



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-099

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Brain Injury Rights Group, Ltd., attorneys for petitioner, by Peter G. Albert, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed by respondent (the district) for her son's tuition costs at the International Institute for the Brain (iBrain) for the 2019-20 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

According to IEPs created by the district and iBrain, the student is non-verbal and non-ambulatory, and presents with low to average cognitive, academic, language and pragmatic skills, and significant delays in his gross and fine motor, activities of daily living (ADL) and self-help skills (Parent Ex. C at pp. 1-18; Dist. Exs. 9 at p. 2; 12 at pp. 1-8). He has several diagnoses including but not limited to, cerebral palsy, spastic quadriplegia and hypoxic ischemic encephalopathy (Parent Ex. C at p. 1; Dist. Ex. 12 at p. 5).

The student began attending iBrain in July 2018 (Tr. pp. 296-97). He previously attended the International Academy of Hope (iHOPE) (Tr. pp. 296-97).

In preparation for the student's annual review, the district conducted a February 2019 social history and a February 2019 psychoeducational update (Dist. Exs. 3; 5; 7; 9; see Dist. Ex. 1-2).

On February 4, 2019, the district sent the parent a notice of a CSE meeting scheduled for March 8, 2019 (Dist. Ex. 6).

In a letter to the district dated February 19, 2019, the parent requested that the upcoming IEP meeting be a "[f]ull [c]ommittee [m]eeting" which included a district school psychologist, social worker, as well as the in-person participation of a school physician and an additional parent member (Parent Ex. H at p. 1). The parent also provided a list of the student's special education teacher and related service providers from iBrain asking that they be listed on any "IEP meeting notices" sent to iBrain (id.). The parent advised the district that she was available for the meeting to be scheduled Monday through Fridays between the hours of 9:00 a.m. and 11:00 a.m. (id. at p. 2). She requested that the CSE consider a non-public school placement and conduct any evaluations necessary for such consideration, and to provide her with a "few proposed dates and times in writing" via email or mail (Parent Ex. H). Furthermore, the parent indicated that once a meeting was scheduled at a "mutually agreeable date and time" she would provide the most recent progress reports and any other documents for consideration (id.). Lastly, the parent requested that the CSE meeting be recorded (id.).

The district sent a second notice to the parent dated March 27, 2019 which informed her of a CSE meeting scheduled for April 9, 2019 and updated the names and titles of persons attending the meeting to include the student's iBrain special education teacher and related service providers, as requested by the parent (Dist. Ex. 8).

By letter to the district dated April 4, 2019, the parent, through an attorney, stated that the CSE meeting scheduled for April 9, 2019 could not proceed (Parent Ex. I). The parent asserted that the meeting notice emailed to her on March 27, 2019 indicated that a copy of the meeting notice had been mailed to the parent, but she had not yet received it (id.). In the same email, the parent asserted that the meeting notice sent to her on March 31, 2019 did not include the names of the additional parent member or the district physician, as required by State regulation (id.).¹ Additionally, the parent asserted that the medical accommodation and special transportation forms for the 2019-20 school year, requested by the parent and school, had not yet been provided to them (id. at p. 2). She argued that the forms were required to be completed and submitted prior to any IEP meeting (id.). The parent reiterated her request that the additional parent member and district physician attend in person and requested confirmation in writing once the meeting was rescheduled that this request would be honored (id. at p. 3). The parent also reiterated her request for medical accommodation and special transportation forms (id.).

¹ The parent suggested that according to the district's standard operating procedural manual, a social worker was required to participate in the CSE meeting if they were involved in the evaluation process and especially if they conducted a social history (Parent Ex. I at pp. 1-2). The March 27, 2019 meeting notice included the name of a social worker scheduled to attend the April 9, 2019 CSE meeting, but it does not appear to be the same person who conducted the updated social history of the student in February 2019 (compare Dist. Ex. 8 at p. 1, with Dist. Ex. 3 at p. 3).

The district sent a third CSE meeting notice, dated April 23, 2019 that informed the parent of a CSE meeting scheduled for June 7, 2019 (Dist. Ex. 10). The meeting notice included the name of the school physician and additional parent member who would be attending the CSE meeting (Dist. Ex. 10).

The parents sent a letter dated May 20, 2019 to the district detailing issues they felt needed to be addressed in the materials that had been emailed and mailed to the parents by the district and requested that all materials used in the development of the student's 2019-20 IEP include accurate and complete information (Parent Ex. K).

On June 7, 2019, the CSE convened to develop the student's IEP for the 2019-20 school year (Dist. Ex. 12). Attendees included a district psychologist, a special education teacher, a district social worker, an additional parent member, and the parents, with the student's educational team from iBrain attending via telephone (Dist. Ex. 13). The district's physician also attended telephonically (Tr. pp. 107-08; Dist. Ex. 13). The parent requested that the CSE reconvene with the full committee attending in person and subsequently chose to leave approximately 30 minutes into the June 2019 CSE meeting (Tr. pp. 106-07, 398-99; see Tr. pp. 388-89).

The June 2019 CSE found the student remained eligible for special education and related services as a student with traumatic brain injury and recommended that he attend a 12-month, 8:1+1 special class in a specialized school with the related services of adapted physical education three times per week, counseling in a group of three once per week for 30 minutes, OT individually five times per week for 30 minutes, PT five times per week for 30 minutes and speech-language therapy four times per week individually and one time per week in a small group for 60 minutes (Dist. Ex. 12 at pp. 23, 26). Additionally, the June 2019 CSE recommended a full-time 1:1 paraprofessional for health and ADLs and an eye gaze computer with a wheelchair mount, communication software, and applications for literacy and math that would be available to the student both at school and at home (id. at p. 23). The June 2019 CSE also recommended special transportation for the student consisting of a lift bus, air conditioning, limited travel time of not more than 60 minutes and an oversized wheelchair (id. at pp. 25-26).

On June 20, 2019, the parent signed a contract to reenroll the student at iBrain for the 2019-20 school year (Parent Ex. D at p. 7). In a letter dated June 21, 2019 the parent notified the district of her intention to place the student at iBrain for the 2019-20 school year and seek public funding for the placement (Parent Ex. L). On July 8, 2019, both of the student's parents signed a contract for private special transportation services with Sisters Travel and Transportation Services (Parent Ex. E).

A. Due Process Complaint Notice

In a July 8, 2019 due process complaint notice, the parents requested an impartial hearing,² asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (Parent Ex. A). The parents asserted that: the district failed to hold an

² The student's father was named in the due process complaint notice (see Parent Ex. A). The student's mother who spoke several times during the impartial hearing, and she was the only parent named in this State-level review. Unless otherwise indicated, this decision will use the term "parent," meaning the student's mother.

annual review meeting at a time that was mutually agreeable" and "which complied with [her] written request dated February 19, 2019 for a [f]ull [c]ommittee meeting with a DOE [p]hysician and [p]arent [m]ember physically present to discuss the extraordinary needs of [the student] for the extended school year 2019-2020"; the student teacher ratio in the recommended 8:1+1 class was insufficient to address the student's needs; the IEP would expose the student to "substantial regression" due to the "significant and unsubstantiated reduction in the related service mandates and the student-teacher ratio of the recommended class size and program"; the IEP was not the product of any individualized assessment of all of the student's needs; the June 2019 IEP inadequately describes the student's present levels of performance and management needs; the annual goals were immeasurable; the IEP was not reflective of the student's individual needs; the recommended program was not the student's least restrictive environment; the classroom ratio did not provide the 1:1 support and direct instruction the student required to make progress; the recommended school program and placement would not provide the individualized attention and intervention required to meet the student's intensive management needs; and the specialized program did not offer an extended school day which was necessary for the student to make meaningful progress (Dist. Ex. A at pp. 1-2).

The parent proposed direct payment to iBrain for the cost of full tuition for the 2019-20 extended school year, transportation costs including a 1:1 paraprofessional and a reconvene of the CSE for an annual review meeting (Parent A at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 14, 2019, August 21, 2019, and September 9, 2019 to address the student's pendency placement (Tr. p. 1-24). In an interim decision dated August 22, 2019,³ the IHO determined that a prior, unappealed IHO Decision dated April 30, 2019 formed the basis for the student's pendency (stay put) placement (IHO Interim Decision at p. 1; see Tr. pp. 7-11; Parent Exs. A at pp. 1-2; B).⁴ During the pendency of the proceedings, the IHO ordered the district to pay for the student's tuition at iBrain, including academics, therapies and a 1:1 paraprofessional, and pay for special transportation including limited time travel of 60 minutes, a wheelchair accessible vehicle, air conditioning, a flexible pick up/drop off schedule and a 1:1 paraprofessional, during the 2019-20 school year until a final decision and order was issued in the matter, retroactive to the filing of the due process complaint notice (IHO Interim Decision at p. 2).

An impartial hearing reconvened on the merits on September 19, 2019, and concluded on February 9, 2021, after 14 days of proceedings (Tr. pp. 25-411). In a decision dated March 22,

³ Although the IHO's pendency order is dated August 22, 2019, the September 9, 2019 transcript indicates that the IHO held off on transmitting the decision while he waited to hear from the district with respect to an affidavit by the parent regarding 12-month services (Tr. pp. 15-16).

⁴ In the prior administrative proceeding for the 2018-19 school year, the district opted not to present evidence to defend its obligation to offer the student a FAPE, and therefore the IHO moved on to address the parent's unilateral placement (Parent Ex. B at p. 5).

2021, the IHO determined that the district offered the student a FAPE for the 2019-20 school year (IHO Decision at pp. 6-7).

Specifically, the IHO determined that for the 2019-20 school year, the proposed 8:1+1 class with related services was sufficient to meet the student's individual needs, specifically noting that the 8:1+1 was "sufficiently restrictive to provide the level of services that this student requires to obtain an educational benefit from instruction" (IHO Decision at p. 6). Additionally, the IHO found that the procedural violations alleged by the parent did not rise to a denial of FAPE because any defect in the district's meeting notices and/or the prior written notices were "de minimus" (*id.*). The IHO determined that the telephone participation by the district physician rather than in person did not limit his ability to review the student's educational records and offer an opinion on placement, and stated that "there is no requirement that the [district] physician participate in person" (*id.* at pp. 6-7). Furthermore, the IHO found that the IEP mandate of 30 minute sessions for OT and PT did not deny the student a FAPE because there was no "persuasive evidence that 30 minute sessions would prevent the student from accessing the curriculum" (*id.* at p. 7). Finally, the IHO found that the annual goals contained in the June 2019 IEP were appropriate and noted that the CSE adopted the goals from the IEP developed by iBrain (*id.*).

Having found that the district offered the student a FAPE for the 2019-20 school year, the IHO did not address the appropriateness of the student's unilateral placement at iBrain or equitable considerations (IHO Decision at p. 7). Furthermore, the IHO stated that the question of funding for the student's placement at iBrain for the 2019-20 school year should be moot because the parties had agreed to a pendency order which "should have funded the student's placement for the entire school year" (*id.*). Accordingly, the IHO denied the parent's request for direct funding of the student's placement at iBrain with transportation costs (*id.*).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in finding that the district offered the student a FAPE for the 2019-20 school year, in not finding that the parent's unilateral placement of the student at iBrain was appropriate, and in not finding that the equities favored the parent. More specifically, the parent argues that the district failed to timely evaluate the student and failed to provide proper meeting notices which impacted the parent's ability to participate meaningfully in the IEP process and precluded the provision of a FAPE to the student. Furthermore, the parent argues that the district failed to send out any required meeting notices prior to a second IEP being created in July 2019, which was completed without any parental input, nor were any meeting notices followed by a prior written notice.⁵ The parent further argues that the district failed to schedule an IEP meeting at a "mutually agreed upon time and place."

⁵ There are also vague assertions about meeting notices and a July 31, 2019 IEP and a CSE meeting that never took place, the substance of which could not have been the due process complaint which was dated weeks earlier and occurred after the student had been unilaterally placed at iBrain (*see* Dist. Ex. 16) In any event, it is not clear how the copy of that IEP differs materially from the first copy, other than the addition of access to school nursing services that are "non 1:1" that the student's paraprofessional could consult, which may have been related to a HIPAA form (*compare* Dist. Ex. 12 at p. 22 *with* Dist. Ex. 16 at pp. 23-24; *see* Dist. Ex. 19 at p. 3) There was no mention of school nursing services in the due process complaint, and the latter IEP is not relevant as the parents had already rejected the public programming did not avail themselves of the services offered by the district.

The parent asserts that during the June 2019 CSE meeting, she requested a reconvene when it became clear that the district had disregarded her request that the district physician appear in person and subsequently left the meeting once the CSE decided to continue the meeting even though she would not be participating. The parent contends that the IHO failed to recognize that such conduct on the part of the district denied the parent meaningful involvement in the CSE meeting. The parent further contends that the IHO erred by finding the district's failure to have a district physician attend the June 2019 CSE meeting in person did not deny the student a FAPE. Next, the parent argues that the IHO failed to address the inappropriateness of the proposed student grouping and instead focused on the class ratio (8:1+1) to determine that the proposed placement was appropriate. Finally, the parent argues that the IHO ignored the recommendation by the student's treating physician regarding related services as well as the testimony of the iBrain special education director regarding the student's need for 60-minute sessions.

The parent argues that the IHO ignored the May 2020 IEP in his determination that the June 2019 IEP was appropriate, noting that the May 2020 IEP had an implementation dated of June 11, 2020 and recommended the same frequency and duration of related services that the student received at iBrain. Furthermore, the parent argued that the IHO ignored the testimony of a district witness that the proposed placement was not capable of implementing the June 2019 IEP recommendations.

Finally, the parent asserts that the IHO erred by not issuing a determination regarding the appropriateness of iBrain as the parent's unilateral placement for the 2019-20 school year and in not addressing or finding that the equities favored the parent.

In an answer, the district responds to the parent's allegations and argues that the IHO properly found that the district offered the student a FAPE for the 2019-20 school year, and the parent filed a reply thereto, which merely expounds further upon arguments already set forth in the request for review and, as such, was impermissibly filed (8 NYCRR 279.6[a]).

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 LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's

needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁶

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

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

VI. Discussion

A. Preliminary Matters—Scope of Impartial Hearing

Before reaching the merits of the parent's appeal, preliminary issues to be addressed are the parent's allegations that the IHO erred in failing to address a failure of the district to evaluate the student and whether the student would be grouped with other students having similar needs. 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). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice 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-

⁶ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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]).

In this case, the parent's due process complaint notice did not include any allegations related to a failure of the district to evaluate the student or a failure to implement the student's IEP in a group of students having similar needs to the student.⁷ Further, there is no indication in the hearing record that the district agreed to expand the scope of the impartial hearing or that the parent sought permission from the IHO to further amend their due process complaint notice. Furthermore, there was no indication that district "opened the door" by eliciting testimony on the issue of evaluations or functional grouping at a public school site in order to defend its proposed programming (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]), and it was impermissible for the parent to attempt to raise new issues for the hearing without approval through cross-examination or a post-hearing briefing.⁸ Therefore, it is unsurprising that the IHO did not rule upon those particular issues, and they cannot be permissibly raised on appeal

B. June 2019 CSE Process

Turning next to the alleged procedural errors, on appeal the parent argues that the IHO erred because the evidence shows that the district failed to provide proper meeting notices and prior written notices, which prevented the parent from engaging in meaningful participation in the IEP process. The IHO addressed this issue in his decision and, upon review, I find that the parent's alleged procedural violations do not rise to the level of denial of FAPE, and thus there is insufficient basis to overturn the IHO's similar determination that any defect in the district's meeting notices or prior written notices were "de minimus" (IHO Decision at p. 6).⁹

With regard to the parent's claim that the CSE meeting had not been scheduled at a mutually convenient time, the parent's argument is belied by the evidence in the hearing record. The hearing

⁷ Even assuming for the sake of argument that the parent had alleged in the due process complaint notice that the CSE failed to evaluate the student, the evidence in the hearing record shows that the student was re-evaluated in February and March 2019, prior to convening the June 2019 CSE to develop the program for the 2019-20 school year (see Dist. Exs. 3; 4; 5; 7; 9).

⁸ Instead, it was the parent's attorney who belatedly and without IHO approval attempted to broach the issues of evaluations and grouping during cross examination and in the parent's post hearing brief (Tr. pp. 59-60, 65, 68, 148-53; Parent Post Hr'g Brief at p. 14-16, 27). While the district later briefly posed two questions that might have been related to the grouping of the student, both were addressed in the context of the student's placement at iBrain, not the public school site (Tr. pp. 291, 301).

⁹ I have a slight quarrel with the term "de minimus" as used by the IHO, which I interpret as being so trivial as to not merit consideration. While I agree that it was a weak argument that did not amount to a denial of a FAPE in this case, I reach that conclusion upon seriously considering the facts and nature of the alleged procedural violation.

record shows that the district attempted to accommodate the parent by soliciting preferred dates or times, cancelling several scheduled CSE meetings, responding to the parent's concerns, and rescheduling the meeting (see Dist. Exs. 6; 8; 10; 11). Furthermore, I note that the parents were able to attend the June 7, 2019 CSE meeting, which was scheduled at 9:00 a.m. on a weekday in accordance with their request (Tr. pp. 398-99; Dist. Ex. 10 at p. 1; 13; Parent Ex. H at p. 1).

As for the parent's allegation that the district ignored the parent's request that a school physician attend the CSE meeting in person, the evidence in the hearing record shows that a district physician was present via telephone at the June 7, 2019 CSE meeting (Tr. pp. 107-08 Dist. Ex. 13). By letter dated February 19, 2021, the parent requested a "[f]ull [c]ommittee [m]eeting" which included, among other members, that a district physician and an additional parent member attend in person (Parent Ex. H at p. 1). The parent made a similar request by letter dated April 4, 2019 for a "Full Committee along with the DOE [s]chool [p]hysician and parent member to participate in person" (Parent Ex. I at p. 1). Therefore, the parents made timely requests for the attendance of the district physician prior to the June 7, 2019 CSE meeting; however, it is clear that the district physician attended via telephone. The parent argues that the requirement in State regulation that "[w]hen conducting a meeting of the committee on special education, the school district and the parent may agree to use alternative means of participation, such as videoconferences or conference telephone calls" (8 NYCRR 200.5[d][7]) should lead to the conclusion that the telephonic participation of the district physician resulted in a denial of a FAPE. While the absence of parental agreement that the district physician attend via telephone, instead of in person may be a technical violation of state procedures, it does not rise to the level of a denial of a FAPE because a procedural violation would only result in a finding that the student did not receive a FAPE if the procedural inadequacy impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). In this case, the physician attending via telephone instead of in person did not preclude the parents from participating in the development of the 2019-20 IEP and instead the evidence shows that the parents chose to leave the CSE meeting after approximately 30 minutes, despite multiple attempts by the district to accommodate their wishes through rescheduling within narrow windows of time and reissuing meeting notices to exacting specifications, and it was the parents who conducted themselves in a manner that limited their own participation by leaving a meeting that 13 other people also arranged their schedules to attend.¹⁰ I remind the parent that the CSE meetings must be scheduled at a mutually agreeable time, not under terms preferred exclusively by the parent (34 CFR 300.322[a], [c]; 8 NYCRR 200.5[d][1][iii]; Dervishi v. Stamford Bd. of Educ., 653 F. App'x 55, 57 [2d Cir. 2016]; Hjortness v. Neenah Joint Sch. Dist., 507 F.3d 1060, 1066 [7th Cir. 2007] [noting that intransigence to block an IEP that yields a result contrary to the one a parent seeks does not amount to a violation of the procedural requirements of the IDEA]).

¹⁰ Six individuals from iBrain were invited by the parents, but it is unclear to me why they did not attend in person if it was so important for members of the CSE meeting to attend in person (Dist. Ex. 13). It would be the parent's responsibility to convince the private school personnel at iBrain to attend a CSE meeting as the district has no authority over those individuals.

C. June 2019 IEP—Related Services

Turning to the specific challenges to the services listed in June 2019 IEP, the parent asserts that the IHO erred in finding that the recommendations for related services were appropriate and argues that based on the student's complex medical history and diagnoses, 60-minute sessions of related services would sufficiently address his unique needs and prevent regression. The IHO found that the June 2019 CSE recommendations for 30-minute sessions of OT and PT five times per week did not deny the student a FAPE because there was no persuasive evidence that 30 minutes sessions would prevent the student from accessing the curriculum (IHO Decision at p. 7). The district argues that the 30-minute sessions of OT and PT were clinically appropriate based on the student's strengths and needs with respect to his deficits.

The CSE convened on June 7, 2019 to conduct the student's annual review for the 2019-20 school year (Dist. Ex. 12). According to the hearing record, the June 2019 CSE reviewed a February 2019 psychoeducational update, a February 2019 social history, the results of a February 2019 administration of the Vineland, a March 2019 classroom observation and a 2019-20 iBrain recommended IEP (Dist. Exs. 12 at p. 1; 14 at p. 2; 20 at p. 3). The June 2019 CSE recommended that the student receive 12-month programming in an 8:1+1 special class in a specialized school, adapted physical education three times per week, with the related services including counseling in a group of three one time per week for 30 minutes, OT individually five times per week for 30 minutes, PT five times per week for 30 minutes and speech-language therapy four times per week individually and one time per week in a small group for 60 minutes (Dist. Ex. 12 at p. 23). Additionally, the June 2019 CSE recommended a full-time 1:1 paraprofessional for health and ADLs, an eye gaze computer, communication software with applications for literacy and math, and a wheelchair mount for the computer to be used both at school and at home (*id.*). Here the parties do not dispute that the student required the related services of OT and PT to address his specific needs during the 2019-20 school year.¹¹

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]).

When drafting the student's 2019-20 IEP, the June 2019 CSE relied heavily on the present levels of performance contained in the recommended iBrain IEP for the 2019-20 school year such

¹¹ The hearing record shows that the June 2019 IEP recommended speech-language therapy services at the same frequency and duration as was recommended in the May 2019 iBrain recommended IEP (*compare* Parent C at p. 27 *with* Dist. Ex. 12 at p. 23).

that the June 2019 IEP present levels of performance contained a majority of the iBrain recommended IEP verbatim (compare Parent Ex. C at pp. 1-13 with Dist. Ex. 12 at pp. 1-8). A discussion of the student's present levels of performance is relevant to the discussion of the related services recommendations in the June 2019 IEP.

With regard to academics, the June 2019 IEP indicated that the student had made "tremendous gains in all areas of academics" and that he had met most of his goals for the 2018-19 school year (Dist. Ex. 12 at p. 1). The IEP indicated that during academic sessions the student used his Tobii Dynavox with Eye Gaze to answer questions and to provide explanations to his answers (id.).

With regard to mathematics, the June 2019 IEP reported that the student had shown mastery in his ability to use place value understanding to answer addition and subtraction problems up to 40 and was currently doing three digit addition with carrying and three digit subtraction with borrowing (Dist. Ex. 12 at p. 1). The IEP noted that the student could use his Tobii Dynavox with Eye Gaze to answer when a number was supposed to be carried or borrowed (id.). In literacy, the IEP reported that the student's goals were to demonstrate spelling and listening skills in response to upper second grade to early third grade texts (id.). The student was able to spell eight out of 10 high frequency words correctly and could answer "wh" questions in a multiple-choice format after listening to a short paragraph (id.). The IEP noted that because of the student's progress during academics, he would continue to focus on expanding answers to "wh" questions, retelling a story, word problems with addition and subtraction, multiplication, and money and time (id.). The June 2019 IEP further indicated that the student benefited from redirection when needed, collaboration with his paraprofessional, repetition of presented materials, and processing time (id.).

With regard to speech-language and communication, the June 2019 IEP indicated that the student had been working on receptive and expressive language and feeding goals (Dist. Ex. 12 at p. 1). Additionally, the IEP stated that "on a good day, [the student could] spontaneously formulat[e] grammatically structured sentences 7-8 words in length to respond to questions, advocate for himself by expressing thoughts, wants and needs, and engag[e] in conversational exchange" (id.). The IEP described that on a more challenging day, the student would become easily distracted and look at the weather (a preferred activity), look around the room, or make silly comments (id.). The June 2019 IEP noted that the student benefited from 60 minute sessions and noted that the session time was used to make environmental modifications in an effort to increase participation and setup the communication program on the Tobii Dynavox (id. at pp. 1-2). The IEP reported that the student was very successful in navigating and activating his device using eye-gaze; however, he benefitted from extended response time to formulate sentences in order to answer questions, participate in conversations and navigate his device (id. at p. 2). The IEP further indicated that when the student's feeding goals were the focus of a session, the time was used to make choices between food and drink, establish optimal positioning for feeding, and to provide tactile and verbal prompts to support eating and drinking skills to ensure food was manipulated and swallowed safely (id.).

Assessment results included in the June 2019 IEP indicated that the student's performance on the Dynamic AAC Goals Grid - 2 (DAGG-2) placed him in the independent range for both receptive and expressive language (Dist. Ex. 12 at p. 2). The additional assessments described in

the IEP did not include standardized scores as they were used for qualitative purposes only and noted that results should be interpreted with caution (id.).

With regard to social skills, the June 2019 IEP reflected the narrative of the February 2019 psychoeducational update that indicated the student was friendly and outgoing, and demonstrated "robust social skills as evidenced by his ease with the novelty of the testing situation" (Dist. Ex. 12 at p. 4). The IEP further reflected that the student communicated effectively with his speech generating device and he exhibited age-appropriate conversational skills; specifically noting his "robust vocabulary with complete and accurate sentences" (id.).

Additionally, the June 2019 IEP reported from the 2019-20 iBrain recommended IEP that the student was a very social and engaging boy who got along well with peers and adults; however, he required encouragement and prompting to interact with peers (Dist. Ex. 12 at p. 4). The IEP noted that the student used nonverbal means to greet, request, answer questions, express thoughts, wants and needs and engage in conversational exchange (id.). Results of the DAGG-2 indicated that in social interactions the student was a "context-dependent communicator" and specified that he would easily answer routine questions appropriately with familiar communication partners; however, he benefitted from help with conversational turn taking (id.). The June 2019 IEP reported that the student struggled with answering questions that were not within context and would often redirect the conversation to something more familiar (id. at p. 5).

With respect to OT, the June 2019 IEP indicated that the student received OT five times per week for 60 minute sessions to address his functional independence with daily routines, participation in academic and classroom activities and his engagement in community mobility (Dist. Ex. 12 at p. 5). The IEP noted that the student benefitted from adaptation devices (i.e., EazyHold cuff, zipper pull, etc.) due to the low tone throughout his neck and trunk, and "velocity dependent spasticity in his upper and lower extremities" (id.). Additionally, the IEP noted that while the student had made progress towards his ADL goals, he would benefit from continuing goals that focused on threading his arm through a shirt or jacket, grasping and reaching grooming items and toileting (id.). The IEP indicated that the student was very tactilely motivated and enjoyed any opportunity to use his hands, including drawing and writing his name (id.). The student presented with stereotyped movement patterns which posed challenges with speed, accuracy and efficiency of his movement and he benefitted from maximum physical assistance for reaching and moderate cueing during movement-based tasks (id.).

The June 2019 IEP indicated that the student demonstrated a level IV on the MACS and handles a limited selection of easily managed objects in simple actions (Dist. Ex. 12 at p. 7).¹² In addition, the IEP stated that the student demonstrated an emerging left hand preference, particularly for fine motor activities (id.). The student benefitted from extended time to reach objects presented in front of left or right hand and he frequently initiated reaching with movement of his head in a stereotypical movement pattern and was more effective and efficient in reaching activities when seated in his wheelchair with his pelvis in neutral alignment (id.). The IEP reported that the student utilizes a gross grasp to hold items with maximal assistance for initial placement and utilized a pronated palmar grasp bilaterally with minimum assistance to stabilize or orient tool

¹² The hearing record does not explain what the acronym MACS stands for.

following placements (id.). Additionally, the student could anticipate the size, shape, and orientation of objects, required assistance to orient his hands around objects, and benefitted from extended time and multiple attempts to do so (id.). The student demonstrated an emerging lateral pinch pattern of left and right hands and could squeeze items to produce symmetrical movement patterns (id.). The student benefitted from built-up handles or an EazyHold on writing and feeding utensils and released items given extended time, moderate cueing, moderate support at wrist and tactile cueing to dorsal aspect of hand (id.). Finally, the June 2019 IEP reported that the student could navigate his wheelchair around obstacles in school using head-eye coordination with minimum to moderate prompting for stopping and turning (id.).

With regard to self-care, the June 2019 IEP noted that the student chose his own clothes using his Tobii Dynavox via eye gaze (or partner assisted scanning when the Tobii was unavailable) and assisted in donning shirts by pushing his arm through sleeves with moderate verbal cueing and moderate-maximal assistance; however, he was dependent for lower body dressing (id.). The student could unfasten "Velcro" with maximum assistance and required minimum to moderate hand over wrist assistance for placement of an adaptive zipper pull (id.). The student could move his arm to unzip and zip a connected zipper given minimal assistance and moderate verbal cueing; however, he was dependent for buttons and snaps (id.). The June 2019 IEP indicated that the student would open his mouth for a toothbrush and using an EazyHold cuff, bring the toothbrush to his mouth given moderate assistance at his elbow to bring his arm to midline and perform three to five lateral strokes (id.). Additionally, using an Eazyhold cuff, the student could brush his hair given moderate assistance at his elbow to lift his arm above his head (id.). The student fed himself using a Maroon spoon with maximum assistance and could take small short sips from a honey bear cup with total assistance (id.). Additionally, the IEP reported that the student used a wheelchair with a head array for functional mobility during the school day and around the community; noting that he was able to drive his wheelchair with supervision using head array (id.). Finally, when given moderate assistance with minimal verbal prompting the student could perform a stand pivot transfer (id.).

With regard to gross motor skills, the June 2019 IEP detailed that the student's 60-minute PT sessions were broken up as follows: during the first 5 minutes the student transitioned from lunch to the PT session and he was taken out of his wheelchair and put onto a mat; the next 15 minutes were spent stretching his lower extremities including ankles, knee flexors and hip extensors which were all significantly tight; after stretching, his HKAFOs (hip knee ankle foot orthotics) and Benik vest were donned; the next 15 minutes were spent working to actively engage the student's muscles in his trunk, neck and extremities through activities such as bouncing on a ball in sitting and prone positions, rolling on the mat and on the ball from supine to prone and back to supine, practicing sit to stand transitions from a bench, and from the mat through half-kneel, working on weight shifts sitting on a bolster; the next 15 minutes were spent working on functional activities such as ambulating in a gait trainer, in the "upsee" or riding the adaptive tricycle; the final five to 10 minutes were spent helping the student back into his wheelchair or into a stander so he could participate in a standing program (Dist. Ex. 12 at p. 5). The IEP noted that the student required a couple of minutes rest breaks between more strenuous activities to avoid fatigue (id.). Additionally, the IEP stated that the student could become distracted at times when other children and adults were present; however, this could be used to the advantage of the therapist by positioning the student facing a group of people to facilitate maintaining his head in neutral, enabling him to be involved in social activities (id.).

The June 2019 IEP indicated that the student's quality of movement was "descriptive of a child with spastic quadriplegia" and noted that he initiated many of his movements with trunk extension (Dist. Ex. 12 at p. 6). For example, when rolling supine to side lying and back the student would extend his trunk, followed by rotation of his lower extremities in the direction he was rolling and when walking in the gait trainer, he initiated by extending his trunk and then taking short and fast steps while maintaining hip/knee flexion (*id.*). Additionally, the June 2019 IEP stated that the student presented with head and trunk slightly flexed toward the left, elbows flexed and shoulders externally rotated and abducted, hips and knees flexed with his hips in internal rotation and adducted (*id.*). The IEP further stated that in sitting, the student's head and trunk were tilted to the left when tailor sitting on the therapy mat or on a bench (*id.*). Additionally, the IEP indicated he could "sit independently with left lateral trunk for a couple of minutes when placed in ring or tailor sitting" and noted that his trunk was minimally active when floor sitting, with his arms typically externally rotated with his elbows in flexion (*id.*). According to the IEP, the student was able to roll from supine to left side lying and back to supine with contact guard assistance (CGA) and minimal assistance, and to roll to the right he needed moderate assistance to place his arm in the proper position to roll to prone from side lying on both sides (*id.*). The student required moderate assistance to transition from supine to sitting to position his legs (*id.*). The student was able to bear weight through his lower extremities when placed in supported standing and wore HKFAFOs for the full school day or when outdoors (*id.*). The June 2019 IEP reported that the student could ambulate in a Rifton pacer while wearing his HKFAFOs with his hips and knees in flexion and his ankles in plantarflexion due to decreased hamstring length (*id.*). Finally, the IEP reported that the student demonstrated decreased overall strength, balance, posture coordination and postural control, and noted that he used a power wheelchair at home and in school as his primary means of mobility which he was able to drive with occasional verbal cueing to avoid obstacles (*id.*).

The June 2019 IEP stated that the student initiated much of his reaching behavior through movement of his head in stereotypical patterns consistent with the asymmetrical tonic neck reflex and the symmetrical tonic neck reflex which limited his ability to use his vision to coordinate his reach (Dist. Ex. 12 at pp. 6-7). Additionally, the IEP noted that the student typically displayed scapular protraction followed by internal rotation of his shoulder with elbow flexion when reaching for objects creating the appearance of a circular movement of the shoulder (*id.* at p. 7). When engaging in fine motor activities, the student initiated movement using the large muscle groups of his shoulder, which made refined fine motor activities difficult to complete (*id.*).

With regard to the student's motor planning, the June 2019 IEP indicated that he presented with stereotyped movement patterns which he used to compensate and assist him to complete motor actions such as coordinating his vision with his reach (Dist. Ex. 12 at p. 8). Additionally, the IEP reported that the student presented with challenges with the speed and accuracy and efficiency of his movement and benefitted from moderate assistance at his elbow for reaching and moderate cueing during movement based tasks (*id.*). Finally, the student benefitted from input to his trunk and feet to make him feel more grounded (*id.*).

The June 2019 IEP identified the following management needs: use of direct instruction for all new concepts; minimal distractions; the use of adapted materials to accommodate his communication and motor abilities; meaningful repetition of instruction as appropriate; highly individualized materials and activities designed to integrate skills learned in therapy into a variety

of settings; academics done in a quiet, distraction free environment; access to visual and manipulative supports for activities and tasks; the Tobii I-12 eye gaze device throughout academic tasks; participation in a standing program for one hour per day to improve muscle length, bowel and bladder function and bone density; repositioned several times during the day to prevent skin breakdown and sores and maintain skin integrity; wedge, pillow or therapy ball to aid in positional changes when he is not sitting on his adaptive stroller; the use of a Benik vest, immobilizers and HKAFO during mobility exercises and KAFOs for weight bearing activities; positioning to prevent contraction and regression of ROM with his power wheelchair and adaptive equipment (Dist. Ex. 12 at p. 8).

The district psychologist, who also served as the CSE chairperson for the June 2019 CSE meeting, testified that the duration of related services depended on the student's needs, stamina and endurance, required supports, and current goals (Tr. p. 131). The psychologist explained that when it came to related services, she had to make recommendations based on typically what was provided within a public school placement, so when a 60-minute session was recommended it was based on the goals the student was working on (Tr. p. 133). She further explained that the student was recommended for 60-minute speech-language therapy sessions because he was working on additional goals that addressed feeding, which accounted for the additional 30 minutes; however, OT was not working on feeding (the use of utensils) and was only targeting fine motor skills therefore the sessions did not need to be 60 minutes in duration (Tr. pp. 132-33, 134-35). With respect to endurance and stamina, the psychologist testified that 60-minute sessions were considered based on the goals a student was working on and she did not consider increasing or decreasing the duration of therapy sessions based on endurance; rather endurance was considered with regard to whether the therapy service was provided or had to be made up because the student was fatigued (Tr. pp. 137-38). She noted that if a student fell asleep during a therapy session it was not counted as complete and the provider needed to do a make-up session (Tr. p. 136). The psychologist also testified that there many factors that determined the length of related services sessions, including age (Tr. pp 138-40). She reviewed the description of the student's physical therapy sessions found in his IEP and indicated that the CSE recommended 30-minute PT sessions for the student because the supports could be provided in 30 minutes (Tr. pp. 140-43; see Dist. Ex. 16 at p. 5).¹³ She suggested that although the iBrain therapist spent 15 minutes stretching the student during therapy sessions it did not mean that every physical therapist would spend 15 minutes stretching the student (Tr. p. 143). The psychologist initially testified that she did not agree that the duration of the stretching portion of the student's physical therapy sessions should be based on how long it took his mind and body to be ready to move on to other activities (Tr. pp. 220-21). However, she later stated that she was unsure and that she did not know the full ramifications of how goals were implemented and the additional things taken into account when considering "those durations" (Tr. p. 222). The psychologist explained that the duration of PT was based on the area of growth that the student was working on as well as the student's needs, age and areas of strength (Tr. pp. 221-22). She clarified that the duration of related services was "not just

¹³ It was the parent's attorney who referred the witness to a later, substantively similar copy of the district's proposed IEP, which is discussed above, but the provisions functioned similarly regardless of which exhibit was used.

based on the [student's] ability to attend" but on their mobility issues which was why goals were created (Tr. p. 222).

In the district psychologist's direct testimony by affidavit, she opined that the student's needs for PT could be met with 30 minutes of service five times per week rather than 60 minutes "in light of his stamina and ability to participate in [PT] without exerting too much strain on his body or ability to remain engaged" (Dist. Ex. 20 at p. 4). She further reported that based on the student's needs, and his inability to maintain mental and physical focus for an extended period of time, the IEP team determined that he would benefit from 30 minutes of OT five times per week because they felt 60 minutes was too much service (id.).

The director of special education at iBrain explained in her direct testimony by affidavit that related services were provided in 60-minute sessions "because of transferring and re-positioning needs, additional transition time and rest and repetition needs to foster neuroplasticity" (Parent Ex. N at p. 2). She testified that the difference between 30-minute sessions and 60-minute sessions for a student like this student was a "night and day difference" (Tr. p. 362). She explained that the longer sessions were necessary because of the amount of skills the student needed to work on (Tr. p. 362). She specified that in PT the student was working on "a lot of muscle development" which required "a lot of body control and learning...muscle memory to execute the activities that he's doing and really learning to sequence his muscles to move and try to learn the motor patterns" (Tr. pp. 362-63, 337-38). The iBrain director testified that this was fundamentally a longer process than working on one discrete skill, and the preparation needed to engage in the process was also longer due to the student's need for two-person transfers and equipment such as the KAFOs that had to be put on and attended to by the therapist (Tr. p. 363). The director denied that the student became fatigued during therapy session and opined that it would be impossible to get all the things done that the student required in 30 minutes (Tr. pp. 332-34, 336-37). She testified that cutting the duration of the student's therapy sessions would "stress him out because he knows the things that he needs to do" (Tr. p. 338). She opined that cutting the session time would make it impossible for the student to meaningfully engage in therapeutic activities (Tr. p. 338).

As noted above, related services are those developmental, corrective, and other supportive services required to assist a student with a disability to benefit from education and the CSE's recommendation for the services, as well as their frequency, duration, and location must be based on the student's needs. The present levels of performance of the student's June 2019 IEP indicated that he had significant communication and motor needs and was dependent for all ADLs (Dist. Ex. 12 at pp. 1-8). The IEP included speech-language goals related to developing recall and narrative skills, improving pragmatic skills with the use of an AAC device, and improving oral motor and feeding skills (id. at pp. 14-16). For OT, the student's IEP included a goal related to gaining independence when manipulating the environment and interacting with peers, and for PT the IEP included a goal related to maintaining tall kneel with moderate assistance so as to participate in leisure activities (id. at pp. 13, 17-18). The IEP also included a goal that targeted the student's ability to roll from supine to prone (similar to an OT short-term objective) and a goal that targeted the student's increased participation in community integration using powered mobility (id. at p. 19). As the student had previously been unilaterally placed at iBrain, it appears that the goals appear to have been adopted by the CSE from the student's most recent planning document, the private 2019-20 IEP developed by iBrain (compare Dist. Ex. 12 at pp. 13-18, with Parent Ex. C at pp. 24-31).

The iBrain 2019-20 IEP included a rationale for why the student's OT and PT sessions should be 60-minutes in duration including the suggestion that the student's motor functioning would regress if the duration of his therapies were to be reduced (Parent Ex. C at pp. 29, 30-31.) More specifically, the iBrain IEP stated that the student required PT services 5 times per week for 60-minute sessions in order to make the maximal amount of progress as the student required time to transition to the sessions and stretch and have his AFOs donned so he could work on functional activities (*id.*). Due to the student's tone this took varying amounts of time (*id.*). The iBrain IEP also indicated that the student required rest breaks throughout his PT sessions (*id.*). The iBrain IEP stated that without daily PT services the student would not gain skills and would also lose gains in his muscular endurance levels and range of motion (*id.*). The iBrain IEP further stated that it was not possible to complete a functional session working on the student's goals in a shorter duration or frequency of sessions (*id.*). Turning to OT, the iBrain IEP indicated that due to the student's challenges with speed, accuracy and efficiency of movement he required 60-minute therapy sessions in order to provide the necessary amount of breaks, as well as physical assistance and cueing during initiation and completion of his tasks (*id.*). The iBrain IEP stated that a decrease from five 60-minute therapy sessions would likely contribute to regression of skills and progress toward his goals (*id.*).

The hearing record also shows that the related service sessions were part of a larger context and that CSE did not indiscriminately reduce the duration of the student's related services sessions. Rather, the CSE considered the student's needs and the goals he was working toward when determining the length of therapy sessions. As noted above, the CSE recommended 60-minute speech-language therapy sessions because the student was working on oral motor/feeding skills in addition to language skills and recommended 30-minute OT and PT sessions because the student not working on additional skills in those therapies (Tr. pp. 132-35). While the iBrain rationale for 60-minute PT sessions indicated that the student would regress without the longer therapy sessions, it also stated that five 60-minute sessions per week were needed for the student "in order to make the maximal amount or progress" (Parent Ex. C at p. 29). However, the IDEA does not promise maximization of educational benefits (*Doe v. E. Lyme Bd. of Educ.*, 962 F.3d 649, 663 [2d Cir. 2020]). While the school psychologist suggested that the duration of the student's OT and PT were reduced due to the student's stamina, the hearing record does not indicate that the student was easily fatigued (Tr. pp. 332-34, 336-37). As noted above, the student is non-verbal and non-ambulatory, and presents with low average cognitive abilities and significant delays in his gross and fine motor development, activities of daily living (ADL), and self-help skills (Parent Ex. C at pp. 1-18; Dist. Exs. 9 at p. 2; 12 at pp. 1-8). The student's IEP also noted that his parent wanted a strong focus on academics as he was near grade level academically and they wanted him to be presented with challenging and grade level work (Dist. Ex. 12 at p. 4). It is also evident from the iBrain IEP that rest breaks, transition time, and repositioning is incorporated into that school's calculation of therapy time, but there are no requirements that specifically mandate how therapists, teachers and paraprofessionals may accommodate those needs or specify the moment-to-moment details in an IEP (see, e.g., *Application of a Student with a Disability*, Appeal No. 20-138). Suffice it to say that the parents and the district members of the CSE in this case disagreed as to how to precisely balance the student's motor needs with his academic needs, with the district members of the CSE favoring more time spent in the classroom and less time spent in therapy sessions. But that disagreement does not amount to a denial of a FAPE. The CSE recommended that the student receive both OT and PT on a daily basis, along with the support of a 1:1 paraprofessional to assist him with ADLs (Dist. Ex. 12 at p. 23). Although the CSE recommended certain related service

therapy sessions that were shorter in duration than the parents preferred considering the totality of the student's needs, this does not form a basis for finding that the IHO erred in concluding that the district offered the student a FAPE.

VII. Conclusion

Having determined that the parent's challenges to the IHO's determination that the district offered the student a FAPE for the 2019-20 school year are without merit, the necessary inquiry is at an end and it was not necessary to for the IHO address the appropriateness of the parent's placement of the student at iBrain or whether equitable considerations preclude relief (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.¹⁴

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
June 3, 2021**

**JUSTYN P. BATES
STATE REVIEW OFFICER**

¹⁴ In particular, the student's proposed May 2020 IEP that is being addressed in a different, later proceeding is irrelevant to the prospective analysis required to determine whether the June 2019 IEP was appropriate at the time it was drafted and the due process complaint notice was filed.