The University of the State of New York

The State Education Department
State Review Officer
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No. 21-143

**Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

**Appearances:**
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Cynthia Sheps, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondent, by Nicholas A. Marricco, Esq.

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for her son's tuition costs at the International Institute for the Brain (iBrain) for the 2020-21 school year. The parent cross-appeals from the IHO decision to the extent that the IHO did not address specified issues. The appeal must be sustained. The cross-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 appeal has been the subject of a prior State-level appeals regarding the 2019-20 school year (see Application of a Student with a Disability, Appeal No. 20-069). In prior school years, going back to the 2016-17 school year, the student was parentally placed at the International Academy of Hope (iHope) and then at iBrain (see Dist. Exs. 2 at p. 7; 3 at p. 3; 4 at pp. 19, 20-21, 25, 28).

On May 26, 2020, the CSE met to develop the student's IEP for the remainder of the 2019-20 school year and the 2020-21 school year (Dist. Ex. 6 at p. 23).[1] Attendees participated via teleconference, and included: the district representative who also participated as the district school psychologist; a district special education teacher; a district physician; the parent; and a translator (Dist. Ex. 7). Attendees from iBrain included, the student's teacher, physical therapist, occupational therapist, speech-language therapist, assistive technology provider, music therapist, and conductive education teacher, as well as the iBrain director of special education and the parent's advocate (id.). The resultant IEP shows that the CSE recommended that the student's classification should be that of a student with multiple disabilities, and that he receive his special education instruction in a 6:1+1 special class in a district specialized school, and related services of occupational therapy (OT), physical therapy (PT), speech-language therapy, and school nurse services (Dist. Ex. 6 at pp. 1, 20, 24). The CSE also recommended that the parent receive parent counseling and training (id. at pp. 20, 24). The CSE further recommended that the student receive the following supplementary aids and services: a 1:1 transportation paraprofessional; a 1:1 health paraprofessional for ambulation, feeding, and student safety; individual assistive technology services, a dynamic display speech generating device (SGD), and a "Jelly Bean Switch" (id. at p. 20).[2]

On June 26, 2020, the parent's advocate provided the district with notice that the parent intended to place the student at iBrain for the 2020-21 extended school year and that she would seek public funding for the placement (Parent Ex. M). The advocate also included a pendency application (id.).

**A. Due Process Complaint Notice**

In a July 6, 2020 due process complaint notice, the parent requested an impartial hearing asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year, and that the impartial hearing be consolidated with a prior requested due process complaint notice concerning the 2019-20 school year (Parent Ex. A at pp. 1-2).[3] The parent also requested that the district fund the student's placement at iBrain, including the costs of tuition, related services, and transportation, pursuant to pendency (id. at p. 2). With respect to the May 2020 CSE and resultant IEP, the parent asserted that the district failed to recommend the same related services, supports, and assistive technology devices as were recommended in the iBrain school report relied on by the CSE in developing the student's program (id. at p. 4). According to the parent, the May 2020 CSE deviated from the iBrain report in terms of the type, frequency, duration, and location of related services, including assistive technology devices and programming service sessions (id.). The parent further asserted that the May 2020 CSE denied the student a

[1] The student's eligibility for special education services is not in dispute in this appeal.

[2] The hearing record does not describe a Jelly Bean Switch; however, it is a large button switch which provides a larger target for users for whom smaller switches are difficult to use, and it provides tactile and auditory feedback when pressed on any point of the button.

[3] On July 22, 2020, the IHO presiding over the 2019-20 school year hearing denied the parent's request for consolidation of the 2019-20 and 2020-21 school year due process complaint notices (IHO Order denying Consolidation).

FAPE by failing to recommend assistive technology programming services and by failing to provide an assistive technology device (id. at pp. 4-5). The parent also raised claims regarding the district's ability to implement the May 2020 IEP, asserting that the district did not offer a seat to the student in a classroom that could implement the IEP at the start of the extended school year and that the parent's investigation revealed the recommended program was not available for the 2020-21 extended school year (id. at p. 3).

To remedy the alleged failures by the district, the parent requested direct payment for: the student's tuition at iBrain for the 2020-21 extended school year, which included related services and a 1:1 paraprofessional; transportation costs, including a travel paraprofessional, nurse, or porter services; and the cost of a 1:1 school nurse (Parent Ex. A at p. 5). The parent also requested an order compelling the district to provide the student with assistive technology services and devices, and an augmentative and alternative communication device (id.).

**B. Impartial Hearing Officer Decision**

The parties convened for a prehearing conference on January 19, 2021; a hearing on pendency took place on January 27, 2021, the hearing proceeded on February 10, 2021 and concluded on March 19, 2021 after nine total days of proceedings (Tr. pp. 1-490). In an interim decision dated March 18, 2021, the IHO determined that the student's pendency placement was an unappealed IHO decision dated April 28, 2018, which found that iHope was an appropriate placement for the student, and the IHO denied the parent's request for funding of iBrain through pendency (Interim Order on Pendency at p. 11).

In a May 22, 2021 decision, the IHO found that the district failed to offer the student a FAPE for the 2020-21 school year, iBrain was an appropriate unilateral placement, and equitable factors weighed in favor of the parent's request for reimbursement (IHO Decision at pp. 13, 19, 20).

The IHO determined that the district recommend a program and offered the student a placement prior to the start of the extended school year (IHO Decision at p. 13). With respect to issues concerning the school location letter and prior written notice, the IHO found that any delay in sending those required documents to the parent was due to "the [p]arent's failure to return completed medical forms" (id.). Along the same lines, the IHO also found that contrary to the parent's assertion, the student did not require 1:1 nursing services due to the parent's failure to provide the CSE with the completed medical forms (id. at p. 14). The IHO noted that the hearing record did not include any independent evaluations of the student and that the evaluative information, therefore, had "somewhat limited value" (id.). The IHO further noted that while the student had been at risk for aspiration, this alone did not prove that the recommendations were insufficient to support the student's feeding and safety needs, and moreover, the CSE provided access to a school nurse as well as the recommended 1:1 paraprofessional with a mandate and training for feeding (id.). The IHO also found that the hearing record supported the CSE's decision to classify the student as a student with multiple disabilities (id. at pp. 16-17).

With respect to the May 2020 IEP, and based on arguments raised in the parent's closing brief, the IHO found that, despite the student's use of a wheelchair and need for an accessible school building, the district's assigned public-school site only contained wheelchair accessibility

at the entrances, and therefore, the district substantively denied the student a FAPE (IHO Decision at p. 13).

With respect to the implementation of the May 2020 IEP, the IHO noted that, contrary to the parent's assertion, the district developed a remote learning plan for the student, and that for the applicable time period the district was capable of remotely implementing the May 2020 IEP (IHO Decision at pp. 13-14). The IHO also found that the parent's assertion that the proposed placement "would not" group the student with students with similar needs was speculative (id. at pp. 15-16).

With respect to iBrain, the IHO determined that the parent's witness's direct testimony, contained in an affidavit, was brief and did not provide any quantitative basis to show student progress, and the hearing record lacked any independent evidence of the student's needs, progress, and potential; however, other evidence in the hearing record showed that the student's program focused on his unique needs including class sizes, related services, and supplementary aids and services, and the program was "targeted to address any potential" (IHO Decision at pp. 18-19). The IHO also found that the hearing record lacked sufficient bases to make a determination with respect to the district's assertions that iBrain failed to provide adequate academic instruction time and that the conductive education methodology lacked clinical or educational validity (id. at p. 19).

With respect to equitable considerations, the IHO found that the testimony and documentary evidence raised questions as to the extent of the parent's cooperation with the CSE, and as the parent did not testify, the hearing record contained "uncontroverted testimony that she impeded" the CSE's ability to develop the May 2020 IEP (IHO Decision at p. 19). The IHO also opined that "on their face, both the tuition contract . . . and the transportation contract . . . raised questions," in part due to the additional and separate billing for related services, the 1:1 transportation paraprofessional, 1:1 nursing services, and assistive technology devices and services, which are all added to the "basic tuition," without explanation for those additional charges (id. at p. 20). The IHO also questioned the total cost of the tuition given that the student's program consisted mostly of related services sessions, and therefore the total tuition appeared to be far beyond the "basic" $158,000 tuition charge (id.). The IHO also, without comment, noted that the transportation contract was for $205 per trip (id.). Despite the IHO's misgivings about the parent's apparent lack of cooperation and noted concerns regarding pricing, the IHO nonetheless determined that although some reduction in tuition might be appropriate, she lacked a basis for determining how much (id. at p. 20).

The IHO ordered the district to directly fund the student's tuition, supplemental tuition, and transportation costs for the 2020-21 extended school year at iBrain (IHO Decision at p. 22-23).

**IV. Appeal for State-Level Review**

The district appeals, asserting the IHO erred in finding the district failed to offer the student a FAPE, that iBrain was an appropriate unilateral placement, and that equitable considerations favored the parent's request for tuition reimbursement.

Specifically, the district asserts that the IHO's basis for finding a denial of FAPE due to wheelchair accessibility was beyond the scope of the impartial hearing, as the issue was not raised

in the due process complaint notice, the district did not "open the door" by eliciting testimony on the issue in order to defend its proposed programming, and the parent was the first to broach the issue of handicapped accessibility at the public-school site during cross-examination. The district also asserts that the IHO's conclusion that the evaluative materials relied upon by the CSE had "limited value" was in error and is belied by the hearing record. The district asserts that the CSE used a newly conducted social history, a March 2019 classroom observation (noting that the district was unable to conduct a classroom observation during the 2020-21 school year due to restrictions related to the pandemic), a 2019 psychoeducational evaluation, a 2019 assistive technology evaluation, and iBrain progress reports, which included reports from the student's then current related service providers.

The district also asserts that the IHO erred in finding iBrain appropriate because the hearing record is devoid of any evidence that iBrain's program was individualized to meet the student's unique needs, and in fact, the programming was substantially similar for all of its enrolled students, which included an extended school day and related services in 60-minute sessions, and further, iBrain provided very little academic instruction (4.5 hours out of 40 hours per week). The district also asserts that the hearing record only contained generalized evidence as to the student's progress, which is unsupported by specific facts or details. Finally, the district asserts that the parent failed to provide any evidence as to a remote learning plan utilized by iBrain during the pandemic, while the student received remote instruction.

With respect to the IHO's determination that equitable factors favored the parent's request for funding of the costs of the student's tuition and related services at iBrain, the district asserts that the parent failed to provide proper notice of unilateral placement and failed to provide proof that she could not afford to front the costs of tuition at iBrain for the 2020-21 school year.

The district requests reversal of the IHO's decision and findings that the district offered the student a FAPE for the 2020-21 school year, that iBrain was not an appropriate placement for the student, and that equitable considerations do not favor the parent's request for relief.

In an answer, the parent generally responds to the district's substantive allegations with denials, and argues in favor of the IHO's determinations that the district failed to offer the student a FAPE, that iBrain was appropriate, and that equitable considerations weighed in favor of the parent's requested relief. The parent also cross-appeals, asserting that the IHO failed to find that the district denied the student a FAPE based "on other grounds properly raised by the parent." Those issues are identified as: the district being precluded from defending the May 2020 IEP under the doctrine of res judicata; the student's classification; the provision of 1:1 nursing services; failure to consider functional grouping and an extended school day; the ability of the assigned public school site to implement the student's IEP due to, among other things, nurses who were not trained in G-Tube feeding, a lack of assistive technology devices, and school staff lacking training in two-person transfers. The parent requests dismissal of the district's request for review in its entirety.

In an answer to the parent's cross-appeal, the district re-asserts that the IHO exceeded her jurisdiction by finding, sua sponte, that the district denied the student a FAPE based on wheelchair accessibility. The district also asserts that the parent's cross-appeal should be dismissed because the district was not timely served with the notice of intention to cross-appeal and the cross-appeal

does not comport with 279.8[c] of the State regulations, in that it only provides two statements of argument that the IHO erred and seven other allegations of district wrongdoing, that have no connection to the IHO decision.

**V. Applicable Standards**

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

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

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

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

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

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).

[4] 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. Initial Matters

#### 1. Additional Evidence

In its answer to cross-appeal, the district attaches a copy of an IHO decision dated May 9, 2021 concerning the student in this appeal. The decision is in relation to the parent's due process complaint notice regarding the 2019-20 school year, which was referenced in the July 6, 2020 due process complaint notice that is the subject of this proceeding, of which consolidation was denied in a July 22, 2020 order (Parent Ex. A at pp 1-2; Order on Consolidation). The district's purpose for providing a copy of the decision is to address the parent's claim that the district should be precluded under the doctrine of res judicata from defending the May 2020 IEP in this proceeding because the prior proceeding concerned the 2019-20 school year and the implementation date of the May 2020 IEP was during the 2019-20 school year. The district asserts that the IHO assigned to hear the merits of the 2019-20 school year specifically "refused to consider the May 2020 IEP" and "any claims and/or arguments with respect to the [May 2020] IEP will not be addressed." The district asserts that, as it was precluded from defending the May 2020 IEP during the proceeding concerning the 2019-20 school year, the doctrine of res judicata is not applicable.

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

#### 2. Res Judicata

The parent asserts that the district should be barred from defending the May 2020 IEP under the doctrine of res judicata, because in a separate proceeding, the parent asserted a denial of FAPE for the 2019-20 school year and the May 2020 IEP was intended to be implemented for a portion of the 2019-20 school year.

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C.

v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]).

The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6).[5] Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]).

The parent's basis for requesting that the district be prevented from defending the May 2020 IEP in this proceeding, which is the only proceeding challenging the program recommended in the May 2020 IEP, is that the parent filed a due process complaint notice on July 8, 2019 raising allegations related to the 2019-20 school year (IHO Ex. II at p. 5; see Parent Ex. A). As the parent brought the prior proceeding approximately 10 months before the May 2020 IEP was developed, there is no basis for finding that any challenges the parent has to the May 2020 IEP could have been raised in the prior proceeding—the parent could not have known at the time of filing the prior due process complaint notice if she even had a disagreement with an IEP that was not yet in existence. On that basis alone, the parent's argument as to res judicata is infirm.

**3. Compliance with Practice Regulations**

The district unartfully asserts that the parent's cross-appeal fails to conform with State regulations in that it "contains two statements which argued that the IHO erred" and the "other seven allegations are merely statements of alleged DOE wrongdoings, without any connection to the IHO's Decision." It appears that the district is attempting to argue that the cross-appeal runs afoul of the requirement that it contain "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review" (8 NYCRR 279.8[c]). While the cross-appeal is vague, the substance of the alleged IHO errors are that the IHO failed to address certain issues. Accordingly, other than identifying the issues that the IHO did not address, it is unclear what more the district expected from the

[5] While the IDEA allows a parent to file "a separate due process complaint on an issue separate from a due process complaint already filed" (20 U.S.C. § 1415[o]; 34 CFR 300.513[c]), "consolidation of multiple issues into a single complaint where such issues are known at the time of the filing of the initial complaint" are encouraged (Due Process Procedures for Parents and Children, 70 Fed. Reg. 35782 [June 21, 2005]). It has been noted in IDEA jurisprudence that "[a]lthough courts were initially hesitant to use res judicata in the administrative setting, the doctrine has consistently been applied to administrative hearings that reach a final judgment on the merits" (Theodore v. Dist. of Columbia, 772 F. Supp. 2d 287, 293 [D.D.C. 2011]).

parent's cross-appeal. In any event, the district was able to respond to the parent's allegations, and as such, there is insufficient basis to exercise my discretion and dismiss the cross-appeal.

Alternatively, the district also asserts that the parent failed to timely file the notice of intention to seek review upon the district and therefore the cross-appeal should be dismissed. A respondent who wishes to cross-appeal from the decision of an IHO must serve a "notice of intention to cross-appeal within 30 days after the decision of the impartial hearing officer" (8 NYCRR 279.2[d]). In this instance, the IHO decision was dated May 22, 2021; the parent served a notice of intention to cross-appeal and case information statement on July 8, 2021, the same day that the parent served the answer and cross-appeal and other supporting documents. This was a clear violation of the practice regulations. However, in its answer, the district has not asserted any prejudice in responding to the answer and cross-appeal and the district timely served an answer to the cross-appeal. Under these circumstances, I will exercise my discretion and not dismiss the cross-appeal for that reason.

**4. Scope of the Impartial Hearing**

The district asserts that the IHO erred by finding that it denied the student a FAPE based on a ground not alleged by the parent in the due process complaint notice, namely that the assigned school was not wheelchair accessible.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

As noted by the district, the parent's due process complaint notice does not make any allegations or references to the assigned public school being inaccessible for students with wheelchairs (see Parent Ex. A). The parent asserts that other, more general allegations, included in the due process complaint notice should be read as raising the wheelchair accessibility issue. These allegations include that the district failed to implement the May 2020 IEP by "not offering a seat to [the student] in a classroom that could implement the IEP," that "investigation by Parent revealed the recommended program [wa]s not available for the extended school year 2020-2021," and that the district recommended "a placement that does not provide the mandated program." However, these allegations are over-broad and following the interpretation requested by the parent would hinder the district's ability to prepare for a hearing and improperly expand the district's burden of proof (see N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *5 [S.D.N.Y. Feb. 11, 2016]).

In addition, the general allegations contained in the parent's due process complaint notice run counter to the Second Circuit's proscription that "challenges to a school district's proposed placement school must be evaluated prospectively (i.e., at 'the time of the parents' placement

decision') and cannot be based on mere speculation" (M.O. v. New York City Dept. of Educ., 793 F.3d 236, 244 [2d Cir. 2015]). Reviewing the parents' due process complaint notice, the parent only raised general challenges and, accordingly, did not raise any prospective, non-speculative challenges to the district's capacity to implement the May 2020 IEP at the assigned school site (see Parent Ex. A). As a result, the district's burden to present testimony about the capacity of its proposed assigned school site to implement every aspect of the May 2020 IEP was never triggered (see J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [finding that a district did not have a burden to produce evidence demonstrating the adequacy of the assigned public school site absent non-speculative allegations about the school's ability to implement the IEP]; N.K., 2016 WL 590234, at *6 [noting that "[t]o be a cognizable claim, i.e., one that triggers the school district's burden of proof, the 'problem' with the placement cannot be a disguised attack on the IEP"]; see also M.B. v New York City Dep't of Educ., 2017 WL 384352, at *6 [S.D.N.Y. Jan. 25, 2017] [noting that the parent in that matter did "not allege that the placement school did not have the ability to satisfy the IEP" but instead sought "to require the District to prove in advance that it w[ould] properly implement the IEP," which "M.O. does not require"]).

Based on the above, the issue of wheelchair accessibility was not properly raised within the due process complaint notice, and as such was beyond the scope of the impartial hearing (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]).

Further, to the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due process complaint notice (M.H., 685 F.3d at 250-51; see B.M., 569 Fed. App'x at 59; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]), here, the subject of wheelchair accessibility was first addressed during the impartial hearing as part of the parent's attorney's cross-examination of the district witness. The parent's counsel, on cross-examination, first broached the issue of accessibility with one question: "And with respect to the structure, the building itself, could you tell us whether or not that building is handicapped accessible?"—to which the district's witness answered: "To my knowledge, it is not an accessible building besides the entrances" (Tr. pp. 334-35). This question and answer were the sum and total of the inquiry of the issue of accessibility (see Tr. pp. 1-490).[6] Given the one-question line of inquiry by parent's counsel during a nine day impartial hearing, finding a denial of FAPE based on this issue is nothing short of the proverbial "sandbag" courts counsel against (R.E., 694 F.3d 167 at 187-88 n.4).

[6] Further, while the IHO's finding that the assigned school building was not wheelchair accessible appears to go to the heart of the school being "factually incapable" of implementing the student's IEP, the testimony only addressed the building as being accessible at the entrances. As there is no further line of inquiry concerning the layout of the building, the size of the building, or where the student's class would have been located within the building, this bare statement does not support a factual finding that the district denied the student a FAPE by assigning him to a school building that he could not access.

In the same vein, the parent asserts in her cross-appeal that the district failed to offer the student a FAPE by not recommending 1:1 nursing services and because the CSE did not consider whether the assigned school could group the student with other students of similar needs in an extended school day, the assigned school did not have nurses trained in G-tube feeding, the assigned school did not have the mandated assistive technology devices available; and assigned school staff were not trained in two-person transfers. None of these issues were raised in the parent's due process complaint notice (Parent Ex. A). However, in its answer to the cross-appeal, the district only contends that the allegation related to 1:1 nursing services was not properly raised. Accordingly, the issue of 1:1 nursing services is outside the scope of the hearing; however, the remaining allegations related to the assigned public school site, such as grouping, extended school day services, staff training, and the availability of assistive technology devices will be discussed below.

**B. Classification**

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

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

"Traumatic brain injury" is defined as "an acquired injury to the brain caused by an external physical force or by certain medical conditions such as stroke, encephalitis, aneurysm, anoxia or brain tumors with resulting impairments that adversely affect educational performance. The term includes open or closed head injuries or brain injuries from certain medical conditions resulting in mild, moderate or severe impairments in one or more areas, including cognition, language, memory, attention, reasoning, abstract thinking, judgement, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, information processing, and speech. The term does not include injuries that are congenital or caused by birth trauma." (see 8 NYCRR 200.1[zz][12]).

"Multiple disabilities means concomitant impairments (such as intellectual disability-blindness, intellectual disability-orthopedic impairment, etc.), the combination of which cause such severe educational needs that they cannot be accommodated in a special education program solely for one of the impairments. The term does not include deaf-blindness." (see 8 NYCRR 200.1[zz][8]). At this juncture, when the student's eligibility for special education is not in dispute, the significance of the disability category label is more relevant to the LEA and State reporting requirements than it is to determine an appropriate IEP for the individual student.[7]

In this matter, the hearing record shows that the student is non-verbal and non-ambulatory, has a minor vision impairment, a diagnosis of Pelizaeus-Merzbacher Disease, which is a brain-based disorder, has severe impairments in cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem solving, and information processing and speech, requires a G-tube for feeding, bilateral ankle foot orthosis, utilizes two switch scanning to communicate, and

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

[i]f a child with a disability has more than one disability, the State Education Agency (SEA)must report that child in accordance with the following procedure:

(1) If a child has only two disabilities and those disabilities are deafness and blindness, and the child is not reported as having a developmental delay, that child must be reported under the category "deaf-blindness."

(2) A child who has more than one disability and is not reported as having deaf-blindness or as having a developmental delay must be reported under the category "multiple disabilities"

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

according to the staff at iBrain, is medically complex, has several medical needs that require a small class size, exhibits low tone with tremors in lower extremities and dysmetria in upper extremities during voluntary movements, exhibits velocity dependent spasticity on lower extremities, low muscle tone, and decreased muscle strength which affects postural control, balance, and coordination, among other deficits (Parent Ex. D at pp. 2; Dist. Ex. 6 at pp. 1, 7, 8, 9, 11, 12, 25). The student's expressive skills are primarily Level 2 - Emergent Transitional (Dist. Ex. 6 at p. 1). In assessing the student's complex needs, the student may qualify for classification as a student with a traumatic brain injury; however, the hearing record also demonstrates that for the May 2020 CSE's decision to classify the student as a student with multiple disabilities was not unreasonable. In addition, the IDEA's strong preference for identifying the student's specific needs and addressing those needs generally outweighs relying on a particular disability diagnosis (Draper, 480 F. Supp. 2d at 1342; Heather S., 125 F.3d at 1055). Accordingly, the disability category used to find the student eligible for special education is not a reason for finding a denial of FAPE under these circumstances.

**C. Assigned School Claims**

The parent asserts that the IHO failed to render determinations concerning the district's ability to properly implement the student's IEP at the district's chosen assigned public school site. The specific allegations that remain on appeal, as discussed above, are that the assigned school could not group the student with students with similar needs in a school that provides extended school day services, that the assigned school did not have nurses trained in G-tube feeding, that the assigned school did not have staff trained in two-person transfers, and that the recommended assistive technology device was not available at the assigned school. The parent asserts that these issues are not speculative because the June 27, 2020 school location letter advised the parent of the proposed assigned public-school site, and the district presented a witness who testified regarding the assigned school.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 2015 WL 1244298, at *3 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F., 746 F.3d at 79 [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ.,

2016 WL 4470948, at *2 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 2016 WL 4470948, at *2). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Turning first to the parent's claims related to the functional grouping of the proposed class at the assigned school, neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).[8] State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

[8] To be clear, there is no requirement in the IDEA or State regulation requiring that grouping be conducted in accordance with a student's chronological grade.

In this matter, the IEP coordinator for the assigned public school testified that the assigned school would have had a seat available for the student in a 6:1+1 special class (Tr. pp. 324-25). He further testified that the majority of students at the school were classified as having autism, that the school included students with other classifications, such as intellectual disabilities, speech and language impairments, and hearing impairments, but that the classifications of the students would not "at all" effect the program recommendations (Tr. pp. 325-26). According to the IEP coordinator, the school would have been able to provide the special class and other services identified in the May 2020 IEP (Tr. pp. 326-31). With respect to the grouping of the classes at the assigned school, the IEP coordinator testified that the school made sure there was no more than a three year age difference between the students, and that, after that, grouping was based on the individual needs of each student, whether students had additional staff members that needed to be in the room, and the cognitive functioning, speech and language delays, and behaviors of certain individual students (Tr. p. 336). During cross-examination, the IEP coordinator testified that two of the 6:1+1 special classes at the assigned school would have been age appropriate for the student (Tr. p. 337). Of the students in those two classes, none were classified as multiply disabled or as having a traumatic brain injury; none were nonambulatory or required the use of a wheelchair; some were nonverbal; four or five used assistive technology for communication purposes; and fewer than half had the assistance of a 1:1 paraprofessional (Tr. pp. 338-40). He also testified that the students in the classes had a wide range of academic performance, social development, physical development, and management needs (Tr. pp. 342-43). The witness also clarified that some of the students in the classes had similar needs as the student and some did not (Tr. p. 356). Based on the above, the parent's challenge to the assigned school's ability to functionally group the student in accordance with State regulation is without merit. Firstly, it is not a permissible prospective challenge to the district's capacity to implement the May 2020 IEP as the issue is not tethered to actual mandates in the IEP, and, secondly, the testimony of the IEP coordinator does not indicate that the assigned school was factually incapable of providing an appropriate grouping for the student. Accordingly, this issue will not be addressed further.

The parent also argues that the assigned school would not be able to implement an extended school day for the student. However, although the student received an extended school day at iBrain (Tr. 458; Parent Ex. Q at p. 2), the CSE did not recommend an extended school day for him in the May 2020 IEP. Comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE; rather, an it must be determined whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint notice, and whether the IEP developed by its CSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (Rowley, 458 U.S. at 189, 206-07; R.E, 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "'the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent'"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith,

959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at *8 [S.D. Cal. Feb. 14, 2013] [noting that "'[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits'"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at *5 [S.D. Cal. Mar. 14, 2011]). Accordingly, the CSE was not required to duplicate the extended school day provided to the student at iBrain or to demonstrate that the assigned school could implement an extended school day in order to prove that it offered the student a FAPE.

For the most part, the parent's remaining allegations do appear to relate to services or needs identified in the May 2020 IEP, and, as such, would be permissible challenges to the assigned school (see Dist. Ex. 6 at pp. 5, 8-13, 20-21). Those allegations include that the assigned school did not have nurses trained in G-tube feeding, that the assigned school did not have staff trained in two-person transfers, and that the recommended assistive technology device was not available at the assigned school.

For example, with respect to G-tube feeding, the May 2020 IEP indicates that the student is "fully dependent on feeding/eating as he is G-tube fed"; the IEP recommends daily nursing services for G-tube feeding; and the IEP provides for G-tube training when there is new staff or equipment (Dist. Ex. 6 at pp. 5, 20-21). The parent asserts that the IEP coordinator's testimony that he was unaware if the nurse at the assigned school was trained in G-tube feeding should result in a finding that the school could not implement the May 2020 IEP (see Tr. pp. 327-28). However, this argument is impermissibly speculative. State guidance indicates that a registered nurse (RN) or a licensed practical nurse (LPN) under the direction of an RN may perform the "[i]nitiation and cessation of gastrostomy tube feeding by bolus or drip with or without pump" ("Provision of Nursing Services in School-Settings – Including One-to-One Nursing Services to Students with Special Needs," at p. 14, Attachment A, Office of Student Support Servs. [Jan. 2019], available at http://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf). On the other hand, the guidance document acknowledges that "[l]icensed health professionals may not have the same work experience or education and may not be familiar with all types of nursing activities/tasks" ("Provision of Nursing Services in School-Settings – Including One-to-One Nursing Services to Students with Special Needs," at p. 11). In such instances, the guidance provides that the professional "who is not knowledgeable in a particular nursing activity/task is responsible for informing school administration of the need for appropriate training to safely meet the student's needs" and that "schools must seek out necessary training for staff to meet students' needs" (id.). In this instance, such training is explicitly provided for in the May 2020 IEP (Dist. Ex. 6 at p. 21). Under these circumstances, the parent's request for a finding that the assigned school could not implement the recommended nursing services is entirely speculative (see K.F., 2016 WL 3981370, at *13; Q.W.H., 2016 WL 916422, at *9; N.K., 2016 WL 590234, at *7).

Similarly, the parent's argument regarding staff training for two-person transfers is also impermissibly speculative. The May 2020 IEP noted the student's need for two-person transfers and indicated that the student's paraprofessional assisted in two-person transfers (Dist. Ex. 6 at pp. 10-12). The May 2020 IEP also recommended that the student be provided with a full-time 1:1 health paraprofessional for ambulation, feeding, and safety (id. at p. 20). The IEP also provided for training for staff in two-person transfers (id. at p. 21). The parent asserts that the district did

not meet its burden of proving that the assigned school could implement two-person transfers for the student because the IEP coordinator testified that he did not know if the paraprofessionals at the assigned school were trained in two person transfers (see Tr. pp. 344-45). However, as discussed above, according to the Second Circuit a district does not have to disprove an allegation regarding an assigned school's capacity to implement an IEP unless it is based on more than "mere speculation" that the school would not adequately adhere to the IEP (M.O., 793 F.3d at 244). Considering that there was no indication that the assigned school could not implement two-person transfers and that the May 2020 IEP recommended staff training for two person transfers, the parent's assertion is speculative.

Next, the hearing record does not support the parent's contention that the assigned school would not have been able to provide the student with the recommended assistive technology devices. The May 2020 IEP recommended assistive technology devices included a jelly bean switch and a dynamic display speech generating device, with both to be provided daily throughout the school day (Dist. Ex. 6 at p. 20). The IEP coordinator testified that the assigned school could accommodate the recommendation for an assistive technology device used for communication; more specifically, he testified that the school had "certain programmatic devices that many students benefit from," but if the student needed a particular device, the speech-language department could put in a request and obtain the device from the district (Tr. p. 329). During cross-examination, the IEP coordinator further explained that when students first arrive, the school would have to request a device if a spare one was not available on site and it might take a couple of days after the request to receive the device (Tr. p. 343). Based on the above, contrary to the parent's assertion, the hearing record shows that the assigned school would have been able to meet the recommendation for an assistive technology device.

Finally, with respect to all of the above, there is no indication that, at the time the parent made the decision to place the student at iBrain for the 2020-21 school year, that she was aware of any of the concerns that she raised on appeal. To the extent that the IEP coordinator testified as to the assigned school and how it was able to implement the May 2020 IEP, all of this testimony took place well after the parent had already made her decision to place the student at iBrain; accordingly, it was not a prospective challenge to the school's ability to implement the May 2020 IEP (see M.O., 793 F.3d at 244).

Having found that there was no denial of FAPE based on the parent's assertions, I need not determine whether the parent met her burden in demonstrating that iBrain was an appropriate unilateral placement, or whether the parent's conduct was such that any award would be subject to equitable considerations.

**VII. Conclusion**

There are no other specified issues on appeal or cross-appeal as required by the State regulations, and having determined that the sole issue found by the IHO to be a denial of FAPE was outside the scope of the hearing, the only conclusion can be that the student was offered a FAPE for the 2020-21 school year (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 SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that that portion of the IHO decision dated May 22, 2021 which found the district failed to offer the student a FAPE for the 2020-21 school year is reversed.

**Dated:** **Albany, New York**
**July 30, 2021**

**CAROL H. HAUGE**
**STATE REVIEW OFFICER**