The University of the State of New York

The State Education Department
State Review Officer
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No. 17-108

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 by the New York City Department of Education

Appearances:
The Patrick Donohue Law Firm, PLLC, attorneys for petitioners, by Patrick Donohue, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Thomas W. MacLeod, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the International Academy of Hope (iHOPE) for the 2016-17 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

The student in this case was born prematurely, remained in the neonatal intensive care unit for more than three months, and began receiving services through the Early Intervention Program at approximately five months of age (Dist. Exs. 1 at p. 1; 2 at p. 1). The student has received diagnoses including visual impairment, cerebral palsy, seizure disorder, failure to thrive, interventricular hemorrhage, periventricular leukomalacia, severe developmental delay, and hypotonia (Dist. Exs. 1 at pp. 1-2; 2 at p. 2). The student began having seizures in June 2012 and underwent several medication trials until the seizures were "under control" (Dist. Exs. 1 at pp. 1-2; 2 at p. 2). In January 2015, the student began attending a 12-month 8:1+2 preschool special class placement, and received four 30-minute individual sessions of physical therapy (PT) per week; three 30-minute individual sessions of occupational therapy (OT) per week; three 30-minute

individual sessions of speech-language therapy per week; and the services of a 1:1 paraprofessional (Dist. Ex. 2 at p. 1). Further, the student received two individual sessions per week each of privately-obtained home-based PT, OT, and speech-language feeding therapy (id.).

In anticipation of the student's transition to a school-age program in September 2016, from January to May 2016 the district conducted or otherwise obtained evaluative information about the student's skills and needs, and between February and March 2016 iHOPE conducted related service evaluations and a vision assessment (see Parent Exs. H; I; J; K; Dist. Exs. 1- 9).[1]

On March 1, 2016, iHOPE staff prepared an IEP for the student (Parent Ex. C at p. 1).[2] The iHOPE IEP included the findings of the student's iHOPE OT and speech-language evaluations, and the vision assessment (Parent Ex. C; see Parent Exs. H; J; K). A PT evaluation of the student was subsequently conducted by iHOPE on March 3, 2016 (Parent Ex. I).

On May 26, 2016 a CSE convened to determine the student's initial eligibility for special education programs and services (Dist. Ex. 10 at p. 19). Attendees included the parents, counsel for the parents who signed in at the meeting as a "parent advocate,"[3] a district representative, two social workers, a school psychologist, a regular education teacher, an assistant principal, and a home care case manager (id. at pp. 23-24; see Parent Ex. A at p. 1). A second parent advocate, the iHOPE special needs coordinator (iHOPE coordinator), the iHOPE PT director, a special education teacher from the student's preschool, and another physical therapist participated in the meeting by telephone (Dist. Ex. 10 at pp. 23-24; see Tr. p. 619; Dist. Ex. 3 at p. 1). The CSE determined that the student was eligible for special education as a student with a traumatic brain injury (TBI) and recommended a 12-month program in a 12:1+(3:1) special class placement in a district specialized school (Dist. Ex. 10 at pp. 15, 19).[4] The CSE also recommended that the student receive full-time group health paraprofessional services, two 60-minute sessions per week of individual OT, three 60-minute sessions per week of individual PT, two 60-minute sessions per week of individual

[1] In November 2015 the district completed a social history update (Dist. Ex. 4 at pp. 1-4).

[2] Although not titled as such, the parties refer to this iHOPE document as an IEP (Parent Ex. C at p. 1; see e.g., Tr. pp. 196, 432, 541).

[3] The United States Department of Education's Office of Special Education Programs has taken the position that the participation of both parent and school district attorneys at CSE meetings, while permitted, should be "discouraged" due the risk of an attorney's presence in creating an adversarial atmosphere (Letter to Clinton, 37 IDELR 70 [OSEP 2001]). The type of adversarial atmosphere that OSEP was concerned about appears to have resulted in this case, especially at the August 2016 CSE meeting (Dist. Ex. 15 at p. 3). Moreover, counsel for the parent identified himself as an "advocate" rather than disclosing he was attorney during the CSE (see, e.g., Parent Ex. O at p. 1), which, in IDEA practice could very easily lead other individuals to mistake him for a lay advocate and, as a matter of candor, he should refrain from this practice in CSE meetings in the future. The hearing record does not indicate one way or the other whether the second parent advocate at the May 2016 CSE meeting, one Kelly Ann Taddonio, was a lay advocate or an attorney (Dist. Ex. 10 at p. 22).

[4] The hearing record and the parents' request for review also refer to the recommended special class placement ratio as "12:1+4" (see e.g. Tr. pp. 45, 690; Dist. Ex. 13). For consistency, this decision will refer to the CSE's recommended special class placement as 12:1+4.

speech-language therapy, and three 60-minute sessions per week of individual vision education services (id. at p. 15).

In a June 10, 2016 letter, the iHOPE coordinator outlined her concerns with and objections to the CSE's proposed 12:1+4 special class placement (Dist. Ex. 13). She expressed concern that the student was making progress in a class of six students, and she "did not hear any explanation" why the CSE was recommending to "double" his current class size (id.). The coordinator stated her belief that the CSE's 12:1+4 special class recommendation constituted the "most restrictive" special class placement on the district's continuum and as such, the "law mandates" that a "less restrictive" 6:1+1 special class be attempted prior to a 12:1+4 special class, given the student's ability to progress in a class size of six students (id.). In the letter the coordinator further explained her position that according to State regulations governing 6:1+1 special classes, the student's "highly intensive" management needs would be best met in a class of six students (id.). Finally, the coordinator objected to the 12:1+4 placement because the student benefited from 1:1 instruction from a teacher, which she characterized as "essentially impossible" to achieve in a class with 12 students and one teacher (id.). She requested that the May 2016 CSE's special class recommendation be "reconsidered" and that the district consider reconvening the CSE (id.).

In a June 22, 2016 letter, the parents asked the district to reconvene a CSE, stating that as of that date they had "met with" the coordinator of the public school the student was assigned to attend and found the assigned school setting "not acceptable" (Dist. Ex. 17). The parents further indicated that they had submitted an iHOPE letter which "serve[d] in support" of their request (id.).

The CSE reconvened on August 1, 2016 (Dist. Ex. 14 at p. 21).[5] Attendees included a school psychologist who also served as the district representative, a special education teacher/related services provider, a social worker, a regular education teacher, the parents, counsel for the parents who again signed in at the meeting as a "parent advocate," and via telephone, the same iHOPE coordinator and iHOPE PT director who participated in the May 2016 CSE meeting (compare Dist. Ex. 10 at p. 23, with Dist. Ex. 14 at p. 25). As a result of the meeting, the CSE changed the student's eligibility classification from a student with a TBI to a student with multiple disabilities (Dist. Ex. 14 at pp. 1, 21; see Dist. Ex. 10 at pp. 1, 9). The CSE continued to recommend a 12-month program of a 12:1+4 special class placement in a district specialized school (compare Dist. Ex. 10 at p. 15, with Dist. Ex. 14 at p. 17). In addition, the August 2016 CSE recommended that the student receive full-time individual health paraprofessional services, two 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, four 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, and three 30-minute sessions per week of individual vision education services (Dist. Ex. 14 at p. 17). The August 2016 CSE added a recommendation for the provision of five periods per week of adapted physical education (compare Dist. Ex. 10 at p. 15, with Dist. Ex. 14 at p. 17).

In a letter dated August 17, 2016, the parents provided the district with 10-day notice that they intended to unilaterally place the student at iHOPE for the 2016-17 school year (Parent Ex.

[5] The CSE was scheduled to reconvene on July 7, 2016 (Dist. Ex. 15 at p. 1). However, the parents did not provide the district with the required 24-hour notice of their request to record the meeting, therefore, the CSE meeting was rescheduled to August 1, 2016 (id.).

B). The parents relayed their belief that "there is no private school placement the [district] can recommend which would be appropriate"; however, they also indicated that they would be willing to visit a possible placement, if one was identified, to determine the placement's appropriateness (id.). The parents further requested "a settlement of this case" by the district providing "prospective payment of tuition at iHOPE" and the provision of related services authorizations (RSAs) for all of the student's related services, excluding the 1:1 paraprofessional (id.). The hearing record shows that the student attended iHOPE during the 2016-17 school year (see Parent Exs. E; F; I; see also Parent Ex. L).

A. Due Process Complaint Notice

In a due process complaint notice dated January 23, 2017, the parents requested an impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 school year (Parent Ex. A). The parents further claimed that the CSE (1) predetermined the student's placement; (2) failed to provide prior written notice after the May 2016 CSE meeting; (3) improperly changed the student's classification to multiple disabilities; (4) failed to sufficiently evaluate the student or consider evaluations provided by the parents and, in particular, failed to conduct an assistive technology assessment; and (5) failed to offer the student a seat in a classroom and school fully capable of implementing the student's IEP (id. at pp. 3-6).

The parents further asserted that the August 2016 IEP was deficient because the management needs were generic, were not reflected in the mandated services and support section of the IEP, and failed to account for the student's environmental and safety needs such as temperature, noise, and food intake (Parent Ex. A at pp. 7-8). The parents also contended that the IEP contained annual goals that were "vague and unmeasurable in parts and wholly unattainable in others," recommended an inappropriate 12:1+4 special class placement, failed to offer a sufficient frequency and duration of related services, and failed to recommend parent counseling and training (id. at pp. 8-10).

B. Impartial Hearing Officer Decision

An impartial hearing convened on March 20, 2017, and concluded on July 7, 2017, after five days of hearing (Tr. pp. 1-695). In a decision dated November 6, 2017, the IHO found that the district offered the student a FAPE for the 2016-17 school year, iHOPE was not an appropriate unilateral placement, and equitable considerations did not favor the parents' request for tuition reimbursement (IHO Decision at pp. 12-21).

The IHO did not find any basis in the hearing record for concluding that any procedural violations impeded the student's right to a free appropriate public education, significantly impeded the parents' opportunity to participate in the decision making process, or caused a deprivation of educational benefits (IHO Decision at p. 18). With respect to the parents' claims regarding the August 2016 CSE meeting and resulting IEP, the IHO found that the CSE had appropriate, extensive, and accurate evaluative information (id. at pp. 12-14). Additionally, the IHO found that the student's classification as a student with multiple disabilities was appropriate given his multiple diagnoses and deficits (id. at pp. 15-16). The IHO also noted that although the student may also qualify for a TBI classification, that fact did not render the multiple disabilities classification

"inappropriate" (id. at p. 15). In addition, while the IHO found that the student required substantial support, there was nothing in the hearing record to indicate the student had substantial or "intensive" management needs, in that the student did not have significant behavior management needs that would require a 6:1+1 special class placement (id. at pp. 16-17).

With respect to the parents' contentions concerning the annual goals contained in the August 2016 IEP, the IHO noted his agreement with the assigned public school site coordinator's assessment that two specific goals exceeded the student's capabilities and found that, for the most part, the goals were appropriate (IHO Decision at p. 14; see Tr. pp. 288-89).[6] As to the parents' assertion that the goals were unattainable due to the reduced duration of the related services that would support those goals, the IHO found the site coordinator's testimony "most persuasive" as to the appropriateness of providing the related services in 30-minute sessions for students with multiple disabilities based on her experience (IHO Decision at p. 14). The IHO also found that the frequency and duration of related services listed in the IEP were recommended by the student's then-current preschool providers and that the student had been making progress with 30-minute sessions while attending preschool (id. at p. 15). Overall, the IHO found the parents' assertion that the goals could only be appropriate if related services were provided to the student in 60-minute sessions was "self-serving" on the part of iHOPE staff (id. at p. 14).

With respect to the recommended 12:1+4 special class in a district specialized school with related services and a 1:1 health paraprofessional, the IHO concluded that the services were similar to student's preschool 8:1+2 special class and related services in which he made progress, and the evidence supported the CSE's placement recommendation (IHO Decision at pp. 15-17).[7] The IHO found that the student did not have significant behavior needs as envisioned for a 6:1+1 special class placement and that the evaluations conducted by the student's preschool providers strongly supported the 12:1+4 special class placement (id. at pp. 16-17). The IHO noted that a 12:1+4 special class is designed to address the needs of students with severe disabilities who require habilitation and treatment and that this student was unlike those found in a 6:1+1 special class placement (IHO Decision at pp. 15-17).

The IHO also found that the assigned public school site could implement the services listed in the student's IEP "successfully if not optimally" (IHO Decision at p. 17). Among other things, the IHO found that the site provided an array of services and supports, was located in a small building, and contained no stairs (id.).

[6] The IHO refers to the assigned public school site coordinator as the "Assistant Principal" in his decision, as she was identified by the district hearing representative and on the appearances section of the transcript; however, she described herself as the "instructional support unit teacher[/]coordinator" of the assigned public school site (see IHO Decision at pp. 14-15, 18; Tr. pp. 281, 284, 288-89).

[7] In reaching this conclusion, the IHO noted that it may have been preferable for the district representative at the August 2016 CSE meeting to have greater familiarity with the district's programs during the CSE meeting, but that any harm was sufficiently offset by the knowledge and experience of the site coordinator, who was involved with the parents during the placement process (IHO Decision at p. 18). The IHO also commented that any adversarial conduct in the education decision making process stemmed from the individuals supporting the parents' views and not district staff (id.).

Turning to the parents' choice of a unilateral placement, the IHO determined that the iHOPE program was inappropriate to the extent that it did not include related services without district or parent funding (IHO Decision at pp. 18-19). The IHO determined that the student required significant amounts of PT, OT, vision, speech-language and paraprofessional services that iHOPE did not include in the program, and there was no legal basis to make a claim limited to tuition costs under the IDEA for the private school while simultaneously maintaining a separate claim that the district should fund related services needed by a student (id. at p. 19).

As to the issue of equitable considerations, the IHO found that iHOPE staff and the parents were involved in the CSE process with the sole aim of obtaining an IEP recommendation to replicate the iHOPE program (IHO Decision at p. 20). The IHO concluded that the parents would not put the student in a district class, and that both iHOPE and the parents were "heavily invested" in the student attending iHOPE for the 2016-17 school year (id.). The IHO further determined that the parents' initial notice of "disagreement" sent to the district was written by iHOPE staff and amounted to a criticism of the district for failing to recommend a program identical to iHOPE (id.).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in determining that the district offered the student a FAPE, that iHOPE was not an appropriate unilateral placement, and that equitable factors did not favor an award of tuition reimbursement.

In their request for review, the parents assert that the IHO erred because the CSE improperly classified the student as a student with multiple disabilities. According to the parents, the IHO erred because the student's management needs were "highly intensive" and the IEP failed to address the student's need for dim lighting to minimize seizures, minimal noise, equipment to aid in positional changes, and repositioning to avoid skin breakdowns and sores. The parents argue that the IHO erred in finding that the annual goals were appropriate because they were cut and pasted from the May 2016 IEP "without consulting [the student's] licensed related service providers who had developed the May IEP goals for 60-minute related service sessions mandates" and that the annual goals were impossible to achieve with 30-minute related service durations. The parents contend that the IHO erred in finding a 12:1+4 special class appropriate because it was not the least restrictive environment (LRE) for the student and that the district was required to consider other special class options that were "less restrictive" for the student. Repeating aspects of the challenges to the annual goals, the parents allege that the 30-minute duration of the related services sessions called for by the August 2016 IEP were insufficient and contrary to best practice for a student with a TBI. Lastly, the parents allege that district's IEP recommendations were predetermined.[8]

With respect to the assigned public school site, the parents assert that the recommended class the student would have attended was inappropriate for the student due to improper functional grouping. The parents also assert that the August 2016 IEP lacked a mandate for school nursing

[8] The parents, in their Memorandum of Law, set forth additional claims that that the August 2016 CSE was not properly constituted, as the student's then-current special education teacher and related service providers were not in attendance, and the parents had not requested their excusal from participation (Parent Mem. of Law at p. l3); however, these claims were not asserted in their request for review.

services and that the assigned public school site could not administer the student's medications, thus "jeopardizing his health and safety."

With respect to their choice of unilateral placement, the parents assert that the IHO erred in finding iHOPE not appropriate because it did not include any of the related services the student required as part of the program. The parents assert that the hearing record demonstrates they met their burden of proof, that the record shows that iHOPE provided educational instruction specially designed to meet the unique needs of the student, that staff provided the student's related services according to its contract, and that iHOPE is an appropriate placement for a student with a TBI.

With respect to the IHO's findings concerning equitable considerations, the parents assert that the hearing record shows that they cooperated with the district in the development of the IEP, provided proper notice of their concerns about the recommendations and timely notice of their intent to unilaterally place the student at iHOPE, and attended all of the CSE meetings. The parents also assert that the IHO was biased, as demonstrated by his finding that there were no circumstances under which the parents would have accepted a district placement.

In its answer, the district generally responds to the parents' allegations with a combination of admissions and denials and argues in favor of the IHO's determinations that the district offered the student a FAPE, iHOPE was not an appropriate unilateral placement, and that equitable considerations do not weigh in favor of the parents' requested relief.

The parents filed a reply to the district's answer. The 14 page reply impermissibly rehashes matters already set forth in the request for review, does not address procedural defenses to the appeal raised in the district's answer, and is well overlength and thus fails to comport with the regulatory requirements (see 8 NYCRR 279.6, 279.8[b]). Pleadings that fail to comply with the requirements of the practice regulations may be rejected at the sole discretion of an SRO (8 NYCRR 279.8[a]). As the reply fails to comport with the regulations in numerous respects, I will not accept or consider it (id.).[9]

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

[9] The parents' memorandum of law is also noncompliant with the practice regulations insofar as it fails to contain a table of contents (8 NYCRR 279.8[d][1]); however, I have not rejected it in this instance solely because of this defect. The parents' counsel is cautioned to correct this deficiency in future filings.

(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]).[10]

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

1. Scope of Impartial Hearing

The parents have raised several new issues that were not raised before or decided by the IHO. The parents assert for the first time on appeal that the district could not have implemented the student's August 2016 IEP at its assigned public school site because the student would not have been functionally grouped in accordance with the grouping provisions found in State regulation. Specifically, the parents assert that the student would have been placed in a class comprised of students with a wide range of academic, social interpersonal, physical development and management needs. The parents also assert that the August 2016 IEP lacked a mandate for school

[10] 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).

nursing services and that the assigned school could not administer medications to the student.[11] Additionally, in their memorandum of law only, the parents now claim that the CSE failed to include the student's then-current special education teacher and related services providers, and the parents "never requested their excusal from participation" (Parent Mem. of Law at p. 13).[12] 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 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]). Where, as here, the parents did not seek the district's agreement to expand the scope of the impartial hearing to include these issues or file an amended due process complaint notice, I decline to review these new claims for the first time on appeal.

To hold otherwise inhibits the development of the hearing record for the IHO's consideration and renders the IDEA's statutory and regulatory provisions that limit the issues meaningless (see 20 U.S.C. § 1415[f][3][B]; 34 CFR 300.511[d], 300.508[d][3][i]; 8 NYCRR 200.5[j][1][ii]; see also B.P. v. New York City Dep't of Educ., 841 F.Supp.2d 602, 611 [E.D.N.Y. Jan. 6, 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011] [holding that a transportation issue was not properly preserved for review by the review officer because it was not raised in the party's due process complaint notice]). Nor can it be said that the district opened the door to such claims by raising evidence as a defense to a claim that was

[11] Even if this had been raised it unclear why the parents believe student would not be administered any necessary medications as all public schools in New York are required to have health services that include medication administration by qualified personnel.

[12] Even if the CSE composition claim had been asserted before the IHO, the attempt to argue additional grounds upon which to conclude that the district failed to offer the student a FAPE solely within the memorandum of law is still improper and counsel for the parents is reminded that it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see also Application of the Bd. of Educ., Appeal No. 16-080; Application of a Student with a Disability, Appeal No. 12-233; Application of the Dep't of Educ., Appeal No. 12-131; Application of the Dep't of Educ., Appeal No. 09-051; Application of a Student Suspected of Having a Disability, Appeal No. 08-100; Application of a Student with a Disability, Appeal No. 08-053; Application of a Student with a Disability, Appeal No. 08-003; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-121; Application of a Child with a Disability, Appeal No. 07-113; Application of a Child with a Disability, Appeal No. 07-112; Application of a Child with a Disability, Appeal No. 06-096; Application of the Bd. of Educ., Appeal No. 05-031). As noted in greater detail below, State regulation specifies that all claims must be asserted in the request for review or they are deemed abandoned.

identified in the due process complaint notice (M.H., 685 F.3d at 250-51). Therefore, these matters were beyond the scope of the impartial hearing and, understandably, were not ruled upon by the IHO. Consequently, I will not review these newly-raised issues for the first time on appeal.

2. Scope of Review

Turning next to matters that were before the IHO, several of the issues contained within the parents' due process complaint notice were not addressed by the IHO, but the parents do not challenge the IHO's failure to address such matters in their request for review. The practice regulations in State-level review proceedings explicitly require that a party's request for review set forth the reasons for challenging the determination of an IHO, including the IHO's "failure or refusal to make a finding" and further state that "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" (see 8 NYCRR 279.4[a], 279.8[c][4] [emphasis added]). Consequently the following claims in the parents' due process complaint notice, which were not addressed by the IHO and have not been advanced in the parents' request for review, are deemed abandoned: (1) the May 2016 CSE failed to provide prior written notice after the May 2016 IEP was created; (2) the district failed to offer the student a seat/spot in a classroom that could implement IEP at the assigned public school site; (3) the district failed to identify an assigned school site for the student prior to the start of classes in September 2016; (4) the August 2016 CSE failed to consider the parentally provided evaluations; (5) the CSE failed to document the requirement for an assistive technology device or methodology to aid the student in achieving the recommended communications goals; and, (6) the lack of a provision for parent counseling and training (compare Parent Ex. A, with IHO Decision, and Req. for Rev.).

The parents also do not appeal the IHO's determination that the August 2016 CSE had appropriate, extensive, and accurate evaluative information for formulating the student's IEP (IHO Decision at pp. 12-14). The determination of the IHO has become final and binding upon the parties as it is unappealed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

3. IHO Bias

Next, the parents assert that the IHO was biased because of his finding that "there were no circumstances under which [the parents] would have accepted a [district] placement." It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). The parents point to the IHO's factual finding regarding equitable considerations as evidence of bias, but "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality" (Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009]; see Liteky v. United States, 510 U.S. 540, 555 [1994]). The fact that the parents disagree with the IHO's fact finding is not a basis for concluding that the IHO was biased. Furthermore, a review of the hearing record does not support a finding that the IHO acted improperly, engaged in any conduct that could support a finding of bias toward any party, or prevented either party from its due process right to be heard. Instead, the hearing record reflects that the IHO appropriately allowed the parents to present witnesses, admit evidence, and thoroughly cross-examine district witnesses and, consequently, the hearing record leads me to the conclusion that the IHO acted

impartially throughout the proceeding and their claim of bias is without merit (see generally Tr. pp. 22-694).

B. August 2016 CSE

1. Participation

The parents make several assertions that amount to claims that their right to meaningful participation in the CSE process was impeded or denied. For example, they assert that the CSE predetermined the student's programming and/or that the CSE determined the program and placement based on the available services in the district (i.e. a 12:1+4 special class or 30-minute sessions for related services) instead of the student's needs. The parents argue on appeal that the August 2016 CSE cut and pasted the annual goals from the May 2016 IEP without the participation of the related service providers who helped create the goals. To the extent these assertions are claims that the parents were denied meaningful participation in the creation of the annual goals, the IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160 [2d Cir. 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [holding that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; DiRocco v. Bd. of Educ., 2013 WL 25959, at *18-*20 [S.D.N.Y. Jan. 2, 2013]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. For Language and Commc'n Development v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]).

The hearing record shows that the parents participated in the August 2016 CSE meeting, as did the iHOPE coordinator and the iHOPE PT director (Parent Ex. O; Dist. Ex. 14 at p. 25). A reading of the minutes and transcript of the August 2016 CSE meeting also shows that the parents, the parents' counsel, iHOPE coordinator, and PT director were all provided ample opportunity to ask questions and provide input (see Parent Ex. O; Dist. Ex. 15). A review of the transcript of the August 2016 CSE meeting shows that district staff attempted to discuss goals; however, the parents' counsel at times diverted the conversation, cut off the discussion about goals, prompted the parents and iHOPE participants to leave, and ended the meeting because he had reached the conclusion that it did not "make[] sense to continue and waste the parents' time any further" because he believed the draft IEP was inappropriate (id. at pp. 6-7, 58-60, 161-62). A comparison of the May and August 2016 IEPs also shows that the district created three new goals and modified several short-term objectives for the student as a result of the August 2016 CSE meeting (compare Dist. Ex. 14 at pp. 8-14 with Dist. Ex. 10 at pp. 8-16; see Tr. p. 175). Based upon my review of the hearing record, I find that the parents' assertion that the student was denied a FAPE because the district continued most of the annual goals from the May to the August 2016 IEP without

"consultation" with the related service providers who developed the May 2016 IEP goals is without merit, and that the parents were afforded an opportunity to participate in the IEP development process (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]).

The parents also assert that the August 2016 CSE failed to give "meaningful consideration" to a "6:1:1 or 8:1:1 placement." The August 2016 IEP reveals that the CSE considered and rejected the following options: general education, related services only, special education teacher support services (SETSS), integrated co-teaching (ICT) services, special classes in a community school (12:1 and 12:1+1), special classes in a specialized school (6:1+1, 8:1+1 and 12 :1+1), as well as State-approved nonpublic day programs (Dist. Ex. 14 at p. 23). The August 2016 IEP indicated that the student demonstrated significant global developmental delays; required a learning environment that assisted with acquiring skills and provided related services; and benefitted from a 12-month program to maintain and build on skills (id. at pp. 1-6, 17, 23). According to the August 2016 IEP, the CSE rejected the 12:1, 12:1+1, 8:1+1 and 6:1+1 special class placements because the CSE determined that the student required more adult support (id. at p. 23). The option for a day program in a State-approved non-public school was rejected because the CSE believed that the student's needs could be met in a "DOE special school with a small pupil to teacher ratio, related services and a 1:1 paraprofessional" (id.). While the district school psychologist who also served as the district representative at the August 2016 IEP meeting testified that the 6:1+1 special class was considered and rejected because it "is geared for children with severe behavior needs," she also testified that the CSE recommended the 12:1+4 special class for the student "based on his academic, educational, and all of his medical needs . . . to improve his skills and functioning and all the daily living skills areas . . . that he needed [] the maximum amount of paraprofessional support" (Tr. pp. 79-80, 202). The iHOPE coordinator testified that there was discussion at the August 2016 IEP meeting regarding which classroom ratios were appropriate for the student (Tr. pp. 505-06; see Parent Ex. O at pp. 3-6, 21-23, 27-32, 34-36, 38-44, 48, 54-56, 64-65, 87, 89-93).

Evidence above regarding the August 2016 IEP and the transcript of the CSE meeting undermine the parents' claims that CSE impermissibly predetermined the student's special education services. The consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P., 2015 WL 4597545, at *8-*9; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253). Districts may "prepare reports and come with pre[-]formed opinions regarding the best course of action for the [student] as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions" (DiRocco v. Bd. of Educ., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013], quoting M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 506 [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

A review of the transcript of the August 2016 CSE meeting reveals that the parents, their counsel, and invited iHOPE attendees were all provided opportunities to ask questions and provide input concerning placement options specific to student to staff ratios (see e.g., Parent Ex. O at pp. 28-31, 47, 54-55, 86). While the viewpoints of the district staff conflicted with those of the attendees supporting the parents, that does not constitute evidence of impermissible

predetermination because the IDEA "does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP" (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013]). Instead, the evidence in the hearing record supports the conclusion that the August 2016 CSE considered a variety of programing options for the student, and provided the parents, their counsel, and invitees the opportunity for meaningful participation in the CSE process and IEP creation (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.322; 8 NYCRR 200.5[d]).

C. August 2016 IEP

Although not a disputed issue on appeal, I have examined the evaluative information and the present levels of performance as reflected in the August 2016 IEP in order to resolve the parties' disputes regarding whether the August 2016 IEP contained an adequate description of the management needs and appropriate annual goals.

The hearing record shows that the district prepared January 2016 OT and speech-language progress reports and conducted a January 2016 PT evaluation; prepared February 2016 classroom observation and teacher reports and obtained some of the student's physical examination records; obtained an April 2016 eye report; and administered an adaptive behavior scale to the student's mother in May 2016 to establish the student's current needs (see Dist. Exs. 1-9). Additionally, iHOPE conducted February 2016 OT and speech-language evaluations and a vision assessment, and a March 2016 PT evaluation (Parent Exs. H; I; J; K). There is a high degree of correlation between the district and iHOPE evaluative information and the present levels of performance in the August 2016 IEP (compare Parent Exs. H; I; J; K; and Dist. Exs. 1-9, with Dist. Ex. 14 at pp. 1-6).

Specifically, evaluation results revealed, and the August 2016 IEP reflected that the student demonstrated significant global developmental delays; including delays in self-help, cognitive, academic, communication, social/emotional, visual, and motor skills (Dist. Exs. 6 at p. 6; 8; 14 at pp. 1-6). The student required assistance for all activities of daily living (ADL) including mobility, dressing, and toileting, and the student's mother reported scores in the low range across all domains (communication, daily living skills, socialization, and motor skills) of the Vineland Adaptive Behavior Scales-Second Edition (Vineland-II) (Dist. Exs. 6 at pp. 1, 6-7; 14 at pp. 1, 5). With respect to cognition, the student demonstrated significantly delayed play and problem-solving skills in that he repeated behaviors with toys placed in his hands, interacted with objects by exploring them with his mouth and hands, pulling, tapping, or shaking them, and displayed an inconsistent ability to use cause/effect toys (Dist. Ex. 14 at pp. 1-2). According to the IEP, the student required assistance to engage with items beyond exploring them for their sensory qualities, quieted to sound, and responded to tactile sensations (id. at pp. 2, 4). Although the student demonstrated self-stimulatory behaviors requiring refocusing, he demonstrated the ability to shift his attention when "something motivating" was presented, attend to motivating activities, look for objects that were dropped or removed, and reach toward objects that were near him (id. at pp. 1-2).

Academically, the student was unable to identify colors, numbers, letters, or words, and had difficulty discriminating between two items upon request (Dist. Ex. 14 at p. 2). He demonstrated the ability to attend to a short story read aloud and followed one-step verbal

directions to interact with items in his immediate environment (id. at p. 2). With respect to communication, the student demonstrated profound deficits in speech and language skills, was "essentially non-verbal" in that he did not vocalize or imitate a variety of sounds or use a consistent means of communication and was unable to communicate his wants and needs (id. at pp. 2-3). He generally communicated his likes and dislikes by either smiling, laughing, and/or crying, respectively (id. at pp. 2, 4). The student was able to locate and activate both a single-panel and double-panel communication switch upon request, although intentionality was unclear (id. at p. 2).

Socially, the student made eye contact, laughed and smiled at familiar people, recognized family members, demonstrated parallel play, participated in familiar games, and responded to his name (Dist. Ex. 14 at p. 3). With respect to physical development, the student is legally blind, with no functional vision in his left eye, and limited vision in his right eye (id. at p. 4). The student demonstrated the ability to visually attend to objects, look at his hands, visually track objects and show awareness of the lights being on or off (id.). He exhibited weakness in his oro-facial musculature, was beginning to consume soft finger foods, but did not demonstrate mature bite and chew patterns and exhibited aversion to many foods presented (id. at p. 3). With respect to fine and gross motor development, the student demonstrated significant delays in that he was non-ambulatory and required maximal assistance for all mobility, movement and transitions, including assuming, maintaining, and/or regaining any of the upright developmental positions (id. at pp. 4-6). Regarding the student's medical needs, the IEP indicated that the student was administered "daily anti-seizure medications" (id. at p. 4).

1. Classification

The parents assert that the IHO erred in finding that the student's classification as a student with multiple disabilities was appropriate and argue that the appropriate disability category for the student is a student with a TBI. Initially, the parents do not argue that the student did not meet the requirements to be considered eligible in the multiple disabilities category, but that a classification of TBI would lead to the student receiving instruction and services based on "best practices." The evidence in the hearing record supports the IHO's determination that the multiple disabilities category was appropriate for the student based on his receipt of diagnoses including visual impairment, cerebral palsy, and a seizure disorder (IHO Decision at p. 15; see Parent Ex. C at p. 1; Dist. Exs. 1 at pp. 1-2; 2 at p. 2; 4 at p. 3). In particular, these diagnoses could qualify the student for categorization as a student with a visual impairment, orthopedic impairment, and other health-impairment (8 NYCRR 200.1[zz][9], [10], [13]; see 34 CFR 300.8[8], [9], [13]). Multiple disabilities are defined as "concomitant impairments (such as intellectual disability-blindness, intellectual disability-orthopedic impairment, etc.), the combination of which causes such severe educational needs that they cannot be accommodated in a special education program solely for one of the impairments" (8 NYCRR 200.1[zz][8]; see 34 CFR 300.8[c][7]). The district school psychologist who attended the August 2016 CSE meeting and served as the district representative testified that the CSE determined multiple disabilities to be the "more appropriate" disability category (Tr. p. 84), and the parents point to no evidence in the record indicating that this judgment was incorrect.

To the extent the parents also assert that the CSE failed to consider evidence that the student has a TBI and predetermined the student's disability category classification, as noted above the parents' request for review does not challenge the IHO's specific findings regarding the

appropriateness of the multiple disabilities category, instead relies on testimony from the iHOPE coordinator for the proposition that classification drives the development of all services. While this may be the approach taken by iHOPE in developing IEPs (Tr. pp. 433-41, 452-57), the IDEA requires that a student's special education programming, services and placement must be based upon the student's unique special education needs rather than the student's disability classification (20 U.S.C. § 1412[a][3][B] ["Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability . . . and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter"]; 34 CFR 300.111[d]; see M.R., 2011 WL 6307563, at *9 [finding that once a student's eligibility is established, "it is not the classification per se that drives IDEA decision making; rather, it is whether the placement and services provide the child with a FAPE" [emphasis in original]; see also Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011] [finding that "the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs"]; R.C. v. Keller Indep. Sch. Dist., 958 F. Supp. 2d 718, 730-32 [N.D. Tex. 2013] [holding that the IDEA "provides no specific right for a student to be classified under a particular disability, but requires that the student's educational program be designed to suit the student's demonstrated needs"]). Accordingly, even if, as the parents contend, classification as a student with a TBI was appropriate for the student, absent convincing evidence that the student's program was inappropriately developed based solely on his classification as a student with multiple disabilities, rather than his needs, the disability category assigned to the student does not require a finding that the district failed to offer the student a FAPE (I.B. v New York City Dep't of Educ., 2016 WL 1069679, at *13 [S.D.N.Y. Mar. 17, 2016] [finding that, although the record indicated that the eligibility classification included on the IEP "may not have captured the full extent of [the student's] challenges and individual needs," it did not result in a denial of a FAPE]; see M.R., 2011 WL 6307563, at *9). As discussed more fully below, the hearing record reflects that the program contained in the August 2016 IEP addressed the student's needs and was not developed based solely on his disability category classification (Tr. pp. 79-82; Parent Ex. O at pp. 28-30, 47, 54-55, 86; see generally Dist. Exs. 3-5; 7-9; 14).

2. Management Needs

On appeal the parents argue that the August 2016 IEP management needs are inadequate. Specifically, the parents claim the management needs did not address the student's need for repositioning several times per day and adaptive equipment such as wedges and pillows to aid in positional changes. In addition, the parents claim that neither the management needs nor the IEP as a whole addressed the environmental controls (including dim lighting) that are required to minimize the student's seizures, or the minimal environmental noise he requires to focus. Further, the parents assert that the IHO erred in finding that the student does not have "highly intensive" management needs.

Management needs are defined by State regulations as "the nature of and degree to which environmental modifications and human or 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 achievement, functional performance and learning characteristics, and social and physical development (8 NYCRR 200.1[ww][3][i][d]).

The August 2016 IEP included approximately 11 management needs to address the student's deficits identified in the present levels of performance (Dist. Ex. 14 at pp. 1-6).[13] With respect to the student's physical development needs, contrary to the parents' claim that the August 2016 IEP failed to address the student's need for repositioning and equipment for positioning, the August 2016 CSE recommended using adapted equipment for alternate positioning in the classroom; specific directions for physically transferring the student; and appropriate positions and duration that the student should remain in various positions (id.).[14] Additionally, the IEP indicated that the student benefitted from breaks in between therapy to "make related service more productive" (id. at p. 6). As discussed further below, the August 2016 IEP also provided annual goals relating to the student's positioning and adaptive equipment needs as well as 1:1 paraprofessional services to meet transition needs, PT, and adapted physical education services (id. at pp. 14-17).

The parents' claim that the "environmental controls that need[ed] to be in place in order to minimize [the student's] seizures," including dim lighting, were not provided in the management needs section or in the IEP as a whole resulting in a denial of a FAPE is not supported by the hearing record. Evaluations conducted during the 2015-16 school year reflect that the student's seizure activity was significantly reduced with medication administration (Parent Exs. H at p. 1; I at p. 1; K at p. 1; Dist. Exs. 1 at pp. 1-3; 2 at pp. 2-3; 3 at pp. 1-3; 5 at pp. 1-2, 8; 9 at pp. 2-3). In their request for review the parents cite to the management needs pages of the iHOPE IEP to support their claim that the student needed dim lighting to reduce seizure activity; however, upon review of the iHOPE IEP, there is no reference to a need for dim lighting in relation to seizure activity in the management needs section (see Parent Ex. C at pp. 15-17). Rather, in relation to the student's seizures, the management needs section of the iHOPE IEP stated that the student has a seizure disorder for which he was administered medication, and that he required close monitoring to prevent injury (Parent Ex. C at p. 15; see Parent Ex. C at pp. 16-17). The specific reference made to "dim lighting" in the hearing transcript was regarding the use of dim lighting with visually impaired students to reduce light gazing (see Tr. pp. 554-55), and the hearing record (and the information available at the time of the CSE in particular) does not otherwise suggest that the student required dim lighting or other environmental modifications in order to minimize seizure activity. Similarly, although the March 2016 iHOPE IEP indicated that the student required minimal environmental noise to improve focus, and that due to the student's difficulty regulating his level of arousal he required a classroom with limited visual/auditory distractions; there was no further information in the hearing record linking an increased arousal level to increased seizure activity (Parent Ex. C at pp. 15-17; see generally Parent Ex. C). Rather, according to the hearing

[13] The management needs section of the August 2016 IEP also included the services of a 1:1 paraprofessional and a bus with a wheelchair lift, which are also listed as specific services in the supplementary aids and services and special transportation sections of the IEP (Dist. Ex. 14 at pp. 17, 20-21).

[14] Further, to address the student's academic, communication, and social needs, the August 2016 CSE recommended management strategies including using a consistent communication system across environments to allow the student to participate in academic tasks and communicate understanding of concepts; using a variety of augmentative communication devices in the classroom to assist the student with communication; and visually modifying materials to continue working on beginning academic skills as well as presenting materials with auditory and tactile supports to ensure understanding (Dist. Ex. 14 at pp. 1-6).

record, the student's seizures typically occurred when he transitioned from sleep to wake (Parent Exs. C at p. 11; H at p. 1; I at p. 1; Dist. Exs. 1 at p. 2; 9 at p. 2).[15]

With respect to the parents' claim that the IHO erred in finding the student did not have "intensive" management needs, the section of the IHO decision from which the parents extract this claim of error appears to refer to the appropriateness of the recommended special class placement rather than the level and type of management needs in isolation (IHO Decision at pp. 16-17). Specifically, the IHO distinguished between students in a 12:1+4 special class placement with "severe disabilities whose programs consist primarily of habilitation and treatment," "who do not have significant behavioral issues," similar to the student in this case, and "the 6:1+1 program where the students have more significant behavior management needs," referring in part to State regulations governing those types of special classes (id.). In his decision, the IHO included descriptions of the student from reports such as "adorable," "endearing," "sociable," "happy," "engaging," and "good natured;" and then indicated that "[t]his is not a description of a student with intensive management needs requiring a 6:1:1 program," referring to the student's lack of behavioral management needs (id. at p. 17).[16] In his decision, the IHO described the student's significant management needs, and an overall read of the decision shows that while the IHO may have erred in suggesting that that there is a general rule that all students in 6:1+1 special classes exhibit behavioral management needs in order to meet the definition of 'highly intensive",[17] the parents' assertion that the IHO erred in finding that the student's management needs were not otherwise "intensive" is taken out of context and is without merit (IHO Decision at pp. 12-13, 15-17).

As stated above, the environmental modifications and human material resources required to enable the student to benefit from instruction were adequate and specific, and determined in accordance with the factors identified in the IEP present levels of performance.

3. Annual Goals

On appeal the parents assert that the annual goals in the August 2016 IEP were not appropriate to the extent that goals were cut and pasted from the May 2016 IEP without consulting the student's related service providers regarding the change from 60 minute to 30 minute related service sessions.[18] However, the hearing record supports the IHO's determination that overall, the annual goals contained in the August 2016 IEP were appropriate.

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[15] I note that the iHOPE IEP indicated that there was a need to obtain history as to the student's type of seizures and seizure triggers (Parent Ex. C at p. 28).

[16] According to the hearing record, the IHO also commented that he understood the psychologist's testimony to be that the 6:1+1 special class was for students with significant behavioral needs "as opposed to children who have a lot of needs, but not specifically behavioral needs" (Tr. pp. 207-09).

[17] The IHO is very experienced and he is not incorrect to the extent that his decision can be interpreted as noting that one very common factor that may lead a CSE to find that a student requires a 6:1+1 ratio is that the particular student engages in interfering behaviors that fit within the definition of "highly intensive."

[18] This section addresses the content of the annual goals as written. The procedure for developing goals in the

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]).

With respect to the appropriateness of the annual goals, a review of the August 2016 IEP establishes that it included approximately 17 annual goals with 55 corresponding short-term objectives that focused on the student's areas of need related to academic, vision, oral-motor, speech-language, social/emotional, gross and fine motor, and basic cognitive and daily living skills (Dist. Ex. 14 at pp. 8-16). In addition, a review of the August 2016 IEP reflects that the annual goals and short-term objectives targeted the student's identified areas of need, and consistent with the State and federal regulations identified above, included appropriate evaluative criteria (i.e., 4 out of 5 trials, 80 percent), evaluation procedures (i.e., as determined by teacher made materials, recorded observations, data collection), and schedules to measure progress toward meeting the annual goals (i.e., two times per month) (id.). For example, one annual goal targeted the student's need to increase the strength, coordination, and mobility of his oral muscles to improve saliva management and the execution of voluntary movements necessary to produce open vowel and consonant sounds; and included corresponding short-term objectives related to the student's ability to tolerate oral motor stimulation techniques and improve tongue mobility (id. at p. 11). Similarly, another annual goal—and its corresponding short-term objectives—targeted the student's need to identify the letters of his name and turn towards a speaker in response to his name (id. at p. 9). A review of the remaining annual goals and corresponding short-term objectives shows that they addressed the student's identified areas of need described in the present levels of performance (compare Dist. Ex. 14 at pp.1-6, with Dist. Ex. 14 at pp. 8-16).

Turning to the parents' challenges regarding the content of annual goals that, according to the parents, were "cut and pasted," the hearing record shows that 11 of the annual goals developed for the May 2016 and August 2016 IEPs originated in the March 2016 iHOPE IEP (compare Parent Ex. C at pp. 17-27, with Dist. Ex. 14 at pp. 8-16, and Dist. Ex. 10 at pp. 7-13). According to the iHOPE coordinator, the goals in the iHOPE IEP were developed from a review of "all of the materials" obtained prior to conducting the iHOPE "evaluation intake assessment," and discussion with the parents, and that the evaluators targeted "the most salient things" to develop the goals (Tr. pp. 468-69; see Parent Ex. C at pp. 17-29). Although some of the wording and phrasing among the iHOPE IEP goals and the district's IEP goals are not identical (i.e., "tactile and auditory approach" was used in the May and August 2016 IEPs, where "multi-sensory approach" was used in the March 2016 iHOPE IEP), the skills to be achieved remained the same (i.e., "identify the

context of the CSE meeting (i.e. copying practices) is addressed above. The parents' assertion that the annual goals are not appropriate because they were created based on the student receiving related services in 60-minute sessions rather than the 30-minute sessions recommended on the August 2016 IEP, is more appropriately described as a challenge to the frequency and duration of the recommended related services and will be addressed in the related services section below.

letters of his name") (compare Dist. Ex. 14 at p. 9, with Dist. Ex. 10 at p. 9 and Parent Ex. C at p. 18).

According to the school psychologist, while the August 2016 CSE did not make any changes to the existing annual goals from the May 2016 IEP, the CSE added benchmarks to some of the short-term objectives, and three annual goals to the August 2016 IEP (Tr. p. 175; compare Dist. Ex. 10 at pp. 7-14, with Dist. Ex. 14 at pp. 8-16). Specifically, the school psychologist testified that all students who attend specialized schools receive adapted physical education, therefore, the August 2016 CSE developed the student's adapted physical education goal based on the information in the physical development present levels of performance included in the August 2016 IEP (Tr. pp. 175-77; compare Dist. Ex. 14 at p. 5, with Dist. Ex. 14 at p. 15). Likewise, an additional daily living skills goal addressed the student's toileting needs identified in the present levels of performance, and another annual goal related to the role of the student's full-time paraprofessional (compare Dist. Ex. 14 at pp. 1, 6, with Dist. Ex. 14 at pp. 15-16). The instructional support unit teacher/site coordinator (site coordinator) for the district's assigned specialized school reviewed the August 2016 IEP annual goals, and while she questioned the level of two of the annual goals, she testified that all of the "goals could be implemented" at the assigned specialized school (Tr. pp. 357-59; see Dist. Ex. 14 at pp. 8-16).[19] In addition, the iHOPE coordinator—who participated in both the May and August 2016 CSE meetings—testified that she did not have disagreements with specific goals, and that she agreed with the goals from the August 2016 IEP "substantively" (Tr. pp. 594-95; see Dist. Exs. 10 at p. 23; 14 at p. 25).

Therefore, review of the hearing record shows that while the skills to be measured by the annual goals carried over from the May 2016 to the August 2016 IEP, the student continued to demonstrate needs in those area, and as such, supports the IHO's finding that the annual goals in the August 2016 IEP were generally appropriate in that they addressed the student's needs, and were sufficiently specific and measurable to guide instruction and to evaluate the student's progress over the course of the school year (see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; E.F., 2013 WL 4495676, at *18-*19; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 334-35 [S.D.N.Y. 2013]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *8 [S.D.N.Y. Dec. 8, 2011]; W.T. v. Bd. of Educ., 716 F. Supp. 2d 270, 288-89 [S.D.N.Y. 2010]; Tarlowe v. New York City Dep't of Educ., 2008 WL 2736027, at *9 [S.D.N.Y. Jul. 3, 2008]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *11 [S.D.N.Y. Sept. 29, 2008]; W.S. v. Rye City School Dist., 454 F. Supp. 2d 134, 146-47 [S.D.N.Y. Sep. 26, 2006]; Application of the Dep't of Educ., Appeal No. 12-108 [finding annual goals appropriate where the goals addressed the student's areas of need reflected in the present levels of performance]).

4. Related Services

The parents assert on appeal that the duration of the 30-minute related service sessions recommended on the August 2016 IEP was not appropriate to allow the student to progress toward

[19] The IHO indicated that the two goals that exceeded the student's capabilities were in areas of need for the student and could be easily ad[a]pted to the student's level of functioning (IHO Decision at p. 14), but this does not rise to the level of a denial of a FAPE to the student in this case.

his annual goals because the annual goals "were originally drafted with 60-minute related services in mind" (Req. for Rev. at p. 5). The parents also assert that "best practices" for related services for a student with a brain injury is to provide longer, more frequent sessions than were recommended by the August 2016 CSE.[20] With respect to whether the related services mandates in the August 2016 IEP were appropriate, a review of the hearing record supports the IHO's finding that the 30-minute related service mandates were sufficient to implement the student's annual goals and address his unique needs.

In reviewing the student's progress while attending a center-based preschool 8:1+2 special class during the 2015-16 school year, the student received three 30-minute sessions per week of individual OT, four 30-minute sessions per week of individual PT, and three 30-minute sessions per week of individual speech-language/feeding therapy (Parent Ex. C at pp. 2, 23, 25, 27; H at p. 7; Dist. Exs. 2 at p. 1; 3 at p. 1; 8 at p. 1; 9 at p. 1).[21] At this time the student also received privately obtained home-based related services including two 30-minute sessions per week each of individual PT, OT, and speech/feeding therapy (Parent Ex. C at p. 25; Dist. Ex. 2 at p. 1). According to the student's January and February 2016 preschool teacher and related service providers' reports, the student sometimes lost focus on tasks, but continued to work toward most of his goals, with improvement noted on some skills (see Dist. Exs. 1 at pp. 7-8; 2 at p. 5; 3 at p. 6; 9 at pp. 3-4). Additionally, the parents testified that the student made progress in preschool (Tr. p. 688).

A review of the preschool related service providers' recommendations for the 2016-17 school year includes reference to 30-minute increments. For example, the preschool PT transition report included goals and additional physical development recommendations that the student maintain a position for "up to 30-minutes" and avoid maintaining a position for more than 30-minutes (Dist. Ex. 2 at pp. 7-9). The student's preschool speech-language therapist as well as his physical therapist recommended 30-minute related service sessions for the student as he transitioned to a school-aged program (Dist. Exs. 2 at p. 7; 9 at p. 6).[22]

In February and March 2016, the parents obtained related service evaluations from iHOPE, and the March 2016 iHOPE IEP included recommendations for 60-minute related service sessions (Parent Exs. C at p. 30; H; I; J; K). The hearing record reflects discussion about the duration of the related services sessions during the August 2016 CSE meeting, including the parents' request for 60-minute sessions (Dist. Exs. 14 at pp. 3, 6; 15 at p. 2; see Parent Ex. O). The August 2016 CSE recommended that the student receive two 30-minute sessions per week of individual OT,

[20] The Sixth Circuit addressed the educational requirements placed on school districts by the IDEA analogously to that of a serviceable Chevrolet, and not a Cadillac (Doe v. Board of Educ. of Tullahoma City, 9 F.3d 455 [6th Cir. 1993]). While I sympathize with the parents for wanting only the "best" for the student, the IDEA only requires a district to provide an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances (Endrew F., 137 S. Ct. at 1001).

[21] The student attended a specialized preschool for the blind and visually impaired, and vision education services were included in classroom instruction, not as a separate related service (Parent Ex. C at pp. 20-21; Dist. Ex. 3 at pp. 1, 6).

[22] The student's preschool occupational therapist did not recommend a specific duration for the student's OT sessions, but indicated that he would benefit from OT services (Dist. Ex. 1 at pp. 8-9).

three 30-minute sessions per week of individual PT, four 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, and three 30-minute sessions per week of vision education services (Dist. Ex. 14 at p. 17). The CSE meeting minutes reflect that the parents did not agree with the CSE's recommendation for 30-minute related service sessions, or its suggestion to increase the overall frequency of the student's sessions, but the CSE did agree to add a group session of speech therapy to the IEP (Dist. Ex. 15 at p. 2; see Parent Ex. O at pp. 100, 133).

According to the minutes from the August 2016 CSE meeting, the CSE determined that 30-minute related service sessions were more "developmentally appropriate" for the student; while taking into consideration "the amount of instructional time [the student] would miss from his classroom" (Dist. Ex. 15 at p. 2; see Tr. pp. 217-18). In addition, the transcript of the August 2016 CSE meeting reflected the CSE's determination that 30-minute related service sessions were appropriate given the student's attention span (Parent Ex. O at pp. 95-97, 100-01, 114, 130-31). The district school psychologist confirmed that the student's attention span and the amount of time he would be missing from the classroom were factors discussed at the August 2016 CSE meeting that supported the determination that 30-minute related service sessions were appropriate for the student (Tr. pp. 183, 221).

According to the August 2016 IEP, the parents were of the view that the student "can maintain attention for up to 60-minute intervals" with 1:1 attention (Dist. Ex. 14 at p. 3). The parents also obtained a June 2016 letter from the student's neurologist advising that the student should receive 60-minute related service sessions, which they provided to the August 2016 CSE during the meeting (Dist. Exs. 12; 15 at p. 2; Parent Ex. O at pp. 7, 9, 11-17).[23] According to the August 2016 IEP, CSE meeting minutes, and the transcript of the CSE meeting, the parents asserted that the student's needs—including the amount of time necessary to transfer the student to therapy and his need for breaks—would best be met with 60-minute related service sessions (Parent Ex. O at pp. 97-99; Dist. Exs. 14 at pp. 3, 6; 15 at p. 2).

Similarly, hearing testimony from iHOPE staff revealed their greatest concerns regarding related service session length related to the time it took to prepare and transition the student for therapy, and the breaks/rest periods he needed during the session. During the impartial hearing, the iHOPE coordinator opined that "given how long it took us during our evaluations to get [the student] ready, to get him to participate in the assessment," and to return him, 30-minute sessions would not be sufficient (Tr. p. 456). Further, she testified that the three primary reasons that she recommended 60-minute sessions were for the time it took to complete transfers and transitions; and, based on iHOPE staff and the parents' premise that the student had a traumatic brain injury, the need to repeat tasks, and take rest breaks (Tr. pp. 526-29). The iHOPE PT director testified that 60-minute related service sessions "would serve [the student] best," and opined that 60-minute sessions would be necessary for "the prep work, vestibular work, then teaching the skill,"

[23] As noted above, the IHO found that the "fill in the blank" letter from the neurologist "lack[ed] credibility" (IHO Dec. at p. 14; see Dist. Ex. 12). Aside from the letter's premise that the student should have been classified as student with a traumatic brain injury versus multiple disabilities—which is not supported by the hearing record as discussed above—the letter does not provide further explanation to support the student's need for 60-minute related service sessions; and no support for the proposition that 60-minute sessions constitutes "best practice" for students with traumatic brain injury (see Dist. Ex. 12).

repetition, and rest breaks, to achieve the August 2016 PT annual goals (Tr. pp. 641-42, 644-48, 650-51; see Dist. Ex. 14 at p. 14).

However, regarding the student's need for repetition of skills, the assigned public-school site coordinator testified that the related service providers "support what goes on in the classroom" and that 60-minute related service sessions would result in "almost no classroom time" (Tr. pp. 340, 350-52). Regarding the time needed to transition the student to and from therapy sessions, the August 2016 IEP recommended full-time individual paraprofessional services, in part to "provide maximum physical assistance" including movement and transitioning (Dist. Ex. 14 at pp. 6, 17). The site coordinator also stated that "sometimes part of therapy is getting ready for therapy," and gave the examples of rather than being lifted out of the wheelchair, staff try to teach students to anticipate and learn the verbal directions needed to get out of the wheelchair; and learn to help with activities such as dressing (Tr. p. 351). Regarding the student's need for breaks due to "attentional factors," although the parents reported that the student maintained attention for up to 60 minute intervals when provided with 1:1 attention, the IEP also reflected that the student required refocusing, tended to lose interest quickly, and overall demonstrated significant deficits in his ability to sustain attention, such that the August 2016 CSE's decision to recommend 30-minute rather than 60-minute sessions of related services was adequately reasoned, addressed the student's needs, and did not result in a denial of a FAPE (see Dist. Ex. 14 at pp. 1-6). The CSE was not required to simply adopt the viewpoints of the iHOPE staff and the parents because they believe it is a better practice (see J.C.S., 2013 WL 3975942, at *11).

Finally, "most significant[]" to the IHO was his finding that the student benefitted from the 30-minute related service sessions he received in preschool, and that this duration of related services was recommended by some of the preschool providers who were familiar with the student (IHO Dec. at p. 15; Dist. Exs. 2;9; see Dist. Ex. 1; 3; 8).[24] I agree that the student's previous progress is significant. A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. June 24, 2013]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ. Mem. [Dec. 2010], at p. 18, available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). In addition, the IHO found the site coordinator's testimony indicating that 30-minute related service sessions were appropriate for the student to be "most persuasive" given the extent of her "broad experience at addressing the needs of students with multiple disabilities" (IHO Dec. at pp. 14-15). Based on the forgoing, the hearing record supports the IHO's findings and must be upheld.

5. 12:1+4 Special Class

The parents assert that the student's 12:1+4 special class placement in a specialized school was not appropriate, including an assertion that it is not the student's LRE. The parents also assert

[24] I note that during preschool, the student's in-school related services recommendation totaled 300 minutes per week, and the August 2016 CSE recommended 390 minutes of related services per week (Dist. Exs. 2 at p. 1; 14 at p. 17).

that the district should have recommended a "less restrictive" 6:1+1 or 8:1+1 special class placement.[25]

Initially, the parents assertion that the district recommended the "most restrictive" 12:1+4 special class in a specialized school and failed to consider other "less restrictive" options such as a 6:1+1 or an 8:1+1 special class placement appears to improperly conflate the idea of "restrictiveness" contained within the LRE requirement to educate students with disabilities the maximum extent appropriate with students who are not disabled, with the student-to-adult ratio of a special class. This approach misconstrues the analysis of the restrictiveness or LRE aspects of the student's educational placement. In circumstances such as those in the present case, LRE is not defined by the particular student-to-adult staff ratio present in a placement because it presents no difference in the degree of the student's access to nondisabled peers (see 20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2]; 300.116[b], [c]; 300.117; 8 NYCRR 200.1[cc]; 200.6[a][1]). Instead, as described by the Second Circuit, the LRE determinations are made by considering the extent to which the student has been placed with nondisabled peers; that is, "whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child,' and, if not, then 'whether the school has mainstreamed the child to the maximum extent appropriate" Newington, 546 F.3d at 120, quoting Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 [5th Cir. 1989]; see J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 639 [S.D.N.Y. 2011]). The parents at no time asserted claims that the student should have been placed in a setting with greater access to nondisabled peers and, consequently, their arguments regarding "restrictiveness" or LRE must be rejected.

Turning to the issue of whether the 12:1+4 special class offers appropriate support to address the student's needs, as discussed above in detail, the student demonstrated significant global developmental delays in cognitive, academic, and communication skills; visual impairment; and physical/motor needs requiring adult assistance for all ADLs, mobility, movement, and transitions (Tr. pp. 55-59, 74, 77-78; Parent Exs. C at pp. 2-16; H at pp. 2-5; I at pp. 1-2; J at pp. 2-3; K at pp. 1-4; Dist. Exs. 1 at pp. 1-7; 2 at pp. 3-7; 3 at pp. 2-6; 6 at pp. 6-7; 7; 9 at pp. 3-6; 14 at pp. 1-6). The school psychologist testified that to prepare the draft IEP for the August meeting, the August 2016 CSE reviewed the "extensive" reports used to develop the May IEP, as well as the May 2016 IEP itself (Tr. pp. 50-51, 55-59, 61-63, 67-71, 74-75; see Dist. Exs. 10; 14; Parent Ex. N).

Following the placement discussion at the August 2016 CSE meeting, the CSE recommended a 12-month 12:1+4 special class placement, full-time individual paraprofessional services, and the related services described above (Dist. Exs. 14 at p. 17; 15; see Parent Ex. O). Contrary to the parents' assertion that the August 2016 CSE failed to "consider" other special class

[25] I note that the parents are correct that at times during the impartial hearing the district's staff stated that 6:1+1 special classes were "geared for children with severe behavior needs" (Tr. pp. 80, 199, 210; see Parent Ex. O at pp. 28). Furthermore, at certain times during the August 2016 CSE, district staff represented that behavioral needs were a contributing factor in recommending a 6:1+1 placement (see e.g., Tr. pp. 79-80, 202, 207-10, 360-61). While that may have been confusing or contrary to the parents' point of view regarding their son, it does not amount to a denial of a FAPE as the CSE's reasoning for recommending a 12:1+4 had more nuances than a simple "absence of interfering behaviors." The IHO's comments on that point are addressed above, and it suffices to say that State regulations regarding special class settings do not explicitly address interfering behaviors as a dispositive factor in selecting a special class ratio (see 8 NYCRR200.6[h][4]).

placements than a 12:1+4 special class, review of the meeting transcript shows that a large focus of the discussion at the meeting was about a 6:1+1 versus 12:1+4 special class ratio (see Parent Ex. O at pp. 4-6, 22-49, 53-58, 86-94, 161; see also Dist. Ex. 15 at p. 2). According to the transcript from the August 2016 CSE meeting, district staff stated that they "rejected" a 6:1+1 special class placement because the student required a setting with "more adults in the room" than the "[o]ne para" found in a 6:1+1 special class, and they did not believe that the student's needs could be met in either a 6:1+1 or an 8:1+1 special class (Parent Ex. O at pp. 28-30, 47, 54). Specifically, the district school psychologist stated during the meeting that due to the severity of his delays, the student required "more adults in the room" to help the student academically, physically, and emotionally (id. at pp. 55, 86). In addition, the school psychologist testified that the CSE recommended a 12:1+4 special class based on the student's academic, educational, and medical needs, his need to improve his skills and functioning in all daily living skills areas, and his need for "the maximum amount of paraprofessional support" (Tr. pp. 79-80, 207-08). Likewise, the special education teacher who attended the August 2016 CSE meeting stated that in a 12:1+4 special class, staff would better be able to monitor the student with more adults in the room, and the placement would allow him to receive more adult support (Parent Ex. O at p. 31).

The site coordinator from the assigned specialized school reviewed the student's present levels of performance from the August 2016 IEP and testified that the student's needs identified in the IEP were "the types of things" that were addressed "daily" at the assigned specialized school (Tr. pp. 329-30). Specifically, the site coordinator testified that the 12:1+4 special class program addressed the feeding, dressing, toileting, play, communication, social, and positioning/motor skill needs of students who functioned at levels similar to the student's levels of functioning (Tr. pp. 329-41, 345-49; see Dist. Ex. 14 at pp. 1-6). Contrary to the parents' assertion that the focus of a 12:1+4 special class is habilitation "to the exclusion of academic achievement," the site coordinator testified that students in the 12:1+4 program work toward identifying colors, numbers, letters, and words—skills identified in the present levels of performance as areas of need the student exhibited—as well as recognizing their name, and tracing (Tr. pp. 334-36; Dist. Ex. 14 at pp. 2, 9-10). The site coordinator further opined, that, while looking at the student's specific ADL, cognitive, and positioning needs, the student would benefit from the 12:1+4 special class rather than the 6:1+1 special class (Tr. pp. 360-61).

These facts align with the design of a 12:1+4 special class set forth in State regulation, which states that "[t]he maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students. In addition to the teacher, the staff/student ratio shall be one staff person to three students. The additional staff may be teachers, supplementary school personnel and/or related service providers" (8 NYCRR 200.6[h][4][iii]). Based upon the foregoing, the hearing record supports the IHO's finding that the recommended 12-month 12:1+4 special class placement in a specialized school—in conjunction with the services of a full-time 1:1 paraprofessional, management needs, and related services—was appropriate and reasonably calculated to enable the student to receive educational benefits and make appropriate progress in light of his circumstances for the 2016-17 school year.

VII. Conclusion

Based on the foregoing, I find that the August 2016 IEP created by the CSE offered the student a program and placement that was reasonably calculated to enable the student to receive

educational benefit and make appropriate progress in light of his 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]).

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 9, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER