The University of the State of New York

The State Education Department
State Review Officer
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No. 21-132

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

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

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathan Luken, 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 found that respondent (the district) offered the student an appropriate educational program and denied her request to be reimbursed for her son's tuition costs at the International Institute for the Brain (iBrain) for the 2019-20 school year. The district cross-appeals from the IHO's decision ordering the district to reevaluate the student and develop a new IEP. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student in this matter has been the subject of prior appeals to the Office of State Review (Application of a Student with a Disability, Appeal No. 20-196, Application of a Student with a Disability, Appeal No. 21-077). By way of background, the student has received diagnoses including cerebral palsy, spastic quadriplegia, hypotonia, intellectual disability, and asthma (Dist. Ex. 8 at p. 2). He is nonverbal, non-ambulatory, and dependent on others for all activities of daily

living (ADLs) (id. at p. 1).[1] He consumes a puree diet and communicates through vocalizations, eye gaze, and facial expressions (id.). From December 2008 until the end of the 2018-19 school year the student attended a 12:1+(3:1) special class in ADAPT Community Network (ADAPT), a State-approved, nonpublic school (Dist. Ex. 18 at pp. 1, 2).[2]

By letter dated December 7, 2018, the district notified the parent of a CSE meeting scheduled for January 18, 2019 (Dist. Ex. 2).

On January 18, 2019 the CSE convened to develop the student's IEP for the 2019-20 12-month school year beginning in July 2019 (Dist. Exs. 1 at pp. 1, 17; 18 at p. 2).[3] The January 2019 CSE determined that the student was eligible for special education as a student with multiple disabilities and for the 2019-20 school year, identifying July 2, 2019 as the projected date for the beginning of services, recommended a 12-month 12:1+4 special class program in a State-approved nonpublic day school, together with three 30-minute sessions per week of individual occupational therapy (OT), three 30-minute sessions per week of individual physical therapy (PT), and three 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 1 at pp. 11-12).[4] The CSE determined that the student would participate in the alternate assessment program, and receive door to door special transportation services including a lift bus with air conditioning, limited travel time, fewer students, and a wheelchair (id. at pp. 13-14).

In a letter dated January 18, 2019, the district informed the parent of the nonpublic school the student was assigned to attend beginning in July 2019 (Dist. Ex. 12). In a prior written notice dated January 30, 2019, the district provided the parent with prior written notice identifying the January 2019 CSE's recommendations for the 2019-20 school year (Dist. Ex. 3). The student remained in his program at ADAPT for the remainder of the 2018-19 school year and for the 12-month portion of the 2019-20 school year in July and August 2019 (Tr. pp. 211, 286).

In a letter dated August 27, 2019, the parent provided the district with notice of her intent to unilaterally place the student at iBrain for the 2019-20 school year and seek public funding for

[1] According to a December 20, 2018 social history update, Spanish is the primary language spoken in the student's home (Dist. Ex. 8 at p. 2).

[2] The January 2019 CSE's special class recommendation is referred to interchangeably in the hearing record as a 12:1+4 and a 12:1+[3:1] (see e.g., Dist. Ex. 1 at p 11; 18 at p. 3). For consistency in this decision, the special class recommendation will be referred to as a 12:1+4 special class placement. However, State regulations define this type of class as including no more than 12 students and, "[i]n addition to the teacher, the staff/student ratio shall be one staff person to three students," which "additional staff may be teachers, supplementary school personnel and/or related service providers" (8 NYCRR 200.6[h][4][iii]).

[3] The January 2019 IEP reflects two different dates of the CSE meeting, with January 11 identified on the form and January 18 written in on the attendance page (see Dist. Ex. 1 at pp. 15, 17). The district school psychologist testified that the IEP was developed at a CSE meeting held on January 18, 2019 (Tr. pp. 49, 115; Dist. Ex. 1 at p. 15).

[4] Although the student's eligibility for special education and related services is not in dispute, as discussed further below, the parties disagree about which disability classification is appropriate for the student.

that placement (Parent Ex. F).[5] Specifically, the parent alleged that the district had not offered the student a program or placement that could appropriately address his educational needs and that she was not accepting the district's recommended IEP and assigned public school placement (id.). The parent requested that "the CSE reconvene an IEP meeting immediately to address her concerns" (id.).

On August 28, 2019, the parent executed a contract securing the student's transportation services to and from iBrain for the 10-month 2019-20 school year (Parent Ex. E). On August 29, 2019 the parent executed a contract to enroll the student at iBrain for the 10-month 2019-20 school year (Parent Ex. C). The student attended iBrain during the 2019-20 school year (Parent Ex. H at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated September 30, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Parent Ex. A). The parent alleged that the January 18, 2019 CSE did not use individualized evaluations and did not accurately identify the student's classification as a student with a traumatic brain injury (id. at pp. 1, 2). The parent also asserted that the January 18, 2019 IEP: contained inadequate, insufficient, or otherwise inappropriate present levels of performance, annual goals, management needs, and related services (id. at p. 2). With respect to management needs, the parent asserted that the recommended placement would not address the student's "highly intensive management needs" (id.). According to the parent, related services mandates of 30 minutes were too short in duration and the student required 60-minute sessions of related services (id.). The parent alleged that the recommended 12:1+4 special class in a State approved, nonpublic school was inappropriate due to the student to teacher ratio as the ratio did not ensure constant 1:1 support and monitoring (id.). The parent further alleged that the recommended program did not represent the student's least restrictive environment (LRE) (id.). Finally, the parent alleged that the recommended placement was inappropriate because it had failed to properly implement the student's IEP during the prior school year (2018-19) when it failed to provide all of the student's related services and did not inform the parent of this failure until the end of the school year (id.). To remedy the district's alleged failures, the parent requested that the district directly pay for the student's attendance at iBrain, including tuition and travel costs, as well as a 1:1 travel paraprofessional, for the 2019-20 school year (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 15, 2019 and concluded on February 25, 2021 after nine days of proceedings (Tr. pp. 1-401). In a decision dated May 6, 2021, the IHO determined that the district offered the student a FAPE for the 2019-20 school year (IHO Decision at pp. 15-26). With respect to the notice of the January 2019 CSE meeting, the IHO found that the notice sent to the parent was not in Spanish; however, the parent attended the meeting, a translator was present, and the parent participated in the meeting (id. at pp. 18, 25). The IHO also determined

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

that the parent was an active member of the CSE team and that, accordingly, any procedural violation based on the composition of the CSE did not result in a denial of FAPE (id. at pp. 15-18, 25). The IHO then reviewed the evaluative information considered by the January 2019 CSE, found that it was sufficient, found that, "for the most part," the IEP mirrored the recommendations contained in the available evaluative materials, and found that the CSE also recommended measurable annual goals to address the student's needs (id.at pp. 18-23, 25-26). The IHO also found that the student was appropriately classified as a student with multiple disabilities (id.at p. 22). Overall, the IHO determined that "the CSE did a fair and reasonable job of producing an IEP that [wa]s reasonably calculated to enable the student in this case to make progress" (id. at p. 24). The IHO did not address whether iBrain was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for an award of reimbursement for tuition and transportation costs (id. at p. 26). However, the IHO directed the district to conduct a reevaluation of the student in all areas of his suspected disabilities, that have not been evaluated within the last two years (id.).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in finding the district offered the student a FAPE for the 2019-20 school year. The parent asserts that the IHO erred by not addressing whether iBrain was an appropriate unilateral placement for the student during the 2019-20 school year, and whether equitable considerations favored the parent's request for an award of reimbursement for tuition at iBrain along with the cost of special transportation for the 2019-20 school year.

With respect to the IHO's determination that the district offered the student a FAPE for the 2019-20 school year, the parent asserts the IHO erred by failing to find that the CSE procedurally denied the student a FAPE when it failed to provide notice of the January 2019 CSE meeting and the January 2019 prior written notice in her native language, failed to advise her that she could request a "parent member" attend the meeting, and held the CSE without the student's then current related service providers or a district physician. The parent further asserts that the IHO erred in finding that the CSE had sufficient evaluative information, alleging that the district did not use any "substantive assessments" to evaluate the student.

The parent also asserts that the January 2019 IEP denied the student a FAPE because it provided for an inappropriate classification of multiple disabilities rather than a classification of traumatic brain injury and contained insufficient academic annual goals and included inappropriate annual goals. With respect to related services, the parent asserts that the IHO erred in not finding a denial of FAPE because the January 2019 CSE recommended 30-minute sessions instead of 60-minute sessions, recommended related service be delivered on a pull-out basis rather than as both push-in and pull-out, and failed to include vision education services. The parent further asserts that the January 2019 CSE failed to recommend assistive technology services, a 1:1 travel paraprofessional, a 1:1 paraprofessional during the school day, and parent counseling and training.

The parent also asserts that the IHO erred in finding that the recommended 12:1+4 special class in a State approved, nonpublic school was appropriate asserting that the district recommended a different placement for the following school year, the January 2019 CSE ignored the student's highly intensive management needs in making the placement recommendation, and

the student did not make progress in the same placement in prior years. As to the assigned school, the parent asserts that it did not provide an appropriate grouping for the student and it was not open to provide services in person for the whole 2019-20 school year.

In an answer with cross-appeal, the district responds with a general denial of all of the allegations in the parent's request for review and requests that the appeal be dismissed with prejudice. First, the district asserts that the parent's request for review fails to comply with the practice regulations in that it failed to explain why or how the IHO's findings were incorrect or erroneous. Next, the district argues that the IHO correctly determined that the student was offered a FAPE for the 2019-20 school year, and that a number of the claims the parent attempts to raise on appeal were not included in the due process complaint notice, including that the district failed to provide the parent with the January 2019 CSE meeting notice and prior written notice in her native language, that the student's related services providers and a physician were not present at the CSE meeting, that the district failed to conduct adequate evaluations, that the recommended related services were not appropriate because they were provided only on a pull-out basis, that the CSE failed to recommend a travel paraprofessional, parent counseling and training, and a 1:1 paraprofessional, that the district did not prove the school could appropriately group the student in the recommended special class, and that the district failed to offer the student a placement for the entirety of the 2019-20 school year because ADAPT closed in April 2020 for in-person learning due to the COVID-19 pandemic. The district further argues that the IHO did not err by not admitting into evidence the May 2020 IEP and a paragraph from an affidavit of one of the parent's witnesses. Additionally, the district asserts that the IHO erred by not finding that iBrain was not an appropriate placement and that equitable considerations did not favor the parent's request for reimbursement. As and for a cross-appeal, the district asserts that the IHO erred by ordering the district to reevaluate the student and develop a new IEP, as the IHO determined that the district offered the student a FAPE for the 2019-20 school year, therefore the parent's request to reconvene should be denied, and the order pertains to the 2021-22 school year which is outside the scope of the impartial hearing. As such, the district requests that the IHO's order that the district reevaluate the student and develop an IEP for the 2021-22 school year be reversed and the parent's appeal be dismissed with prejudice.

In an answer to the district's cross-appeal, the parent denies any and all allegations asserted by the district, and asserts that all issues contained in the request for review were properly addressed in the due process complaint notice, and regardless, the district waived any defense to by not raising the defense during the impartial hearing.

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]).[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. Initial Matters

1. Compliance with Practice Regulations

The district asserts that the request for review should be dismissed for failure to conform to the pleading requirements because it does not explain why or how the IHO's findings were incorrect or erroneous. State regulation provides that: the request for review, answer, or answer and cross-appeal shall each set forth: (1) the specific relief sought in the underlying action or proceeding; (2) a clear and concise statement of the issues presented for review and the grounds

[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).

for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number. (8 NYCRR 279.8[c]). Further, any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer. (8 NYCRR 279.8[c][4]).

I note that the district was able to answer the request for review—touching on several issues. While the request for review raised some issues awkwardly, i.e. "the IHO failed to find," they were nonetheless sufficiently raised, and the request for review includes challenges to the prior written notice not being in the parent's native language, the CSE composition, the evaluative information, and the recommended related services (see e.g., Req. for Rev. at ¶¶ 12-14, 16, 18). Based on the district's ability to respond to the parent's assertions and the ability to identify the issues raised in the request for review, I decline to dismiss the request for review based on a lack of conformance to the pleading requirements.

2. Scope of Impartial Hearing

The district asserts that the request for review includes claims that were not raised in the due process complaint notice and that, therefore, they are not a subject of the impartial hearing and should not be considered on appeal. Specifically, the district asserts that the following issues were raised on appeal, but were not a part of the hearing: that the CSE meeting notice and prior written notice were not in Spanish; that the CSE was not properly composed due to the absence of the student's then current iBrain related service providers and a district physician; that the evaluations were not adequate; that the IEP did not include recommendations for a 1:1 travel paraprofessional, a 1:1 paraprofessional, or parent counseling and training; that the district did not prove it could appropriately group the student; and, finally, that the closure of ADAPT during the Covid-19 pandemic precluded proper implementation of the student's IEP due to the lack of in-person learning (Ans. at ¶¶ 7-9, 11, 12, 17, 18).

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]).

As noted by the district, the parent's due process complaint notice does not make any allegations or references to the language of the CSE meeting notice or prior written notice or the composition of the January 2019 CSE (see Parent Ex. A). The due process complaint notice also does not include any allegations as to parent counseling or training, the ability of the proposed school to provide an appropriate grouping for the student, or the school's closure to in-person instruction during the Covid-19 pandemic (id.). Additionally, although the due process complaint

notice includes a request for transportation costs "including a 1:1 travel paraprofessional," there is no allegation in the due process complaint notice that indicates the district did not recommend appropriate special transportation services, or that the January 2019 CSE should have recommended a travel paraprofessional (id.). However, the due process complaint notice did include allegations related to the January 2019 CSE's recommendation for a 12:1+4 special class asserting that the class ration was too large "to ensure the constant 1:1 support and monitoring [the student] require[d] in order to remain safe and d[id] not offer the 1:1 direct instruction and support [the student] require[d] to make any progress under the IEP" (id. at p. 2). Additionally, the due process complaint notice included an allegation that the January 2019 IEP was "not the product of any individualized assessment of [the student's] needs" (id.). Accordingly, the parent's allegations related to a 1:1 paraprofessional and whether the CSE relied on any individualized assessments of the student's needs will be addressed as they were raised.

In response to the district's request that the above allegations were not raised in the parent's due process complaint notice, the parent contends that some of these issues were raised because the parent made a general allegation that the district "significantly impeded [the parent's] opportunity to participate in the decision-making process regarding the provision of a FAPE to the student" or because "she raised the [district's] failure to recommended a program that appropriately reflect[ed] [the student's] needs. (Parent Ex. A at p. 1; Reply ¶¶ 4, 5). However, these allegations are over-broad and following the interpretation requested by the parent would hinder the district's ability to prepare for a hearing and improperly expand the district's burden of proof (see N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *5 [S.D.N.Y. Feb. 11, 2016]).

In addition, to the extent that the parent asserts the district waived any objection to including these issues as a part of the impartial hearing, the parent did not identify any point in the proceeding where the district was made aware of the parent's intention to raise these issues Reply ¶ 2). Accordingly, the parent appears to be arguing that the district should be required to affirmatively identify issues that it was not made aware of during the hearing or run the risk of having to defend those issues after the conclusion of the hearing (id.). This position is untenable. Finally, while 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]), the parent has not identified any portion of the hearing record where such a finding could be made (see Reply). Based on the above, the issues raised on appeal related to the language of the CSE meeting notice and prior written notice, the composition of the January 2019 CSE, parent counseling and training, the ability of the proposed school to provide an appropriate grouping for the student, the school's closure to in-person instruction during the Covid-19 pandemic, and a 1:1 travel paraprofessional ae all outside the scope of the impartial hearing and will not be addressed further.

3. Additional Evidence

The parent asserts that the IHO erred by not admitting the May 27, 2020 IEP which is now proposed exhibit A on appeal and striking paragraph 21 of parent exhibit H. The parent appears

to want these documents admitted for the purpose of demonstrating that the program, placement, and related services contained in the May 2020 IEP and provided at iBrain prove that the January 2019 IEP is flawed.

Generally, documentary evidence not presented at an impartial hearing will be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (Application of a Student with a Disability, Appeal No. 14-179; Application of a Student with a Disability, Appeal No. 13-238; Application of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). When the non-submitting party does not object to the inclusion of additional evidence, or relies on the evidence in formulating its pleadings, the determination to either include or exclude additional evidence still rests solely within the discretion of the SRO (see 8 NYCRR 279.10[b]; L.K., 932 F. Supp. 2d at 488-89; Application of a Student with a Disability, Appeal No. 18-114).

Further, the purpose for which the parent is attempting to submit this additional evidence is not a proper. It is inappropriate to use a subsequent IEP or the results of a subsequent impartial hearing to prove that a student was either provided with or denied a FAPE during a prior school year. In submitting the May 2020 IEP, the parent is attempting to use information not available to the January 2029 CSE to judge the January 2019 CSE's recommendations; this argument is misguided as the CSE's determinations must be judged based on the information that was available to them (see C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [finding that "a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events . . . that seek to alter the information available to the CSE"]; F.O. v New York City Dep't of Educ., 976 F. Supp. 2d 499, 513 [S.D.N.Y. 2013] [refusing to consider a subsequent school year IEP as additional evidence because it was not in existence at the time the IEP in question was developed]).

Based on the above, the relevant inquiry concerning the 2019-20 school year needs to focus on the January 2019 CSE and resulting IEP, and not the May 2020 CSE and resulting IEP. As such, I find that the IHO did not err in excluding the May 2020 IEP or by striking paragraph 21 of parent exhibit H.

B. January 2019 IEP

Turning to the allegations properly raised by the parent in the request for review, the parent contends that the January 2019 IEP failed to accurately reflect the student's classification as a student with traumatic brain injury, was not the "product of any individualized assessment" of the student, contained insufficient academic annual goals and included inappropriate annual goals, included a recommendation for 30-minute sessions of related services instead of 60-minute sessions, included a recommendation for related service to be delivered on a pull-out basis rather than as both push-in and pull-out, did not include vision education services, did not include assistive technology services, and included an inappropriate program recommendation for a 12:1+4 special class in a State-approved nonpublic school.

1. Disability Classification

The parent asserts the IHO erred in finding that the student's classification as a student with multiple disabilities was appropriate and that the student should have been classified as a student with a traumatic brain injury.

Generally, with respect to disputes regarding a student's particular disability category or classification, federal and State regulations require districts to conduct an evaluation to "gather functional developmental and academic information" about the student to determine whether the student falls into one of the disability categories under the IDEA, as well as to gather information that will enable the student to be "involved in and progress in the general education curriculum" (34 CFR 300.304[b][1]; see 8 NYCRR 200.4[b][1]). Courts have given considerably less weight on identifying the underlying theory or root causes of a student's educational deficits and have instead focused on ensuring the parent's equal participation in the process of identifying the academic skill deficits to be addressed though special education and through the formulation of the student's IEP (see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [noting the IDEA's strong preference for identifying the student's specific needs and addressing those needs and that a student's "particular disability diagnosis" in an IEP "will, in many cases, be immaterial" because the IEP is tailored to the student's individual needs]; Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331, 1342 [N.D. Ga. 2007]; see also Application of a Student with a Disability, Appeal No. 21-056; Application of the Dep't of Educ., Appeal No. 12-013; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]). "Indeed, '[t]he IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education'" (Heather S. v. State of Wisconsin, 125 F.3d 1045, 1055 [7th Cir.1997]).

CSEs are not supposed to rely on the disability category to determine the needs, goals, accommodations, and special education services in a student's IEP. That is the purpose of the evaluation and annual review process, and this is why an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (see 34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Once a student has been found eligible for special education, the present levels of performance sections of the IEP for each student is where the focus should be placed, not the label that is used when a student meets the criteria for one or more of the disability categories.

> "Traumatic brain injury" is defined as "an acquired injury to the brain caused by an external physical force or by certain medical conditions such as stroke, encephalitis, aneurysm, anoxia or brain tumors with resulting impairments that adversely affect educational performance. The term includes open or closed head injuries or brain injuries from certain medical conditions resulting in mild, moderate or severe impairments in one or more areas, including cognition, language, memory, attention, reasoning, abstract thinking, judgement, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions,

> information processing, and speech. The term does not include injuries that are congenital or caused by birth trauma."

(see 8 NYCRR 200.1[zz][12]). "Multiple disabilities means concomitant impairments (such as intellectual disability-blindness, intellectual disability-orthopedic impairment, etc.), the combination of which cause such severe educational needs that they cannot be accommodated in a special education program solely for one of the impairments. The term does not include deaf-blindness" (8 NYCRR 200.1[zz][8]).

At this juncture, when the student's eligibility for special education is not in dispute, the significance of the disability category label is more relevant to the local educational agency and State reporting requirements than it is to determine an appropriate IEP for the individual student.[7]

In this case, the hearing record shows that the student is non-verbal and non-ambulatory, has a minor vision impairment, depends on adult assistance for mobility and to complete all ADLs, has received diagnoses of quadriplegic cerebral palsy, muscle hypotonia, a developmental delay, coxa valga, dystonia, chorea, impaired mobility, microcephaly, and an intellectual disability (Parent Ex. B at p. 1). In assessing the student's complex needs, the student may qualify for classification as a student with a traumatic brain injury; however, the hearing record also demonstrates that the January 2019 CSE's decision to classify the student as a student with multiple disabilities was not unreasonable. Additionally, while the parent asserts that the student required

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[7] The disability category for each eligible student with a disability is necessary as part of the data collection requirements imposed by Congress and the United States Department of Education upon the State, which require annual reports of "[t]he number and percentage of children with disabilities, by race, ethnicity, limited English proficiency status, gender, and disability category," who fall in several subcategories (20 U.S.C. § 1418[a] [emphasis added]; see 34 CFR 300.641). Although it does not bind the CSE in its responsibility to provide individualized services in accordance with the student's unique needs, for reporting requirement purposes:

> [i]f a child with a disability has more than one disability, the State Education Agency (SEA)must report that child in accordance with the following procedure:
>
> (1) If a child has only two disabilities and those disabilities are deafness and blindness, and the child is not reported as having a developmental delay, that child must be reported under the category "deaf-blindness."
>
> (2) A child who has more than one disability and is not reported as having deaf-blindness or as having a developmental delay must be reported under the category "multiple disabilities"

(34 CFR § 300.641[d]). The Local Education Agency (LEA) must, in turn, annually submit this information to the State though its Special Education Data Collection, Analysis, and Reporting (SEDCAR) system (see, e.g., Verification Reports: School Age Students by Disability and Race/Ethnicity" available at http://www.p12.nysed.gov/sedcar/forms/vr/1819/pdf/vr3.pdf; see also Special Education Data Collection, Analysis & Reporting available at http://www.p12.nysed.gov/sedcar/data.htm). According to the Official Analysis of Comments to the revised IDEA regulations the United States Department of Education indicated that the multiple disability category "helps ensure that children with more than one disability are not counted more than once for the annual report of children served because State's do not have to decide among two or more disability categories in which to count a child with multiple disabilities" (Multiple Disabilities, 71 Fed. Reg. 46550 [August 14, 2006]).

a program with a direct instruction model (i.e., 1:1 instruction) based on a classification (see Req. for Rev. at pp. 8-9), as is more fully described below, the district's recommended program was appropriate, not based on a classification, but based on it addressing the student's identified deficits, and the IDEA's strong preference for identifying the student's specific needs and addressing those needs generally outweighs relying on a particular disability diagnosis in order to create the program (Draper, 480 F. Supp. 2d at 1342; Heather S., 125 F.3d at 1055). Accordingly, the disability category used to find the student eligible for special education is not a reason for finding a denial of FAPE under these circumstances.

2. Evaluative Information

Although as described above the only issue the parent raised regarding the evaluative information available to the January 2019 CSE was that it did not include any individualized assessment of the student, a full discussion of the evaluative information available to the January 2019 CSE provides context for the remaining issues; namely, whether certain components of the student's January 2019 IEP were appropriate.

The district school psychologist and the ADAPT school psychologist who both participated at the January 2019 CSE meeting stated that the CSE reviewed the following documents at the meeting: a January 2018 psychological evaluation report, a December 2018 social service update report, a December 2018 speech-language and feeding progress report, a January 2019 OT progress report, a January 2019 PT progress report, and a January 2019 educational progress report (Tr. pp. 59-60, 64-68, 169-71; Dist. Exs. 1 at p. 17; 18 at p. 1; see Dist. Exs. 5-9, 16). Additionally, in connection with the student's IEP, in November 2018 the district school psychologist prepared a request for transportation accommodations packet, which was answered in a document the CSE received on November 27, 2018 (Tr. pp. 66-69; see Dist. Exs. 10; 13).

The January 2018 psychological evaluation report relayed the student's diagnoses and then-current classroom placement and services, and briefly described that he was nonverbal, non-ambulatory, and dependent on others for all ADLs (Dist. Ex. 16 at p. 1). The ADAPT school psychologist administered the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II) to the student's teacher and obtained the following domain standard scores (percentile, descriptor): communication 28 (<.1, low-severe deficit), daily living skills 25 (<.1, low-severe deficit), and socialization 34 (<.1, moderately low deficit), with an overall adaptive behavior composite standard score of 25 (<.1, low-severe deficit) (id. at pp. 2-3).[8] The ADAPT school psychologist

[8] There is some confusion in the hearing record regarding which of the domain scores reflected in the January 2019 IEP were from the more recent administration of the Vineland-II. For example, the January 2018 psychological evaluation report reflects a Vineland-II communication score of 28 (low-severe) and a socialization score of 34 (moderately low), while the January 2018 IEP reflects a Vineland-II communication score of 47 (low-moderate) and a socialization score of 55 (low-moderate); scores which are consistent with those in the January 2019 IEP (compare Dist. Exs. 1 at pp. 1, 14, and 4 at pp. 1, 14, with Dist. Ex. 16 at pp. 2-3). The district school psychologist testified that she did not use the most recent results of the administration of the Vineland-II in the student's January 2019 IEP, but rather used "information based on the previous testing" conducted a "couple years ago," acknowledging that the results from the administration in January 2018 showed a decrease in scores from the previous administration (see Tr. pp. 77-79). Her later testimony indicated that she did not recall when the Vineland-II results reflected in the January 2019 IEP were obtained (see Tr. pp. 117, 119-20). However, the ADAPT school psychologist testified that the Vineland-II scores reflected in the January 2019 IEP were from an

concluded that given the results of the Vineland-II, she recommended that the student continue to receive special education through a nonpublic specialized school and related services (id. at p. 3).

On December 20, 2018 a district social worker conducted a social service update with the parent (Dist. Ex. 8). The report reflected a brief description of the student including his diagnoses, medical care, status and equipment, the related services received, family composition, and a brief development history (id. at pp. 1-2). At that time, the parent reported that she did not have any concerns, and regarding transportation, the update reflected that the student required a "lift bus" with a regular size wheelchair and air conditioning, fewer students, and limited travel time (id. at p. 2).

In a December 21, 2018 speech-language and feeding progress report, the student's speech therapists indicated that at ADAPT the student received three, 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 6 at pp. 1, 4). The report stated that "[a]lthough [the student] continue[d] to have severely delayed receptive, expressive and oral motor skills, he ha[d] demonstrated improvement in recent months"; specifically, increasing vowel vocalizations during play, capacity to use augmentative alternative communication (AAC) for interactive language activities, and attention to sound sources such as rattles and musical toys (id. at p. 2).[9] According to the report, the student presented with difficulty consistently imitating vowel vocalizations, showing comprehension of object permanence, receptively identifying familiar objects, using "pushing away" to show rejection, and exhibiting more than limited play skills (id.). The student's oral motor skills were characterized by frequent extraneous oral movements, lack of saliva management, and difficulty with tongue movement and jaw grading (id.). Regarding feeding skills, the student consumed pureed food via spoon and thin liquids through a covered straw cup and exhibited adequate "bolus transport" and swallowing time (id. at pp. 2-3). The report provided long and short-term annual goals to improve the student's expressive, receptive, and oral-motor and feeding skills (id. at pp. 3-4). The speech therapists recommended that the student continue to receive three 30-minute sessions per week of individual speech-language services to progress toward his goals and prevent regression (id. at p. 3).

The student's occupational therapist prepared an OT evaluation report dated January 4, 2019 which reflected the student's basic functioning level, diagnoses, current IEP mandate of three, 30-minute sessions per week of individual OT, and that the student used a manual tilt in space wheelchair and bilateral ankle foot orthotics (Dist. Ex. 7 at p. 1). The report described that the student "display[ed] an alert state of arousal during school" and that he exhibited some ability to show preference/rejection, displayed decreased sensory processing abilities and fair tolerance for therapeutic handling, and that he could complete some aspects of basic fine motor tasks with

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administration of that measure that occurred "[a]round January 4th" of 2019 (Tr. pp. 179-80). Regardless of the specific Vineland-II scores the student received, overall the information available to the January 2019 CSE sufficiently described the student's significant global deficits (see Tr. pp. 59-60, 64-68, 169-71; Dist. Exs. 1 at p. 17; 18 at p. 1; see Dist. Exs. 5-9, 16).

[9] The evidence in the hearing record suggests that parent's use of the term assistive technology encompasses other terms such as AAC, computer adaptive switch, communication device, etc. and are used somewhat interchangeably, in that they are used to describe the student's use of materials and devices for communication purposes (see e.g. Tr. pp. 182-83, 188, 216, 222-23, 277; Dist. Exs. 5 at p. 2; 6 at pp. 2, 3).

assistance (id.). Overall, the occupational therapist reported that the student "demonstrate[d] delayed fine motor skills, visual-motor skills, visual-perceptual skills, cognitive skills, strength, motor coordination, ADL skills, gross motor skills, and sensory processing abilities" (id. at pp. 1-2). Specifically, the report indicated that the student did not demonstrate that he had the ability to reach in various planes for a target item or imitate large gross motor movements with his upper extremities when prompted (id. at p. 2). The report also provided details regarding the student's upper extremity active and passive range of motion, muscle tightness, ability to reach for and explore preferred toys, and complete fine motor activities (id.; see Dist. Ex. 5 at p. 2). The student frequently mouthed his hands or other materials, displayed a fair tolerance for upper extremity sensory input, and appeared to enjoy oral tactile vibratory feedback to improve sensory processing abilities (Dist. Ex. 7 at p. 3; see Dist. Ex. 5 at p. 2). Additionally, the occupational therapist reported that the student was "dependent in all activities of daily living tasks" (id.). The report included long and short-term goals to improve the student's sensory processing/cognitive skills, play skills, attention to books, and fine and visual motor skills (Dist. Ex. 7 at pp. 3-4). The occupational therapist recommended that the student continue to receive his "current mandate" of three 30-minute sessions per week of individual OT to improve his ability to access the classroom environment (id. at p. 3).

In a progress report dated January 4, 2019, the student's physical therapist described the student as non-ambulatory, dependent on others for ADLs, and that he presented "with significant hypo tonicity throughout and decreased strength which inhibit[ed] his functional gross motor abilities" (Dist. Ex. 9 at p. 1). According to the report, the student maintained different positions with assistance and was "able to sit to stand from his wheelchair with moderate assistance and remain standing" near a support with minimal assistance for 30 seconds (id.). Additional information about the student's physical development included that the student used a wheelchair for mobility and that he was dependent on others for assuming and maintaining all developmental positions (Dist. Ex. 5 at p. 2). The PT progress report provided long and short-term goals for the student to improve trunk, head control, and endurance, perform prone prop positioning, and improve muscle strength and coordination (Dist. Ex. 9 at pp. 1-2). The physical therapist recommended that the student continue to receive three 30-minute sessions per week of PT (id. at p. 2).

According to the district school psychologist, the student's special education teacher from ADAPT presented the information contained in the January 2019 educational progress report (Tr. pp. 64-65; see Dist. Ex. 5). The report reflected that the student received 30 hours per week of instruction in a 12:1+4 class (Dist. Ex. 5 at p. 1). The special education teacher reported that the student was functioning at "sensory-motor level of skills acquisition" and that he had made gradual progress "acquiring his academic and ADL skills" (id.). He was described as alert and responsive to the teacher's approach, he responded inconsistently to one-step commands, and reached for/grasped an object presented to him (id. at pp. 1-2). The special education teacher indicated that the student's language skills were at the pre-receptive level of language development in that he attended, listened and looked momentarily when presented with visual or auditory stimulation, and he vocalized vowel-like sounds, vocalized playfully, and vocalized at a sound source (id. at p. 2). Socially, the student smiled during play, expressed feelings differently, was alert and aware of his surroundings, enjoyed communicating with adults, and at times sought attention from staff by

vocalizing (id.). He smiled in response to social approach, enjoyed 1:1 interaction, was attentive during classroom activities, and showed affection for familiar people (id.).

The January 2019 IEP reflected that results of an administration of the Vineland-II yielded a communication domain score of 47 (low-moderate) and a socialization domain score of 55 (low-moderate) (Dist. Ex. 1 at p. 1). Additionally, results of administration of the Non-Speech Test reflected in the IEP showed a receptive language score in the 5-7-month age equivalent range, and an expressive language score in the 9-11-month age equivalent range (id.). The district school psychologist testified that the student was not able to be assessed "under traditional psychological, academic and cognitive testing methods" as he was nonverbal and "his level of functioning, cognitive functioning was very low, so he was not able to participate in standardized tests for cognitive or academic functioning" (Tr. pp. 73-74). Rather, the Vineland-II was administered to parents and/or teachers to obtain "their view of different areas of functioning" including social interaction, communication, ADL, and motor skills (Tr. p. 75). Although the parent may have preferred that the district conduct additional nonverbal measures of the student's cognitive skills (see Tr. pp. 118-19), neither State nor federal regulations require that a district assess the student using a specific evaluation (see 34 CFR 300.304[b], [c]; 8 NYCRR 200.4[b]). The ADAPT school psychologist testified that it was the "practice at ADAPT Schools that our progress reports, which [were] generated for the IEP meeting, [were] thorough and all-inclusive of a child's educational progress and functional levels," and that they were "in a sense, our evaluation of the student yearly" (Tr. pp. 214-15). As such, the evidence in the hearing record shows that the January 2018 CSE had information regarding the student's cognitive, academic, communication, motor, and ADL skills in order to develop the student's IEP (Tr. pp. 59-60, 64-68, 169-71; Dist. Exs. 1 at p. 17; 18 at p. 1; see Dist. Exs. 5-9, 16).

3. Annual Goals

The parent asserts on appeal that the IHO erred in finding that the January 2019 IEP contained comprehensive and measurable goals for the student. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

Review of the January 2019 IEP shows that it included approximately 13 annual goals and corresponding short-term objectives to address the student's needs in the areas of motor, sensory regulation, fine and visual motor, communication, feeding, and pre-academic skills (Dist. Ex. 1 at pp. 3-11).[10] Specific to motor skills, the IEP annual goals were designed to improve the student's

[10] All of the January 2019 IEP annual goals contained criteria to measure whether the goal was achieved (80 percent accuracy), the methods used to measure progress (i.e., teacher made materials, teacher/provider

trunk, head control, and endurance, perform prone prop positioning to next assume quadruped positioning, improve muscle strength and coordination, and shoot a basketball with hand-over-hand assistance (id. at pp. 3-5, 8). Annual goals related to OT included that the student would improve his sensory processing skills by decreasing sensory seeking and mouthing behaviors while increasing his ability to attend to a book read to him, and improve fine motor and visual motor skills using pegboards and novel toys (id. at pp. 5-6). With respect to expressive communication, the IEP provided annual goals to develop the student's ability to exchange PEC symbols to request items, reciprocate vocalizations, expand the use of AAC devices such as the BIGmack or Quicktalker, and choose a desired item via eye gaze (id. at p. 6-7). To improve receptive skills, the CSE developed an annual goal to improve the student's ability to imitate motor movements and reciprocally play with toys upon request (id. at p. 7). The student's feeding and oral motor needs were addressed through an annual goal to improve his lip strength, ability to tolerate facial massage, and improve lip seal when using a spoon (id. at p. 8). Academic annual goals addressed the student's need to improve his choice-making skills by showing preferences via eye gaze and reaching, improve his attention to and comprehension of a story being read, increase his ability to attend and indicate comprehension by reaching for objects, using eye gaze, or vocalizing, improve his ability to use visual and auditory skills to attend to and identify different objects/pictures, and increase the use of eye gaze to indicate shapes and numbers from fields of two and three (id. at pp. 9-11).

According to the ADAPT school psychologist, the annual goals the CSE developed "were based upon the numerous evaluations and school reports provided to or completed by the team at ADAPT prior to the January" 2019 CSE meeting (Dist. Ex. 18 at p. 6; see Tr. p. 74). During the January 2019 CSE meeting, the ADAPT school psychologist testified that the CSE "reviewed each of [the student's] goals for the upcoming year and considered whether additional supports were required to achieve those goals, which the team determined was unnecessary" (Dist. Ex. 18 at p. 3). She further stated that the related service annual goals were developed to improve the student's access to his classroom environment, target particular skill deficit areas, improve functional gross motor abilities, and develop expressive, receptive, and oral-motor skills (id. at pp. 5-6).

While the ADAPT school psychologist acknowledged that the annual goal for the student to shoot a basketball with hand over hand assistance did "not sound like something that [the student] would be able to do," that admission does not render the remainder of the annual goals deficient or result in a finding that the student was denied a FAPE on this basis (Tr. pp. 190-91; see Tr. pp. 279-80). Further, to the extent the parent asserts that the IEP did not contain a sufficient amount of "academic" annual goals, review of the student's needs shows that he required prerequisite skill development including improving his ability to be physically positioned to participate in class activities, attention, engagement, sensory processing, and communication skills, which are the areas the annual goals addressed, and I decline to overturn the IHO's determination that the annual goals were appropriate based on an alleged lack of adequate academic goals (compare Dist. Ex. 1 at pp. 1-2, with Dist. Ex. 1 at pp. 3-11).

observations), and the schedule when progress would be measured (one time per year) (Dist. Ex. 1 at pp. 3-11).

4. Special Factors – Assistive Technology

On appeal the parent argues that the IHO erred by failing to find a denial of a FAPE on the basis that the district did not provide the student with assistive technology services.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. One of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]). Accordingly, the failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access his educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121).

The January 2019 IEP references the student's ability to activate a computer adaptive switch or other communication device, including a BIGmack switch, and included a short-term objective to expand the student's use of AAC devices to participate in language activities (Dist. Ex. 1 at pp. 1, 2, 6). The ADAPT school psychologist testified that a "significant" improvement the ADAPT team noted was the student's ability to independently activate his BIGmack switch or other communication device on a consistent basis, as previously the student had required hand-over-hand assistance to do so (Dist. Ex. 18 at p. 4).

According to the ADAPT school psychologist, the January 2019 CSE was aware that the student used specific assistive technology, which was documented in the present levels of performance in the IEP (Tr. pp. 223, 277). The ADAPT school psychologist testified that the student used a BIGmack switch in the ADAPT program "to assist him in communicating" and that he did not use any other assistive technology devices (Tr. pp. 182-83). She continued that "[d]epending on the device [the student [was] dependent" on assistive technology devices for communication purposes (Tr. p. 183). However, she also testified that the student did "not need a programmatic IEP driven communication device to address his communication needs," and as such, the January 2019 CSE did not recommend that the student receive a "formal" assistive communication device or services (Tr. pp. 188, 223). She further stated that the CSE did not consider any other assistive technology devices for the student, as it had concerns regarding his "ability to fully understand how to use the device and the appropriateness of such devices" (Tr. p. 279).

The evidence in the hearing record shows that the student, who was nonverbal, communicated through a variety of means, including vocalizations, eye gaze, facial expressions, pushing away or pulling an item towards or away from himself, and by hitting a BIGmack switch, but that his communication skills were such that he was dependent on others to anticipate his wants and needs (see e.g., Dist. Exs. 6 at pp. 1, 2; 7 at p. 1; 8 at p. 1; 16 at p. 1). Despite the progress the student has made in his ability to participate in classroom language activities using the BIGmack switch, an overall reading of the hearing record does not show that the student required devices and services as a formal recommendation in the January 2019 IEP to access his educational program and receive a FAPE.

5. 12:1+4 Special Class

On appeal the parent asserts that the IHO failed to determine that the student needed a smaller classroom (i.e. a 6:1+1 special class) with less distractions and with regard to the student's "highly intensive" management needs. The parent also argues that the IHO erred by failing to find that the lack of 1:1 paraprofessional services did not deny the student a FAPE.

State regulation provides that the maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students (see 8 NYCRR 200.6[h][4][iii]). In addition to the teacher, the staff/student ratio shall be one staff person to three students (id.). The additional staff may be teachers, supplementary school personnel, and/or related service providers (id.). The maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction (see 8 NYCRR 200.6[h][4][ii][a]). Management needs, in turn, are defined by State regulations as "the nature of and degree to which environmental modifications and human material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social and physical development (8 NYCRR 200.1[ww][3][i][d]).

The ADAPT school psychologist testified that in all the years from December 2008 through August 2019, the student attended ADAPT in a 12:1+4 special class (Tr. p. 286; Dist. Ex. 18 at p. 2). At the time the ADAPT school psychologist completed her January 2018 psychoeducational assessment of the student, the social worker reported that "there were no parental concerns at the time" (Dist. Ex. 18 at p. 2). According to the ADAPT school psychologist, at the January 2019 CSE meeting, the team discussed the student's present levels of performance and progress in each of the areas of related services and also in his ability to use the BIGmack switch, show engagement in his environment, and use eye gaze to initiate interactions and express preferences (id. at pp. 3, 4). She continued that based on the evaluative material, for the 2019-20 school year the CSE recommended a 12:1+4 special class placement in a State-approved nonpublic school because the student "presented with severe multiple disabilities and required a program focused primarily on habilitation and treatment" (Dist. Exs. 1 at p. 11; 18 at p. 3). The ADAPT school psychologist stated that although the CSE also considered a district specialized school placement, the CSE determined that the student required the additional support of a nonpublic school (Dist. Ex. 18 at p. 3). She further testified that the parent was an active participant and expressed her agreement with the IEP recommendations at the conclusion of the meeting (id.).

The district school psychologist testified that during the January 2019 CSE meeting, the student's mother reported that she had seen progress in the student's level of functioning as compared to his performance the previous year (Tr. pp. 83-84; see Dist. Ex. 1 at p. 1). She described the 12:1+4 special class recommendation as a "small class with 12 students, one special education teacher, and four paraprofessionals, so it w[ould] be 12 students and 5 adults in the classroom" (Tr. p. 84). She opined that was an appropriate program for the student because he "was making progress year after year," including that the teacher had noted that the student "was happy, he started participating more in the classroom activities, and the evidence that the [student]

[was] making progress . . . it's why [the CSE] decided to continue the same services" (Tr. pp. 84-85, 89-90). Additionally, she stated that at the CSE meeting the "teacher and everybody" said that the 12:1+4 special class was an "appropriate setting for [the student]" (Tr. pp. 142-43). The district school psychologist stated that she did not recall that the parent objected to the placement recommendation at the time of the meeting (Tr. p. 90).

In conjunction with the supports inherent in a 12:1+4 special class placement, the January 2019 CSE determined that the student's management needs included a barrier free environment and transportation services (Dist. Ex. 1 at p. 2). Regarding the parent's concern about the student's distractibility, review of the IEP shows that the CSE next determined that the student would benefit from visual and tactile materials, repetition of instruction, rephrasing questions, redirection to activities, modeling of tasks, reinforcement, visual cues to modify behaviors and for transition, visual learning strategies with support from classroom staff, assignments broken down into smaller tasks, repetition, verbal and visual prompts and cues, and picture schedules (id.). Further, the student needed to attend by remaining focused during classroom activities using verbal prompts, and continue to work on communication, adjusting to different routine activities, as well as ADL skills with the necessary supports (id.). According to the ADAPT school psychologist, the management needs identified in the January 2019 IEP were "appropriate because they provide[d] specific support for [the student's] needs," which were "detailed in the school and provider reports," and which addressed the student's "issues with distractibility, sensory input and need for intensive academic support" (Dist. Ex. 18 at p. 5). She stated that the management strategies were "intensive for the needs of the student" and met his needs (Tr. p. 185).

The parent argues on appeal that the IHO erred in finding a 12:1+4 special class placement was sufficient to meet the student's "highly intensive" management needs, and that a smaller class ratio, such as a 6:1+1 special class was appropriate. The ADAPT school psychologist testified that the January 2019 CSE did not consider a 6:1+1 special class placement "because a class of [that] size and type [was] wholly inappropriate for this student" (Dist. Ex. 18 at p. 3). She continued that the student required hand-over-hand assistance from adults to complete any academic task or activity of daily living, he was nonverbal and required an adult to interpret his needs, and he required a minimum of two adult staff members in order to safely transfer him in and out of his wheelchair (id.). The ADAPT school psychologist stated that a 12:1+4 special class "provide[d] for a minimum of five staff in the classroom at all times," and that a 6:1+1 staffing ratio provided "for as few as two adult staff in the classroom which [was] simply inadequate for this student" (id.). Therefore, although the evidence in the hearing record shows that the student exhibited highly intensive management needs, as discussed above, that fact did not require the district to recommend a 6:1+1 special class to the exclusion of other appropriate special class placements (Tr. pp. 135, 216, 260).

The parent asserts that the placement recommendation was not appropriate because the CSE failed to recommend 1:1 paraprofessional services. In a January 2012 guidance document by the Office of Special Education entitled "Guidelines for Determining a Student with a Disability's Need for a One-to-One Aide," with respect to special classes, an additional 1:1 aide should only be considered based upon the student's individual needs and in light of the available supports in the setting where the student's IEP will be implemented (see http://www.p12.nysed.gov/specialed/publications/1-1aide-jan2012.pdf). For those students recommended for a special class setting, the 1:1 aide should be recommended "when it has been

discussed and determined by the CPSE/CSE that the recommended special class size in the setting where the student will attend school, other natural supports, a behavioral intervention plan, etc., cannot meet these needs" (id.).

In this case, the district school psychologist testified that the way the 12:1+4 special class was designed, a student who required "constant attention" would "have his own para," and that the needs of the students in the class who did not need constant attention were met by the four paraprofessionals in the classroom (Tr. p. 144). When asked if the student required "constant attention" from a paraprofessional, the district school psychologist testified that he did not (id.). Further, as discussed extensively above, the information available to the January 2019 CSE does not indicate that the student required 1:1 paraprofessional services, rather, the record shows that he had previously demonstrated progress in the 12:1+4 special class without 1:1 support (Tr. pp. 59-60, 64-68, 83-85, 169-71; Dist. Exs. 1 at pp. 1-2, 17; 18 at pp. 1, 3, 4; see Dist. Exs. 5-9, 16). Given the evidence contained in the hearing record, the student did not require the provision of a 1:1 paraprofessional.

6. Related Services

The parent argues on appeal that the IHO erred in finding that the related services recommended in the January 2019 IEP were appropriate. Specifically, the parent asserts that the frequency and duration of the services were insufficient, and that the lack of vision education services was not appropriate. 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]).

Turning first to the frequency and duration of the student's related services sessions, the evidence in the hearing record shows that according to a December 21, 2018 speech-language and feeding progress report, the student's speech therapists indicated that at ADAPT the student received three, 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 6 at pp. 1, 4). The report stated that "[a]lthough [the student] continue[d] to have severely delayed receptive, expressive and oral motor skills, he ha[d] demonstrated improvement in recent months"; specifically, increasing vowel vocalizations during play, capacity to use AAC devices for interactive language activities, and attention to sound sources such as rattles and musical toys (id. at p. 2). The providers who prepared the January 2019 OT and PT progress reports recommended that the student continue to receive three 30-minute individual sessions per week each of OT and PT (Dist. Exs. 7 at p. 3; 9 at p. 2). The ADAPT school psychologist testified that over the course of the four proceeding school years, she "remained in daily communication" with the student's related service providers, she had observed the student in his therapy sessions, and prior to the

January 2019 CSE meeting she reviewed the related services progress reports (Tr. p. 274; Dist. Ex. 18 at pp. 1, 2). During the CSE meeting, the team discussed the student's "progress in each of the areas of related services that he received, using the related service provider progress reports as a reference point for our discussions" (Dist. Ex. 18 at p. 3).

Regarding the recommended speech-language therapy, the ADAPT school psychologist testified that those services were recommended to specifically target and develop the student's expressive, receptive, and oral-motor skills, expand on the student's existing skills such as reciprocal play and vocalization, and build new skills such as gross motor imitation (Dist. Ex. 18 at p. 5). She continued that the "service duration and frequency were appropriate based on the noticeable improvement [the student] was demonstrating at the time of the meeting" (id. at pp. 5-6). As for OT, the ADAPT school psychologist stated that those services were recommended to improve the student's "ability to access his classroom environment" by targeting skill areas including fine-motor, visual-motor, visual-perceptual, cognitive, attention, motor coordination, ADL, and sensory processing skills (id. at p. 5). Regarding PT, the ADAPT school psychologist testified that those services were recommended because the student presented with hypotonicity and decreased muscle strength which inhibited his functional gross motor abilities; annual goals were designed to improve his muscle strength, endurance, coordination and head/neck control (id.).

According to the ADAPT school psychologist, due to the student's "cognitive, physical, social and communication abilities, the team determined that related services sessions consisting of 30 minutes was clinically appropriate" (Dist. Ex. 18 at p. 6). The ADAPT school psychologist testified that the student had a short attention span, was easily fatigued, and had very low stamina and tolerance for physical activities (id.). As a result, the student was "unable to attend sessions of longer than 30 minutes," specifically relaying her observation that when the student was given a task that was longer than 30 minutes, he was not able to continue past that time, and that he did not have energy for the second of two "back-to-back" sessions (Tr. pp. 275-76; Dist. Ex. 18 at p. 6). Further, she stated that 30-minute sessions allowed the student to maximize the time spent on therapy-specific tasks and ensure that he remained fully engaged in each of his sessions to the maximum extent possible, noting that the session time did not include transitioning the student to and from sessions (Dist. Ex. 18 at p. 6). Additionally, the ADAPT school psychologist testified that some students at ADAPT receive related service sessions of 60-minutes in length, but that due to the student's needs, at times "30 minutes was even too long" for his sessions (Tr. p. 242). As such, the January 2019 CSE had a basis to recommend three 30-minute sessions per week of related services (Dist. Ex. 1 at pp. 11-12).

Next, regarding the lack of a recommendation for vision education services, according to the speech-language progress report and reflected in the January 2019 IEP, the student's "vision [was] sufficient that he [could] usually turn his head toward objects presented to him and reach for them with accuracy" and would "frequently shake his head at an object he [was] trying to see until the clinician [shook] the object for him" (Dist. Exs. 1 at p. 1; 6 at p. 2). The January 2019 educational progress report indicated that the student was able to establish eye contact for a short time, track people and objects in the classroom, looked intently towards the direction of spoken words and music, and initiated interactions with the teacher by eye gaze and/or smile (Dist. Ex. 5 at p. 1). The report stated that the student attended to the pictures in books upon the teacher's request and displayed preference of pictures or objects in a field of two via eye gaze (id. at p. 2).

Additionally, the ADAPT school psychologist testified that at no point during the student's enrollment at ADAPT or the January 2019 CSE meeting did staff observe a need for the student to receive vision education services to access the school curriculum (Dist. Ex. 18 at p. 3). She continued that "to the contrary, our educators observe[d] that [the student] was able to visually track objects in the classroom and establish and maintain eye contact with familiar people" (id.). Additionally, the ADAPT school psychologist stated that the parent had "never raised any concerns related to [the student's] vision despite numerous conversations regarding [his] needs and progress," nor had she ever requested that a vision education evaluation be conducted (Tr. pp. 284-85; Dist. Ex. 18 at p. 3). During the hearing, the ADAPT school psychologist testified that "[t]here was no medical documentation regarding vision impairment" including cortical vision impairment (Tr. pp. 221-22, 264-65). She also stated that "the staff in the school did not feel that . . . [the student's] vision was an issue that required such a service" as vision education (Tr. pp. 264-65). As such, the evidence in the hearing record does not support a finding that the student required vision education services in order to receive a FAPE.

C. Relief

The district cross-appeals from the IHO's order directing the district to reevaluate the student and reconvene the CSE to develop a program for the 2021-22 school year. Although the IHO did not find a denial of FAPE, or that the evaluations relied on by the January 2019 CSE were insufficient, the IHO directed the district to conduct a reevaluation of the student in all areas of his suspected disabilities, that have not been evaluated within the last two years, and to reconvene upon completion of the reevaluation and "produce a new IEP for the student's 2021-2022 school year" (IHO Decision at p. 26). Absent a finding of a substantive denial of FAPE, any procedural noncompliance is insufficient to merit compensatory relief (D.K. v. Abington Sch. Dist., 696 F.3d 233, 251 [3d Cir. 2012]); however, an IHO may order a district to comply with certain procedural requirements (34 CFR 300.513[b][3]; see 34 CFR 300.500-536). Under the circumstances presented, the IHO's order directing the CSE to conduct new evaluations and to reconvene upon the completion of the evaluations was not proper. As such, the IHO's award must be annulled.

VII. Conclusion

Based on the foregoing, I find that the January 2019 was reasonably calculated to enable the student to receive educational benefit in light of his unique circumstances (Endrew F., 137 S. Ct. at 1001; Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]). Having found that the district offered the student a FAPE, I need not reach the issues of whether the private educational services obtained by the parents were appropriate for the student or whether equitable considerations support the parent's request for relief and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that that the IHO's decision dated May 6, 2021 is modified by reversing those portions which ordered the district to conduct a reevaluation of the student in all areas not evaluated within the last two years and which ordered the CSE to reconvene and develop an IEP for the student for the 2021-22 school year.

Dated: **Albany, New York**
August 6, 2021

STEVEN KROLAK
STATE REVIEW OFFICER