The University of the State of New York

The State Education Department
State Review Officer
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No. 20-038

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

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

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the International Institute for the Brain (iBrain) for the 2018-19 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 parties' familiarity with the detailed facts of the case is presumed and will not be recited here in detail. At the time the parent began the instant due process proceeding on July 9, 2018, the student was nine years old, had a history of seizures, spastic quadriplegia, cerebral palsy, intractable epilepsy, microcephaly, asthma, and cortical visual impairment, and was non-verbal

and non-ambulatory (Parent Ex. A at p. 1; Dist. Ex. 4 at p. 1).[1] The student received all means of nutrition, medications, and hydration through gastric and jejunal tubes, and was fully dependent in all domains of mobility and activities of daily living (ADLs) (Dist. Ex. 4 at pp. 5, 10, 20). The student had received early intervention services and attended a private school prior to attending the International Academy of Hope (iHope) for the 2016-17 and 2017-18 school years (Tr. pp. 546-47, 580).

The CSE convened on March 15, 2018 to formulate the student's IEP for the 2018-19 school year (see generally Dist. Exs. 6 at pp. 1-19; 7 at p. 1). Finding the student eligible for special education as a student with multiple disabilities, the CSE recommended a "12:1+(3:1)" special class placement in a district specialized school, along with the support of a full time 1:1 paraprofessional, and related services of three 30-minute sessions of individual occupational therapy (OT) per week, five 30-minute sessions of individual physical therapy (PT) per week, five 30-minute sessions of speech-language therapy per week, three 30-minute sessions of vision education services per week, and one 60-mminute session of parent counseling and training per month, as well as special transportation (Dist. Ex. 6 at pp. 14-15, 17-18).[2]

The parent disagreed with the recommendations contained in the March 2018 IEP and with the CSE's failure to respond to the parent's request for "a Full Committee Meeting along with a [district] school physician" and, as a result, by letter dated June 21, 2018, notified the district of her intent to unilaterally place the student at iBrain (see Parent Ex. N at p. 1; Dist. Ex. 6 at p. 18).

A. Due Process Complaint Notice

In a due process complaint notice dated July 9, 2018, the parent alleged that the district failed to offer the student a FAPE for the 2018-19 school year (Parent Ex. A at pp. 1-3). According to the parent, the district failed to conduct the March 2018 CSE meeting with a "Full Committee" in accordance with the parent's request and failed to conduct the CSE meeting at a mutually agreeable time (id. at p. 2). The parent argued that the March 2018 CSE "feigned interest in the independent evaluations and reports" provided to the district prior to the meeting (id.).

The parent further contended that the March 2018 IEP "was not the product of any individualized assessment of all [of the student's] needs and [would] not confer any meaningful educational benefit for [the] 2018-2019 [school year]" (Parent Ex. A at p. 2). The parent asserted that the March 2018 IEP did not accurately identify the student's disability classification as a student with a traumatic brain injury and inadequately described the student's present levels of

[1] Rather than consecutively identifying the exhibits in the hearing record, the parties produced one set of exhibits during the hearing regarding the student's pendency on August 21, 2018 (August 21, 2018 Parent Exs. A-B; August 21, 2018 Dist. Exs. 1-4) and another set of similarly marked exhibits for the remaining portion of the hearing (Parent Exs. A-F; H-N; S-U; Dist. Exs. 1-12). For ease of reference, citations to the exhibits introduced during the August 21, 2018 hearing will include the date of the hearing and the remaining exhibits will be referred to as marked.

[2] While the student's eligibility for special education is not in dispute, the parent alleges that multiple disabilities was not the most appropriate disability category for the student (34 CFR 300.8[c][7]; 8 NYCRR 200.1[z][8]).

performance and management needs and contained immeasurable goals (id. at pp. 2-3). The parent alleged that the recommendations set forth in the March 2018 IEP would cause substantial regression because the proposed 12:1+(3:1) special class was too large given the student's need for "constant" 1:1 support and monitoring to remain safe and also because the student required 1:1 direct instruction to make progress (id. at pp. 2, 3). The parent further objected to the March 2018 CSE's recommended changes to the student's related services (id. at p. 2). The parent alleged that the district failed to offer the student programming in the least restrictive environment (LRE), the district's programming was inappropriate because it did not address the student's highly intensive management needs, and the IEP lacked "extended school day" services (id. at p. 3). The parent also contended that the district ignored her written request that the CSE reconvene (id. at p. 2).

As relief, the parent sought the costs of the student's tuition at iBrain for the 2018-19 school year, transportation costs including a 1:1 "travel aide," and that the district be required to reconvene the CSE to conduct an annual review meeting for the student (Parent Ex. A at p. 3).[3]

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on August 21, 2018 and addressed the student's pendency placement that day (Tr. pp. 1-44). In an interim decision dated September 12, 2018, IHO 1 found that a change in location does not necessarily constitute a change of placement, that an unappealed February 2018 IHO decision (issued as a result of a prior impartial hearing relating to the student's 2017-18 school year) ordered the district to amend the student's IEP to reflect a 6:1+1 class ratio at a nonpublic school and iBrain would comply with such order, and that iBrain was substantially similar to iHope (Sept. 12, 2018 Interim IHO Decision at pp. 5-6; see Parent Ex. B).[4] Therefore, IHO 1 ordered the district to fund the student's pendency placement at iBrain (Sept. 12, 2018 Interim IHO Decision at p. 7). The parties participated in two additional days of proceedings on October 23, and December 5, 2018, the latter of which involved a further discussion the student's pendency placement (Tr. pp. 45-66). As a result, on December 8, 2019, IHO 1 issued an amended order on pendency to include special transportation as a component of the student's pendency placement (Dec. 8, 2018 Interim IHO Decision at pp. 6-7).

Two more days of proceedings took place on March 12 and March 13, 2019, including the presentation of testimonial and documentary evidence on the merits (Tr. pp. 65-252). Subsequently, IHO 1 recused herself (see IHO Decision at p. 1). IHO 2 was assigned to the matter

[3] The parent also sought an interim decision directing the district to pay for iBrain as the student's pendency placement (Parent Ex. A at pp. 1-2).

[4] IHO 1's interim decisions relating to pendency in this matter were not paginated. For purposes of this decision, citations to the interim IHO decisions will be to the consecutive pages with the cover page for each decision identified as page "1" (see generally Sept. 12, 2018 Interim IHO Decision at pp. 1-9; Dec. 8, 2018 Interim IHO Decision at pp. 1-9).

and four additional days of hearing took place between May 3, 2019 and August 16, 2019 (Tr. pp. 253-610).[5]

In a decision dated January 13, 2020, the IHO found that the district offered the student a FAPE for the 2018-19 school year, that iBrain was not an appropriate unilateral placement for the student, and that equitable considerations did not weigh in favor of an award of the costs of the student's tuition at iBrain, related services, and transportation (IHO Decision at pp. 2-21).

Specifically, with regard to the timeliness of the student's annual review, the IHO held that, even if the March 2018 CSE meeting was held after the annual review deadline, the delay was not significant and "did not prejudice the student inasmuch [as] the March 2018 IEP was to be implemented starting July 2018" (IHO Decision at p. 5). As for CSE composition, the IHO found that the district notified the parent of her right to request the participation of a school physician but that the parent did not exercise this right (id. at p. 6). Moreover, the IHO found that the parent's testimony that she requested participation of a physician on the day of the March 2018 CSE meeting was not credible (id.). The IHO found that the fact that staff from iHope was not listed on the meeting notice was inconsequential since the student's iHope special education teacher and related service providers participated in the meeting (id.). The IHO further found that the parent's claim that the CSE predetermined the student's program and placement was without merit (id. at p. 14). With respect to evaluative information, the IHO found that the CSE had sufficient information about the student from the iHope progress reports and input from iHope staff and, in any event, the student's triennial review was not due until shortly after the March 2018 CSE meeting (id. at pp. 6-7).

Turning to the March 2018 IEP, the IHO found that the CSE's determination that the student was eligible for special education as a student with multiple disabilities was appropriate and that the parent and the district could disagree about the disability category "without denial of a FAPE" (IHO Decision at p. 10). Further, the IHO determined that a 12:1+4 special class ratio was "precisely the type of programming that w[ould] address the student's unique needs" (id. at pp. 11-12). As for the duration of related services sessions, the IHO found support in the hearing record for the CSE's recommendation for 30-minute sessions (id. at pp. 12-13). Next, the IHO found that the IEP included "appropriate goals and services" and, further, that a claim regarding the CSE's failure to recommend assistive technology was outside the scope of the parent's due process complaint notice (id. at p. 13).

As for the parent's allegation that the CSE failed to reconvene, the IHO first noted that, to the extent the parent sought enforcement of the February 2018 IHO's decision requiring the CSE to reconvene, that was not before her (IHO Decision at p. 7). Further, the IHO found that, even if the district failed to provide the parent with prior written notice of its determination not to grant

[5] The parent is not appealing IHO 1's pendency determination in this matter and the issues on appeal are solely related to IHO 2's determinations. Therefore, for clarity, the remainder of this decision will refer to "IHO 2" simply as "the IHO."

the request for the reconvene meeting, such a violation did not amount to a denial of a FAPE given the breadth and sufficiency of the March 2018 CSE meeting (id. at p. 8).

Notwithstanding that the IHO found that the district offered the student a FAPE, she went on to review the appropriateness of the unilateral placement and equitable considerations (IHO Decision at pp. 15-21). With respect to the unilateral placement, the IHO described the evidence regarding iBrain, as well as the student's individual programming (id. at pp. 16-17). The IHO noted that certain staff was not available during the beginning of the 2018-19 school year "due to lack of providers" and that, although sessions of vision education services were allegedly made up, no documentation of the same was presented (id. at p. 17). The IHO found that the lack of vision services made iBrain inappropriate (id. at p. 18).

Turning to equitable considerations, the IHO noted concerns regarding the parent's cooperation with the district, the parent's removal of the student from iHope, the development and content of the iBrain IEP, the reasonableness of the costs of the tuition and related services at iBrain, and the terms of the transportation contract and the costs of transportation (IHO Decision at pp. 19-21). Based on the foregoing, the IHO denied the parent's request for relief (id. at p. 21).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in finding that the district offered the student a FAPE for the 2018-19 school year, that iBrain was not an appropriate unilateral placement, and that equitable considerations did not weigh in favor of the parent's requested relief. As to the district's offer of a FAPE, the parent asserts that the IHO erred in her findings relating to the timeliness of the annual review, the sufficiency of the CSE meeting notice and composition of the CSE, and the sufficiency of the evaluative information available to the CSE. Further, the parent challenges the IHO's determinations with respect to the appropriateness of the March 2018 IEP, specifically the multiple disabilities eligibility category, the 12:1+4 special class placement, and the duration of the related services. The parent further argues that the IHO erred by failing to find a denial of a FAPE due to the CSE's failure to recommend assistive technology services or 12-month services. In addition, the parent alleges that the IHO erred by failing to address the appropriateness of the functional grouping of students in the 12:1+4 special class. The parent also alleges that the IHO erred by finding that the CSE was not required to reconvene upon the parent's request.

As for the unilateral placement, the parent alleges that the IHO erred in finding that iBrain was not appropriate based on the lack of vetting by a credentialing entity, the lack of individualization of the program, and the delay in delivering vision services. Turning to equitable considerations, the parent alleges that the IHO erred in her findings and that the parent cooperated with the CSE.

In an answer, the district responds to the parent's allegations and argues that the IHO's decision should be upheld in its entirety. In addition, the district asserts that the parent raises issues on appeal that were not raised in her due process complaint notice. The parent submits a reply to the answer.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created"

(Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the LRE (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

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

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

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

VI. Discussion

A. Preliminary Matters—Scope of the Impartial Hearing and Review

On appeal, the parent raises several issues that were not raised in the due process complaint notice, but some of which were discussed by the IHO. In particular, the parent challenges the IHO's findings about the timing of the March 2018 CSE meeting. The parent also asserts that the IHO erred by failing to address whether the 12:1+4 special class would offer an appropriate grouping for the student. In addition, the parent challenges the IHO's determination (or lack thereof) relating to assistive technology and 12-month services. In its answer, the district specifically raises the parent's failure to raise claims related to assistive technology and 12-month services in her due process complaint notice.

The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

Here, the parent's due process complaint notice did not include claims pertaining to the timing of the CSE meeting, grouping, assistive technology, or 12-month services (see Parent Ex. A), and, although the parent included these claims in her post-hearing brief (Parent Ex. U at pp. 10, 17-18), she 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 containing these claims (see M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011] [declining to address new claims first raised in the party's post hearing brief after a lengthy impartial hearing process]). On the other hand, to the extent that the issues of grouping and 12-month services were first raised by counsel for the district during direct questioning of district witnesses at the impartial hearing for the purpose of defending against such claims (see Tr. pp. 197, 347), it is arguable that the district opened the door to such issues and, therefore, they are addressed briefly below (see M.H., 685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [S.D.N.Y. Aug. 5, 2013]). There being no such indication that the district opened the door to the issues of the timing of the CSE meeting or assistive technology, these issues were outside the scope of the impartial hearing and, therefore, of review. However, since the IHO addressed the question of the timing of the CSE meeting—and the district does not argue in its answer that this issue was

outside of the scope of the impartial hearing—it is discussed below out of an abundance of caution. Yet, I decline to review the merits of the issue of assistive technology, which the IHO explicitly found was outside of the scope of his review, particularly as the parent has offered no argument that this finding by the IHO regarding the scope of the hearing was error (IHO Decision at p. 13).

Further, on appeal, the parent has not challenged the IHO's finding that there was no merit to the parent's claim that the CSE predetermined the student's program and placement (see IHO Decision at p. 14). Accordingly, that aspect of the IHO's decision has become final and binding on the parties and shall not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. March 2018 CSE Meeting

1. Timeliness of the Meeting

Although this issue was not raised by the parent as an issue to be resolved at the impartial hearing, out of an abundance of caution, I turn to a discussion of the IHO's finding regarding the timeliness of the March 2018 CSE meeting. The parent asserts that the IHO erred in finding that any violation in the timing of the March 2018 CSE meeting did not amount to the denial of a FAPE. The parent alleges that the two-month delay significantly denied the parent's opportunity to participate in the IEP process, particularly because it took the CSE three months after the meeting to formalize the IEP and identify a school for the student to attend for the 2018-19 school year.

The IDEA and State regulations require the CSE to meet "at least annually" to review and, if necessary, to revise a student's IEP (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]); however, there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194). Further, the regulations do not preclude additional CSE meetings, specifically prescribe when the CSE meeting should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). The IDEA's implementing regulations and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). Failure to provide a finalized IEP before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE (see Application of a Student with a Disability, Appeal No. 15-099 [finding that a district's failure to finalize an IEP until after start of school year contributed to a denial of FAPE despite evidence of the parties' extensive efforts to locate an appropriate placement]).

Both of the meeting notices in this matter indicated that the CSE meeting "must be held no later than 1/30/2018" (Dist. Exs. 1 at p. 1; 2 at p. 1). However, the district supervisor of school

psychologists (psychologist supervisor) testified that this date was frequently "populated as an error" (Tr. p. 225). Additionally, as noted by the IHO, the impartial hearing record did not include evidence regarding the date of the last CSE meeting that occurred prior to the March 2018 CSE meeting (see IHO Decision at pp. 4-5). Further, although the prior written notice for the March 2018 IEP was sent approximately three months later as it was dated June 21, 2018, the prior written notice and school location letter were delivered to the parent prior to the start of the 2018-19 school year and the district had an IEP for the student in effect at the beginning of the 2018-19 school year (see Dist. Exs. 9; 10). Accordingly, there is no basis in the hearing record to depart from the IHO's finding on this issue.

2. CSE Meeting Notice and Composition

The parent alleges that the IHO erred in finding that the parent waived her objection to the CSE meeting notice and that the failure of the notice to list all attendees was not inconsequential. Moreover, the parent argues that the IHO erred in finding that the parent did not testify credibly regarding her request for the attendance of a physician at the March 2018 CSE meeting. The parent asserts that it was not incredulous that she would have requested a physician given the student's medical needs.

Generally, a school district is required to notify a parent of a CSE meeting on a form prescribed by the Commissioner of Education that, among other things:

> (i) inform[s] parent of the purpose, date, time, and location of the meeting and the name and title of those persons who will be in attendance at the meeting;
>
> (ii) indicate[s] that the parent(s) has the right to participate as a member of the committee on special education with respect to the identification, evaluation and educational placement of his or her child;
>
> (iii) state[s] that the parent(s) has the right to invite such individuals with knowledge or special expertise about his or her child, including related service personnel as appropriate, as determined by the parent(s); [and]
>
> (iv) for meetings of the committee on special education, inform[s] the parent(s) of his or her right to request, in writing at least 72 hours before the meeting, the attendance of the school physician member and an additional parent member of the committee on special education at any meeting of such committee pursuant to section 4402(1)(b) of the Education Law and include a statement, prepared by the State Education Department, explaining the role of having the additional parent member attend the meeting

(8 NYCRR 200.5[c][1], [2][i]-[iv]; see 34 CFR 300.322[b][1][i]-[ii]).

Both the IDEA and State and federal regulations specify the individuals required to fully compose a CSE (see 20 U.S.C. § 1414[d][1][B]; 34 CFR 300.321[a]; 8 NYCRR 200.3[a][1]). Under State regulations, a CSE is required to include the parents of the student; one regular education teacher of the student if the student is, or may be, participating in a general education environment; one special education teacher of the student or, where appropriate, not less than one special education provider of the student; a school psychologist; a district representative; an individual capable of "interpret[ing] the instructional implications of evaluations results"; a school physician if requested "in writing . . . at least 72 hours prior to the meeting"; an additional parent member if requested "in writing . . . at least 72 hours prior to the meeting"; "other persons having knowledge of special expertise regarding the student"; and "if appropriate, the student" (8 NYCRR 200.3[a][1]; see 8 NYCRR 200.1[xx] [defining "special education provider" as an "individual qualified . . . who is providing related services . . . to the student"]; 8 NYCRR 200.1[yy] [defining "special education teacher" as a "person . . . certified or licensed to teach students with disabilities"]).

On February 27, 2018, the district sent the parent a notice scheduling a CSE meeting for March 15, 2018 at 10:00 A.M. (Dist. Ex. 2 at p. 1). It identified the names and titles of the meeting participants, including a special education teacher, a school psychologist who would also serve as the district representative, and the parent (id. at p. 2). The meeting notice indicated that the parent could invite "other individuals who you determine to have knowledge or special expertise about your child" (id.). Additionally, as noted by the IHO, the meeting notice indicated that the parent could request the participation of the school physician in the CSE meeting; however, the parent did not make a request for the school physician's participation (id.; IHO Decision at p. 6).[7]

Participants at the March 15, 2018 CSE meeting included the district representative identified in the February 27, 2018 meeting notice, a different special education teacher/related service provider, a different school psychologist, the psychologist supervisor, the parent, and the parent's advocate (Dist. Exs. 2 at p. 2; 7; see Tr. pp. 117). Additionally, staff from iHope participated by telephone, including the associate director, the director of assistive technology, a special education teacher, a speech-language pathologist, a vision therapist, an occupational therapist, and a physical therapist (Dist. Ex. 7). Of the iHope staff who participated in the March 2018 CSE meeting, the special education teacher, the vision therapist, the occupational therapist, and the physical therapist were listed as contributors on an iHope IEP dated March 9, 2018, which the IHO relied upon to develop the IEP, as discussed below (compare Dist. Ex. 7, with Dist. Ex. 4 at p. 40).

[7] Prior to this, on February 14, 2018, the district sent the parent a notice scheduling a CSE meeting for April 24, 2018 at 10:00 A.M. (Dist. Ex. 1 at p. 1). It identified the names and titles of the meeting participants, including a special education teacher, a general education teacher, a school psychologist who would also serve as the district representative, and the parent (id. at p. 2).

With respect to the meeting notice, while the February 27, 2018 CSE meeting notice did not reflect all of the participants who actually attended the March 2018 CSE meeting (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 7), at most, this amounts to a procedural inadequacy, which would not support a finding that the district denied the student a FAPE unless it impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). The hearing record does not contain any evidence upon which to base a finding that any meeting notice deficiency warrants such a conclusion in this instance, especially since the CSE ultimately included all required members, as well as the parent, her advocate, and staff from the student's private school.

As for composition of the CSE, on appeal, the parent focuses on the lack of a school physician at the March 2018 CSE meeting; however, there is no evidence that the parent requested the attendance of a physician prior to the meeting as required by State regulation (8 NYCRR 200.5[c][2][iv]). The parent also takes issue with the IHO's finding that the parent did not testify credibly at the impartial hearing regarding her request for a physician (see IHO Decision at p. 6). However, the parent testified that, at the March 2018 CSE meeting, she inquired about having the student's neuropsychologist participate (Tr. pp. 585-86), not a school physician. Additionally, even if the parent expressed a desire at the meeting to have the student's neuropsychologist present, it does not alter the analysis as to the composition of the March 2018 CSE meeting. The parent clearly testified that she did not invite the student's neuropsychologist to participate in the meeting (Tr. pp. 584-85). To the extent that the parent alleges that she later requested the presence of a school physician in an April 20, 2018 letter to the CSE, that request is discussed below. Based on the foregoing, the evidence in the hearing record supports the IHO's finding that the CSE was properly composed.

3. Sufficiency of Evaluative Information

The parent asserts that the IHO erred in finding that the information available to the CSE was sufficient. In particular, the parent argues that the March 2015 psychological evaluation, although technically timely, was insufficient to provide the CSE with current information about the student's needs.

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district agree otherwise (34 CFR 300.303[b][1]; 8 NYCRR 200.4[b][4]). Pursuant to 8 NYCRR 200.4(b)(4), a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the

student's disability and, in accordance with 8 NYCRR 200.4(b)(5), the reevaluation must be "sufficient to determine the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education." A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

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

In developing the recommendations for a student's IEP, the CSE must consider the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

The psychologist supervisor testified that the March 2018 CSE reviewed the student's March 20, 2015 psychological evaluation report, the March 9, 2018 proposed iHope 2018-19 IEP, the January 12, 2018 iHope quarterly progress report, and the 2017-18 school year iHope IEP (Tr. pp. 146-47; see Parent Ex. C at pp. 1-33; Dist. Exs. 3 at pp. 1-11; 4 at pp. 1-40).[8] She noted that the CSE reviewed those documents "because they're critical and important in terms of understanding the current student's functioning," to get an understanding of progress, and to enable the CSE to "write a current appropriate IEP with realistic goals" (Tr. p. 147). Further, the psychologist supervisor testified that after reviewing the documents she believed that they were sufficient, and that no other information or evaluations were required to develop an appropriate IEP for the student (Tr. pp. 147-48). Specific to the parent's allegation on appeal, review of the

[8] The parent asserted in the due process complaint notice that the "independent evaluations and reports" were provided to the CSE in advance of and "discussed extensively during" the March 2018 CSE meeting (Parent Ex. A at p. 2). The June 21, 2018 prior written notice indicated that the CSE reviewed a March 9, 2018 teacher report and a January 12, 2018 progress report (Dist. Ex. 9 at p. 2).

March 2018 IEP shows that the majority of the information in the present levels of academic, social, and physical development and management needs—the sufficiency of which is not disputed on appeal—is similar if not identical to that information in the March 9, 2018 present levels of performance that iHope developed less than one week before the CSE meeting (compare Dist. Ex. 4 at pp. 1-6, 10-21, with Dist. Ex. 6 at pp. 1-7). Therefore, the age of the student's psychological evaluation in relation to the adequacy of the more current information available to the March 2018 IEP does not result in a denial of a FAPE in this instance.

C. March 2018 IEP

1. Disability Classification

With respect to the disability classification, the parent asserts that the IHO ignored the testimony of the iBrain director regarding the student's brain injury and the significance of the proper disability category and found the CSE's use of the multiple disabilities category appropriate.

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

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

"Traumatic brain injury" is defined as;

> an acquired injury to the brain caused by an external physical force or by certain medical conditions such as stroke, encephalitis, aneurysm, anoxia or brain tumors with resulting impairments that adversely affect educational performance. The term includes open or closed head injuries or brain injuries from certain medical conditions resulting in mild, moderate or severe impairments in one or more areas, including cognition, language, memory, attention, reasoning, abstract thinking, judgement, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, information processing, and speech. The term does not include injuries that are congenital or caused by birth trauma

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

As the IHO explained, the parents and the district can continue to disagree on the student's classification without it amounting to a denial of a FAPE (IHO Decision at pp. 9-10). At this juncture, when the student's eligibility for special education is not in dispute, the significance of the disability category label is more relevant to the local educational agency and State reporting requirements than it is to determining an appropriate IEP for the individual student.[9]

[9] The disability category for each eligible student with a disability is necessary as part of the data collection requirements imposed by Congress and the United States Department of Education upon the State, which require annual reports of "[t]he number and percentage of children with disabilities, by race, ethnicity, limited English proficiency status, gender, and disability category," who fall in several subcategories (20 U.S.C. § 1418[a][1][A] [emphasis added]; see 34 CFR 300.641). Although it does not bind the CSE in its responsibility to provide individualized services in accordance with the student's unique needs, for reporting requirement purposes:

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

(34 CFR § 300.641[d]). Local education agencies (LEAs) must, in turn, annually submit this information to the State though its Special Education Data Collection, Analysis and Reporting (SEDCAR) system (see, e.g.,

The iBrain director testified that the disability classification of traumatic brain injury was important because the student's brain injury is "what drives his educational needs" (Tr. pp. 447-48). She further explained that, because of the brain injury, the student has severe cerebral palsy, which is "at the core of everything" and represents "the basis of his needs" (Tr. p. 448). However, as discussed above, the student must be assessed in all areas of his special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified and that information should be described in the present levels of performance sections of the IEP, which then forms the basis for developing the student's special education program (see 34 CFR 300.304[c][6], 300.320[a][1]; 8 NYCRR 200.1[ww][3][i], 200.4[b][6][ix], [d][2][i]). The March 2018 IEP included a detailed description of the student's needs in the areas of academic achievement, functional performance and learning characteristics (including literacy and math, speech and language, feeding, and oral motor skills, and vision education), social development (detailing the student's communication skills), physical development (including PT, OT, and medical needs), and management needs (Dist. Ex. 6 at pp. 1-7). The present levels of performance also identified that, "[d]ue to the extensive nature of [the student's] brain based disability, which severely effects his physical and cognitive capabilities, in order to make progress and not regress, [the student] requires an environment which offers highly individualized attention and support" (id. at p. 4). Accordingly, while the iBrain director's testimony focused on the student's eligibility classification itself, the IEP contains a wealth of information regarding the student's needs and sufficiently identified the areas of concern related to classification raised in the iBrain director's testimony. Thus, I find no basis in the hearing record to find that CSE's classification of the student as a student with multiple disabilities denied the student a FAPE.

2. 12:1+4 Special Class

Next, the parent claims that the IHO's determination that a 12:1+4 special class placement was appropriate for the student was erroneous and that the student required a 6:1+1 class due to his "highly intensive management needs." The parent also claims that the 12:1+4 was more "restrictive" than a 6:1+1 special class and, therefore, violated LRE requirements.

State regulation provides that the maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students (see 8 NYCRR 200.6[h][4][iii]). In addition to the teacher, the staff/student ratio shall be one staff person to three students (id.). The additional staff may be teachers, supplementary school personnel, and/or related service providers (id.).

Verification Reports: School Age Students by Disability and Race/Ethnicity," available at http://www.p12.nysed.gov/sedcar/forms/vr/1819/pdf/vr3.pdf; see also "Special Education Data Collection, Analysis & Reporting," available at http://www.p12.nysed.gov/sedcar/data.htm). According to the Official Analysis of Comments to the revised IDEA regulations, the United States Department of Education indicated that the multiple disability category "helps ensure that children with more than one disability are not counted more than once for the annual report of children served because States do not have to decide among two or more disability categories in which to count a child with multiple disabilities" (Multiple Disabilities, 71 Fed. Reg. 46,550 [Aug. 14, 2006]).

State regulation also indicates that the maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction (see 8 NYCRR 200.6[h][4][ii][a]). Management needs, in turn, are defined by State regulations as "the nature of and degree to which environmental modifications and human material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social and physical development (8 NYCRR 200.1[ww][3][i][d]).

Initially, to address the parent's argument regarding LRE requirements, class size and the level of adult support are, generally speaking, unrelated to the IDEA's LRE requirement (34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; R.B. v. New York Dep't of Educ., 603 Fed App'x 36, 40 [2d Cir. Mar. 19, 2015] [stating that "[t]he requirement that students be educated in the [LRE] applies to the type of classroom setting, not the level of additional support a student receives within a placement"]; see T.C. v. New York City Dep't of Educ., 2016 WL 1261137 at *13 [S.D.N.Y. Mar. 30, 2016] [stating that "[a] less restrictive environment refers to the ratio of special education to general education students in the same classroom, not the ratio of special education students to teachers"]). As neither party disputes that the student should not attend a general education class setting or otherwise participate in school programs with nondisabled students, there is no basis for a finding that the March 2018 CSE's recommendations run afoul of LRE requirements.

Turning to the student's strengths and deficits, as previously described, the student exhibits significant, global cognitive, communication, physical, and health-related needs (see Parent Ex. C; Dist. Exs. 3-5). To address these needs, the March 2018 CSE recommended a 12:1+4 special class in a specialized school with the support of a full-time 1:1 paraprofessional and related services including OT, PT, speech-language therapy, vision education services, and parent counseling and training (Dist. Ex. 6 at pp. 14-15).[10] As for supports for the student's management needs, the IEP stated that the student needed "constant repetition of learning concepts and

[10] As a part of the IEP form, the IEP included a "yes" or "no" box for whether the student was eligible for special education services during July and August, and on the March 2018 IEP the "no" box was checked and no services were identified (Dist. Ex. 6 at p. 15). Additionally, the prior written notice did not identify 12-month services; however, both the March 2018 IEP and the prior written notice did indicate that the student was "best served in a 12:1+4 where he can work on academic, life skills, and receive on going [sic] support on a 12 month basis with a small ratio" (Dist. Exs. 6 at p. 19; 9 at p. 2). The minutes from the March 2018 CSE meeting also indicated that the program recommendation was for a 12-month program (Dist. Ex. 8 at p. 7). Additionally, the district's supervisor of psychologists testified that the failure to identify 12-month services on the IEP "appear[ed] to be a clerical error" as the student was "entitled, clearly, without question, to 12-month services" (Tr. pp. 197, 307). Given the forgoing, the evidence in the hearing record supports a finding that the omission of 12-month services on the particular portion of the IEP dedicated to such services was a clerical error and does not rise to the level of a denial of a FAPE. To hold otherwise "would exalt form over substance" (M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding an IEP appropriate, notwithstanding that a recommendation was omitted from the IEP because of a clerical error, where the recommendation appeared in the CSE meeting minutes and was reflected in the conduct of the parties]).

multimodal instructional strategies in order to generalize knowledge and achieve academic success" (id. at p. 7). In addition, the IEP indicated that the student benefited from: close monitoring for injury prevention, aspiration, allergen exposure, and severe allergic reaction; reduced lighting and environmental noise, as well as use of sunglasses and noise-canceling headphones; access to "three-dimensional objects and tactually/visually adapted symbols"; and frequent changes in position and time out of his chair (id.).

Neither party disputes the IHO's determination that both parties were in agreement the student had "highly intensive management needs requiring a high degree of individualized attention and intervention to maintain his physical well-being throughout the school day" (IHO Decision at p. 11). However, the parent's strict adherence to the language in State regulation guiding 6:1+1 special class placements to the exclusion of other appropriate placement options is reductive and overlooks the IHO's finding, which is supported by the evidence in the hearing record: that the student's highly intensive needs are due to his severe multiple disabilities, and that a program consisting of habilitation and treatment was appropriate to meet the student's needs (id. at pp. 11-12). Indeed, it is no mistake that the adult-to-student ratio required in a 6:1+1 special class and a 12:1+4 special class is a similar ratio, albeit with a greater variety in the type of school personnel typically found working with a student in the 12:1+4 special class setting—the very type of providers that this student requires and are not found in the definition of a 6:1+1 special class. Therefore, review of the hearing record does not provide a rationale to depart from the IHO's finding that "the 12:1+4 special class for students with severe multiple disabilities, called for in State regulation, is precisely the type of programming that will address this student's unique needs" (id.).[11]

[11] In addition, the parent asserts that the district did not prove that it would have followed State regulation regarding the grouping of students in the special class the student would have attended if he had attended public school. In this instance, the district sent the parent a school location letter dated June 21, 2018 identifying the public school to which the student was assigned (Dist. Ex. 10). The student did not attend the public school and the parent had not visited the public school since 2015 (Tr. pp. 564-65, 600). Accordingly, the parent was not aware of how the student would have been grouped at the public school for the 2018-19 school year at the time she placed the student at iBrain (see Parent Ex. N). Any evidence about how the student would have been grouped if he had attended the public school is necessarily retrospective. The Second Circuit has held that "our precedent bars us from considering such retrospective evidence" (J.C. v New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016] [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible" where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP"], quoting R.E., 694 F.3d at 195). Various district courts have followed this precedent (G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at *4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"]). Accordingly, the parent's argument regarding the grouping of the students in the special class is without merit and will not be further discussed.

3. Duration of Related Services Sessions

Next, the parent asserts the IHO erroneously found that the related services recommended in the March 2018 IEP were appropriate. The parent argues that the IHO shifted the burden of proving the inappropriateness of the thirty-minute sessions of related services to the parent. The parent further asserts that the evidence in the hearing record showed the student required the longer 60-minute sessions, as provided at iHope and iBrain, for transition, rest, and repetition.

The January 2018 iHope progress report reflected that the student's progress toward his PT, OT, speech-language, and vision education goals was generally affected by his levels of arousal, fatigue, and his ability to be "alert and engaged" (see Dist. Ex. 3 at pp. 2-8). The March 2018 iHope IEP made reference throughout that the student's performance and participation during related service sessions was dependent on his level of fatigue, alertness, and health status (see Dist. Ex. 4 at pp. 3-5, 10, 18, 20). Consistent with the iHope IEP, the district's March 2018 IEP present levels of performance also provided information about the student's ability to participate in related services sessions due to varying degrees of fatigue and alertness (compare Dist. Ex. 4 at pp. 3-5, 10, 18, 20, with Dist. Ex. 6 at pp. 2-3, 5, 7). In contrast to the March 2018 iHope IEP, which provided that the student would receive related services in 60-minute sessions, the March 2018 CSE recommended that the student would receive OT, PT, speech-language therapy, and vision education services in sessions of 30-minute duration (compare Dist. Ex. 4 at pp. 27-32, with Dist. Ex. 6 at pp. 14-15).[12]

The psychologist supervisor testified that the March 2018 CSE discussed the student's related services recommendations (Tr. pp. 159-73). Specifically, the psychologist supervisor stated that the March 2018 CSE, including the parent and iHope staff, had an "in depth" conversation about the duration of related service sessions (Tr. p. 175). She indicated that the student showed minimal and limited responses, slept frequently, was lethargic and medically fragile, and therefore unable to emotionally and physically sustain a related services session longer than 30 minutes (see Tr. pp. 161-62, 167, 169-70, 172-73). Following the discussion and although there was disagreement, ultimately the CSE based its recommendation for 30-minute related services sessions on its understanding of the student's skills and the opinion that he could not "withstand" 60-minute sessions (Tr. pp. 175-76, 233). While this determination departs from the opinion of iHope staff and the parent, the hearing record provides a basis for the district's concerns about the student's ability to benefit from related service sessions longer than 30-minutes.

In further support of the proposition that the related services in the March 2018 IEP were insufficient, the parent argues that the IHO did not address how the student could meet the annual goals, which were taken from the iHope IEP, given the reduction in the related services. The psychologist supervisor stated that the March 2018 CSE developed the goals in collaboration with

[12] According to the iHope IEP, rationales for 60-minute related service sessions included to ensure continued progress, generalization of skills, adequate visual processing and transition time, and due to the student's need for two-person transfers, rest breaks, positional changes, and extra processing and task-initiation time (Dist. Ex. 4 at pp. 27, 29-30, 32).

iHope staff (Tr. pp. 294-95; see Tr. pp. 176-97). Review of the March 2018 IEP annual goals shows that, with the exception of one vision goal, none of the remaining 10 related services goals specified the length of the sessions in which the goal would be achieved (see Dist. Ex. 6 at pp. 9-13). When asked about the vision goal, the psychologist supervisor testified that it was "appropriate for the 30 minutes" and that the goal would be modified if the student demonstrated progress (Tr. pp. 298-99; see Dist. Ex. 6 at p. 11). Although the March 2018 IEP related service annual goals are similar if not identical to the March 2018 iHope annual goals—which were developed envisioning they would be addressed during 60-minute sessions—the psychologist supervisor testified that the CSE reviewed the goals during the meeting, and determined they were appropriate for the student in order to "start him at a basic level and to move him forward" (see Tr. pp. 176- 93, 294-95, 297; compare Dist. Ex. 4 at pp. 25-31, with Dist. Ex. 6 at pp. 9-13).

To the extent the parent's argument implies that the annual goals should be deemed inappropriate in light of the 30-minute duration of the related services sessions, a determination of the appropriateness of a particular set of annual goals for a student turns, not upon their suitability within a particular classroom setting or student-to-teacher ratio, but rather on whether the annual goals and short-term objectives are consistent with and relate to the identified needs and abilities of the student (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). To hold otherwise would suggest that CSEs or CPSEs should pre-select an educational setting on the continuum of alternative placements and/or related services and then draft annual goals specific to that setting; however, that is, idiomatically speaking, placing the cart before the horse (see generally, "Guide to Quality Individualized Education Program [IEP] Development and Implementation," at pp. 38-39, Office of Special Educ. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf [stating, among other things that "[t]he recommended special education programs and services in a student's IEP identify what the school will provide for the student so that the student is able to achieve the annual goals and to participate and progress in the general education curriculum (or for preschool students, age-appropriate activities) in the [LRE]" [emphasis added]).

Based on the above, and in particular due to the student's documented difficulties with fatigue and alertness levels, the hearing record supports a conclusion that the 30-minute sessions as recommended in the student's March 2018 IEP were appropriate for the student and designed to allow him to make progress towards his annual goals. Thus, there is insufficient basis to disturb the IHO's findings that the March 2018 CSE related services recommendation for 30-minute sessions was appropriate in light of the student's needs.

D. Reconvene of the CSE

The parent asserts the IHO erred in failing to find a denial of FAPE arising from the CSE's failure to reconvene after the parent requested the attendance of a district school physician, among other requests and conditions, and again after the parent sent a 10-day notice letter.

Initially, the hearing record is not clear as to whether the district was provided an appropriate notice of the parent's request for a reconvene. Included in the hearing record is a photograph of a letter dated April 20, 2018, in which the parent requested that the CSE reconvene

(Parent Ex. M; see Tr. p. 581). The letter is signed by the parent and addressed to the CSE; however, the district's supervisor of psychologists testified that she did not see the letter prior to the impartial hearing (Tr. pp. 242-43). Additionally, while the parent responded to a question asking if the exhibit was "the letter you sent to the CSE" in the affirmative (Tr. p. 556), the parent later testified that the letter was "written up by my lawyers with my input, and we CC and emailed all - - to everybody" and further clarified that she did not send the letter to the CSE herself (Tr. pp. 581-82). Given the above, it would be difficult to hold the district accountable for failing to respond to a letter where there is conflicting evidence regarding its transmission to the district.[13]

However, even if the letter was delivered to the CSE, under the circumstances presented, I agree with the IHO that any failure to provide prior written notice of the CSE's decision not to reconvene did not amount to a denial of a FAPE. In addition to the district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Furthermore, in a guidance letter the United States Department of Education indicated that parents may request a CSE meeting at any time and that if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). However, a district's failure to comply with procedural requirements of the IDEA only constitutes a denial of a FAPE if the procedural violation deprived the student of educational benefits or significantly impeded the parents opportunity to participate in the decision-making process regarding the provision of a FAPE to the student (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Specific to the issues raised in the April 20, 2018 letter regarding the 2018-19 school year, the parent sought "a Full Committee Meeting," that a district school physician participate in person, and that specific iHope staff be included on any "IEP Meeting Notice" (Parent Ex. M at p. 1). The parent also requested that, "prior to scheduling the meeting," the CSE conduct new evaluations and consider placement of the student in a nonpublic school (id.).

The IHO determined that, although the district failed to respond to the parent's request to reconvene, that failure did not result in a denial of a FAPE as it was not a case in which "the CSE ha[d] not yet conducted a required annual review or reevaluation meeting, ha[d] not yet completed an IEP, or in which the parent ha[d] not already participated in the development of the IEP" (IHO Decision at p. 8). Rather, the IHO found that the parent "had a nearly four-hour long meeting with

[13] In contrast with the district's alleged failure to respond to the parent's March 20, 2018 letter, the district responded to the parent's June 21, 2018 letter notifying the district of the parent's intent to place the student at iBrain for the 2018-19 school year in a letter dated August 2, 2018 (Parent Ex. N; Dist. Ex. 11).

iHope staff and sufficient information about the [s]tudent" and also that the parent had not objected at the March 2018 CSE meeting to the district's physician not being present (id.). I see no reason to depart from the IHO's findings because as previously discussed the March 2018 CSE had extensive information about the student upon which to base its program and placement decisions, including medical information such as a March 2018 iHope individualized healthcare plan and a March 2018 health examination form (Tr. pp. 236-39; Dist. Exs. 4 at pp. 34-37; 5). As such, the failure to reconvene to include the participation of a district physician and conduct new evaluations to determine the student's placement did not rise to the level of a denial of a FAPE.[14]

Finally, the parent appeals the IHO's decision that the CSE's failure to reconvene after the parent notified the district in June 2018 of her intent to unilaterally place the student at iBrain for the 2018-19 school year and seek tuition reimbursement was not a denial of a FAPE. In the June 21, 2018 letter the parent asserted that the district "ha[d] not conducted an annual IEP for this student" due to the failure to include a district physician at a CSE meeting, and requested that the CSE schedule a "Full Committee Meeting at a mutually agreeable date and time to allow for all mandated members of the IEP team to participate" (Parent Ex. N at p. 1). By letter to the parent dated August 2, 2018, the CSE chairperson acknowledged the parent's June 2018 notice of unilateral placement and indicated that the CSE's March 2018 recommendation was appropriate to meet the student's educational needs (Dist. Ex. 11). Although the parent's June 2018 notice of unilateral placement could be viewed as another request for the CSE to reconvene, absent additional information about how the student's needs had changed since the March 2018 CSE meeting, for the reasons described above this does not result in a denial of a FAPE.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2018-19 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether iBrain was an

[14] The parent references a requirement in the district's standard operating procedures manual that calls for the district to conduct an evaluation of a student prior to considering placement in a nonpublic school (Reply ¶2). Initially, there is no indication in the hearing record that the CSE considered placement of the student in a nonpublic school. Once the CSE determined an appropriate class placement for the student, the district was not obligated to consider a more restrictive placement—such as a nonpublic school (see B.K. v. New York City Dep't of Educ., 12 F.Supp.3d 343, 359 [E.D.N.Y. 2014] [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. Aug. 19. 2013] [explaining that "under the law, once [the district] determined . . . the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options"]). In any event, I would be unable to find that a deviation from a district's internal policies that does not constitute a violation of State or federal law would, by itself, constitute a denial of a FAPE warranting tuition reimbursement (see, e.g., M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *9-*10 [S.D.N.Y. Aug. 27, 2010]; Application of a Student with a Disability, Appeal No. 15-089).

appropriate unilateral placement for the student or whether equitable considerations support the parent's request for relief (Burlington, 471 U.S. at 370).

I have considered the parent's remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 29, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER