pushing a ball that produced an auditory sound towards pins or into a hoop with minimal assistance and cueing (id.). The IEP noted that the student benefitted from being presented with all items and allowed to tactilely explore the objects before beginning an activity (id.).

The March 2018 IEP contained information from the May 2017 social history update which indicated that the student's health was reportedly stable and gave a detailed update regarding the

condition of his eyes, food and medication allergies, seizure disorder, hearing, feeding, and sleeping habits (Dist. Ex. 1 at p. 7).

The March 2018 IEP set forth a variety of medical and instructional management needs including that the student was fully dependent in all domains of mobility, required one-to-one assistance in feeding, activities of daily living (ADLs), and two-person assist to transfer; he had a seizure disorder and was on anticonvulsant medication which required close monitoring to prevent injury, aspiration, and to manage constipation issues; he needed to be in a setting with dim controllable lighting to minimize seizure episodes and to avoid identified seizure triggers and due to his sensitivity to light, the student worked best in darkened environments; he had asthma and required close monitoring to maintain patent airway and for prompt and effective management; he had drug and food allergies which required close monitoring to prevent accidental exposure to allergens and allergic reaction; he received nutrition, hydration, and medications by mouth which required close monitoring to prevent aspiration; he needed to be repositioned several times during the day to prevent skin breakdown and sores, and to maintain skin integrity; he required a wedge, pillows, or a therapy ball to aid in positional changes if not sitting in his adaptive stroller and used bilateral ankle-foot orthotics during weight bearing activities; he required minimal environmental noise to be able to focus on instructions and directions given to him; he required a full time paraprofessional to attend to his "significant, highly intensive needs, which required a high degree of individualized attention and intervention"; shields from visual and or sound distractors; a multi-modal approach for academic tasks; meaningful repetition of instruction; reinforcement of the use of consistent communication system across all instructional environments; and repetition provided and keyword support (Dist. Ex. 1 at p. 7). The IEP also indicated the student should be placed with his back to windows or light sources; he was visually attracted to lights and sounds; he used a tilt in space manual wheelchair as his primary means of mobility; he required frequent repositioning to avoid sliding forward and to maintain upright sitting posture; he required bilateral ankle-foot orthotics for weight bearing activity including walking, standing, and sitting; and he required assistance with personal grooming (hand washing, hair brushing, toothbrushing), adaptive feeding equipment, adaptive utensil grips, and switch based toys (id.).

The March 2018 IEP contained the results of the May 2017 psychological evaluation which indicated that because the student was unable to participate in standardized testing, the examiner used observation, a records review, and parent interview to "gain insight into [the student's] current levels of functioning across the areas of communication, daily living skills, socialization, and motor skills" (Dist. Ex. 1 at p. 1). The examiner reported that the student presented with significant global delays, required assistance and support in all areas of communication, activities of daily living and socialization, noting that across all areas assessed his abilities fell within the very low range (id.). Additionally, the examiner reported that the student required assistance with most of his self-care needs and that his gross motor skills were significantly delayed, but noted that his mother had reported that he had made some progress in strengthening his core (id.). The examiner described the student's fine motor skills, noting that he was able to reach for and grab objects within his field of vision but was not yet able to move an object from one hand to another; he could move an object from a box to another container; he could sometimes hand an object to a person; however, he was not yet able to mark on paper using a crayon, pen or pencil (id. at pp. 1-2).

The March 2018 IEP also included the results of a December 2017 classroom observation which took place during a vision therapy session (Dist. Ex. 1 at p. 2). The observer reported that

the student had gone to the nurse at the beginning of the session; however, once he returned, he worked on tracking a red pompom (id.). The student was observed to turn his head towards the object, track the object to the right and left, assist in putting the object away, and indicate "all done" (id.). The observer summarized that the student willingly participated in the activities that he liked and that overall, he appeared to be an engaging youngster who was well groomed (id.).

Turning to the substance of IHO 3's determination on this issue, in her decision, IHO 3 stated that the district failed to provide evidence or explain "how the goals created by iHope and implemented by iBrain [sic] an extended day program at a private school in a 6:1:1 classroom with 60-minute push-in pull out related services could be achieved through implementation in the [d]istrict's radically different recommended program" (IHO 3 Decision at p. 31). IHO 3 also stated that the director of special education at iBrain "convincingly explain[ed] how this would not be possible" (id.). To the extent IHO 3 compared the March 2018 CSE's recommendations to the program the student received at iBrain during the 2018-19 school year and relied on the testimony of the parents' witness, 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 notice, 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]).[14]

The district psychologist testified that she observed the student at iHope on December 13, 2017 for approximately 40 minutes (Tr. pp. 113-14, 116, 118, 120; see Dist. Ex. 5). According to the psychologist, she observed the student during vision education services and that the student had participated in two activities; however, the student was screaming due to having bitten his lip

[14] 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.

and was removed from the classroom for 15 minutes to visit the nurse (Tr. pp. 117, 118-19, 121, 134). The psychologist further testified that she observed how staff used a Rifton chair with the student prior to beginning OT (Tr. pp. 119-21). The psychologist also testified that she was not able to determine the student's strengths and weaknesses during an observation (Tr. p. 121).

Concerning the recommendation for 40-minute sessions of related services, the psychologist testified that the student's mother disagreed with the recommendation during the March 2018 CSE meeting and that the school team "always want 60 minutes because they feel the kids could benefit from 60 minutes of related service. And the fact is these kids are really multiply handicapped, and they can't focus on a task for 60 minutes" (Tr. pp. 128, 129-30). The psychologist further testified, "I've seen [the student] seizure, not this year, but anyway, the previous year. And he can't -- he can't really focus for 60 minutes" (Tr. p. 130). In support of her statement, the psychologist read the student's diagnoses from the March 2018 IEP and concluded, "[y]ou know, he's dependent -- fully dependent in all domains of mobility, one-to-one assisted in feeding, ADLs, two-person assisted transfer. He -- that's why I really don't feel he can benefit from 60 minutes" (Tr. p. 131). The psychologist was then asked why she believed the student was unable to focus for 60-minute sessions of related services and she responded "He doesn't have the stamina … [t]o focus for 60 minutes a day on PT, OT, speech, vision therapy, it's like -- I couldn't focus on it. It's too much. It's just too -- it's really -- it's just too many minutes for a service" (Tr. p. 133). IHO 2 asked the psychologist whether she believed 60-minute sessions were too much for all students or for this particular student and she responded, "60 minutes for this particular student" (Tr. p. 133). After recounting the student's various diagnoses, the psychologist further stated, "I feel 60 minutes is just too much because he needs to be constantly … repositioned, constantly monitored, constantly, you know, for everything" (Tr. p. 134). The psychologist testified that at one point during the observation the student "slept a little bit", the student's eyes were closed and he appeared to sleep for three or five minutes (Tr. pp. 134-35).

On cross-examination, the psychologist indicated that related services sessions of 60-minutes in length were "overkill" and that the student was pulled out of class many times (Tr. p. 157, 170). She further testified that the sessions required a lot of attention and that the student did not have "that much ability to focus … and attend" (Tr. p. 158). However, the psychologist also conceded that she did not have any documentation to demonstrate that the student lacked stamina, nor did her written classroom observation reflect that the student lacked stamina or that she had observed him sleeping (Tr. pp. 170-72). The psychologist further conceded that one of the student's documented avoidance behaviors in the March 2018 IEP was closing his eyes, but that the IEP did not indicate that the student had low stamina or frequently slept (Tr. pp. 173-74; see Dist. Ex. 1 at p. 3). The psychologist also stated that she did not believe the student was able to participate in "five or six 60-minute sessions"; however, she did not observe the student "long enough to really ascertain whether he was capable of doing it" (Tr. p. 175). In her professional opinion she stated that it was beyond the student's capacity to sit for 60 minutes and the CSE determined that 60-minute sessions were not appropriate for the student (Tr. p. 176).

Despite the psychologist's opinion regarding the student's ability to tolerate 60-minute related services sessions, the documentary evidence in the hearing record and the remainder of the psychologist's testimony fails to demonstrate that the March 2018 CSE's decision to recommend 40-minute related services sessions was based on the specific needs of the student. For example, the psychologist did not explain how the student's needs were addressed by each recommended

related service and why a specific duration of service was clinically appropriate for the student in each area of need. In cases such as this I would expect testimony from related service providers and/or a special education teacher having experience with a district 12+1:(3+1) special class about the degree of benefit they would expect a similarly situated student to receive from the quantity of related services offered in the March 2018 IEP. Here the district does not offer a rationale for the reduction in duration of the related services as compared to what the student received at iHope. The psychologist did not explain how the CSE's recommendations set forth in the March 2018 IEP were designed to enable the student to derive educational benefit in light of his circumstances. Given the needs identified during the March 2018 CSE meeting, the record is insufficiently developed to support a finding that the related services recommendations were sufficient to offer the student a FAPE. As a result, the district failed to sustain its burden of demonstrating that it offered the student a FAPE for the 2018-19 school year.

Having found that the student was denied a FAPE for the 2018-19 school year based on the related services recommendations included in the March 2018 IEP, it is not necessary to address each of the IHO 3's alternative findings regarding FAPE or the additional grounds alleged by the parents in their due process complaint notice. Nevertheless, this is not an instance where the hearing record reflects a well-reasoned and well-supported IHO decision, but rather, as pointed out briefly in the scope of the impartial hearing, reflects errors in addressing claims which were not raised in the parents' due process complaint notice and in applying incorrect legal standards.[15] Additionally, while I agree with IHO 3's ultimate conclusion that the district did not offer the student a FAPE, I do not concur in IHO 3's findings as to specific issues but agree with the district that IHO 3 erred in finding that the CSE improperly changed the student's classification, in finding that the CSE's failure to reconvene denied the student a FAPE, and in finding that the CSE was required to use the March 5, 2018 IHO decision as an evaluative tool during the student's annual review for the 2018-19 school year. Accordingly, although I do not agree with IHO 3's reasoning, she correctly determined that the district failed to demonstrate that the March 2018 CSE's recommendation of 40-minute sessions of related services addressed the student's needs and as a result the student was denied a FAPE for the 2018-19 school year.

C. Appropriateness of the Unilateral Placement

The district argues that IHO 3 erred in finding that the program at iBrain was appropriate to meet the student's needs during the 2018-19 school year. The district asserts that the parents failed to sustain their burden to show their unilateral placement was appropriate because iBrain "was not able to immediately implement [the student's] program because the school did not have a vision provider or a social worker" (Req. for Rev. ¶ 15). For the reasons discussed below, review of the evidence in the hearing record supports a finding that iBrain provided a program and placement that was appropriate to meet the student's needs during the 2018-19 school year.

[15] Upon review of IHO 3's decision, it appears that IHO 3 determined that the student was denied a FAPE based on procedural violations of the IDEA without considering whether those violations impeded the student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]; see IHO 3 Decision at pp. 16, 18, 23, 24-25, 26).

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

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

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

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

The student's present levels of performance and identified needs were discussed in greater detail above. The student's vision needs are reprised herein as relevant to the district's appeal. Briefly, the student has a diagnosis of cortical visual impairment, which impacts his ability to attend to, perceive and remember what he sees, and glaucoma which causes sensitivity to light (Parent Ex. W at p. 6; Dist. Ex. 1 at p. 5). He has had numerous surgeries on both eyes to decrease intraocular pressure and to improve eye function (Tr. pp. 440-42; Parent Ex. W at p. 7; Dist. Ex. 1 at p. 5). Review of the summary of the assessments contained in the 2018-19 recommended iHope IEP indicated that the student exhibited strengths in the areas of fixating on light, reaching for items, and tolerating tactile input; and that he exhibited weaknesses in depth perception, scanning, and tracking (Parent Ex. W at p. 11). The student's CVI Range was described as "Phase I, transitioning into Phase II," and the iHope IEP explained that at the end of Phase I "children have, and are continuing to learn visual behaviors and are transitioning into using these behaviors in a functional manner" (id.). Finally, the summary noted that the student demonstrated a significant deficit in his functional vision and that his ability to improve his functional use of vision as well as his ability to develop compensatory skills were both vital to provide him with full access to learning and his environment (id.).

According to the hearing record, iBrain is a private special education school for students with acquired brain injuries or brain-based disabilities ages 5 to 21 years old (Parent Exs. F at p. 2; Y at pp. 1-2). All students received the services of a 1:1 paraprofessional to assist them throughout the school day, and iBrain provided a variety of related services, generally in 60-minute sessions, in an extended school day program (Parent Ex. Y at pp. 1-2). The director of special education (director) testified that iBrain's first vision education services provider (who was the director of vision education services) began in September 2018 (Tr. pp. 352, 371, 381). She further testified that by that time, since the school year had begun in July 2018, the student had missed approximately 24 sessions (Tr. pp. 382-83). The director reported from a conversation she had with the director of vision education services that all missed sessions were made up by the end of the 2018-19 school year (Tr. p. 383). She explained that iBrain "overstaffed for vision for the later part of the year so that we could make sure all the sessions were made up" (id.). In addition, the director testified that iBrain staff worked with the student on his "vision education recommendations and goals," which were "addressed during his academic sessions" (Tr. pp. 53-54). Tracking of the student's progress towards his vision goals appears in the iBrain progress report (Parent Ex. X at pp. 9-10).

With regard to parent counseling and training, the director testified that the service was provided on a monthly basis and although parent counseling and training did not begin in July 2018, all of the parents were contacted by the social worker in August 2018 (Tr. pp. 392-93) The director further testified that if any months of parent counseling and training had been missed, it would have been for no more than the July 2018 session (Tr. p. 393).

Although the private school IEP may be helpful in determining what iBrain intended to provide to the student, it is not necessary. As a general matter, private institutions which are not State-approved to provide special education services to students with disabilities—such as iBrain—are not required to follow the same procedural process of developing their own written IEPs for students in the same way as public school districts are (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 13-14 [1993]), and, furthermore a unilateral placement is not mandated by the IDEA or State law to provide services in compliance with an IEP. Thus noncompliance with

the privately created iBrain IEP is not a basis for denying the parent's request for public funding of the unilateral placement.

Furthermore, to the extent the district argues that iBrain was an inappropriate unilateral placement because it did not offer sufficient related services to meet the student's vision needs, it is well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). "The test for the private placement 'is that it is appropriate, and not that it is perfect'" T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877–78 [2d Cir. 2016] [citations omitted]). Nevertheless, a review of the evidence in the hearing record demonstrates that iBrain did address the student's vision needs. As discussed above, although the student did not receive services provided by a vision therapist for a period of time at the beginning of the 2018-19 school year, iBrain otherwise endeavored to make up all missed vision education sessions prior to the end of the school year. Additionally, the student had multiple surgical procedures on his eyes during a significant portion of the school year beginning in July 2018 effecting his availability to participate in vision education sessions. Therefore, I decline to find that iBrain was not an appropriate placement due to the lack of vision education services at the beginning of the 2018-19 school year; iBrain identified the student's special education needs and provided a program that addressed those needs.

D. Equitable Considerations

The district next alleges that IHO 3 failed to address the parents' ability to pay the cost of tuition prior to awarding direct payment to iBrain. The district further contends that a portion of the cost of each school day should be deducted from IHO 3's award because the student's extended school day was for the purpose of maximizing the student's education. The district also argues that IHO 3 erred by finding that the district acted in bad faith and that equitable considerations favored the parents. The district did not allege that the parents failed to cooperate with the CSE or failed to provide ten-day written notice of their intention to unilaterally enroll the student at iBrain and seek public funding for the cost of the student's attendance at iBrain for the 2018-19 school year.

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to

equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

The district first asserts that the parents failed to demonstrate an inability to pay the cost of the student's attendance at iBrain and appeals from IHO 3's determination that the parents were not required to show that they were unable to front the tuition costs. The hearing record reflects that no evidence related to the parents' ability to pay was presented. Nevertheless, the parents have demonstrated an obligation to pay by offering the enrollment contract with iBrain into evidence (see Parent Ex. E). The Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]; see also Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]). In this instance, as the parent has not demonstrated a lack of financial resources, IHO 3 should have awarded tuition reimbursement upon proof of payment rather than direct payment to iBrain.

Turning to the district's allegation that a portion of the cost of each school day should be deducted from IHO 3's award because the student's extended school day was for the purpose of maximizing the student's education, it is well settled that 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). Reimbursement does not require maximization of the student's potential, although the parents can of course choose to provide extra services on their own (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 100-01; C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the [the predecessor statute to the IDEA] requires"]). As stated by the Supreme Court, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148; C.B., 635 F.3d at 1160 ["[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Still v. DeBuono, 101 F.3d 888, 893 [2d Cir. 1996]).

Further, while the district raises the issue of maximizing the student's education in its request for review, the district appears to have taken the opposite position during the hearing, where it argued that iBrain did not provide the student with a sufficient amount of academic instruction (compare Req. for Rev. ¶16, with IHO Ex. I at p. 22). Additionally, the district's position on both of these points was only supported by reference to the student's schedule at iBrain (id.; see Parent Ex. G). Accordingly, even if I were to consider the district's new argument, raised for the first time on appeal, the length of the iBrain school day, in and of itself, does not demonstrate that the extended school day was solely for the purpose of maximization and is not a reimbursable expense. Further, given that IHO 3 determined that the program at iBrain, which included the extended school day, was an appropriate unilateral placement for the student, a finding with which I agree for the reasons set forth above, and given that the district has not identified any specific portion of the student's schedule that could be cut out as excessive so that it could be excluded from the parents' selected program without making the overall program inappropriate, there is no basis to reduce any award on this ground.

Finally, the district does not argue on appeal, nor has it presented any evidence that the actual costs of the services provided by iBrain were excessive, i.e., by reference to actual evidence of lower-cost programs and/or services that were comparable to and available in the same geographic area or correlated to the length of the school day. The district also did not attempt to show if similar services to those being provided to the student at iBrain could be provided at significantly lower cost by the district somewhere in its public schools. Further, the evidence does not support a finding that the student received services at iBrain that far exceeded the level that the student required in order to receive a FAPE such that a reduction of the amounts charged for each of the segregable costs would be warranted. Therefore, the length of the student's school day is not a sufficient basis on which to reduce the award of tuition reimbursement. Lastly, while I do not agree that the district acted in bad faith, the evidence in the hearing record demonstrates that equitable considerations overall do not warrant a reduction in the amount of tuition reimbursement.

VII. Conclusion

In summary, the hearing record supports the conclusion that the March 2018 CSE's recommendation for 40-minute sessions of related services was not an appropriate recommendation for the student, based on his needs as presented to the CSE. As a result, the student was denied a FAPE for the 2018-19 school year. In addition, the district has raised insufficient grounds to disturb IHO 3's conclusion that the parents sustained their burden to establish that iBrain was an appropriate unilateral placement for the student, and moreover, that equitable considerations supported the parents' requested relief. Nevertheless, IHO 3 erred in finding that the parents were entitled to direct funding of the cost of the student's attendance at iBrain for the 2018-19 school year. Accordingly, the parents are instead awarded reimbursement for the costs of the student's tuition at iBrain for the 2018-19 school year.

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

THE APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that IHO 3's decision dated February 17, 2021, is modified by reversing those portions which directed the district to reconvene the CSE in order to make a determination regarding the 2018-19 school year and which awarded the parents direct payment of the cost of the student's attendance at iBrain for the 2018-19 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the cost of the student's attendance at iBrain, including transportation, upon submission of proof of payment, for the 2018-19 school year.

Dated: **Albany, New York**
April 23, 2021

STEVEN KROLAK
STATE REVIEW OFFICER