The University of the State of New York

The State Education Department
State Review Officer
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No. 21-203

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by John Henry Olthoff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

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

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student in this matter has been the subject of prior appeals to the Office of State Review (see Application of a Student with a Disability, Appeal No. 21-125; Application of the Dep't of Educ., Appeal No. 21-060; Application of the Dep't of Educ., Appeal No. 19-117; Application of a Student with a Disability, Appeal No. 14-049). Therefore, a full recitation of the student's educational history is not necessary. Briefly, as pertinent to this proceeding, the student started attending iBrain during the 2018-19 school year, and remained there through the 2019-20 school year (Tr. p. 7).

In December 2018, the district sent the parents a form requesting consent to evaluate the student (Dist. Ex. 2).

In a January 2, 2019 email, the CSE emailed a welcome letter to iBrain, acknowledging the district's awareness that iBrain had just relocated inside the CSE "catchment area" (Dist. Ex. 1 at p. 13). In a January 8, 2019 letter, the district provided the parents with notice of the scheduled social history update, which was followed up by email notification on January 11, 2019 (Dist. Exs. 3 at p. 1; 1 at pp. 12-13).

In a January 24, 2019 letter and email, the CSE notified the parents of a scheduled psychoeducational re-evaluation for February 12, 2019 (Dist. Exs. 4 at p. 1; 1 at p. 12). In a February 4, 2019 letter and emails, the CSE notified the parents of the rescheduled social history update and psychoeducational evaluation, both of which were rescheduled for February 12, 2019 at 5:30 p.m. (Dist. Exs. 5 at p. 1; 1 at 12).

In a February 2019, the CSE sent two emails to iBrain requesting dates and times that it could conduct a classroom observation of the student (Dist. Ex. 1 at pp. 10-11).

The parent signed the consent to evaluate the student on February 12, 2019 (Dist. Ex. 2). A social history update and psychoeducational evaluation of the student were conducted on February 12, 2019 (Dist. Exs. 6; 7).

In a March 6, 2019 email, iBrain responded to the district's request with a list of dates and 30-minute time frames that the CSE could observe the student (id. at p. 10). On March 13, 2019, an observation of the student in his iBrain classroom was conducted by a CSE representative (Dist. Ex. 8).

In a March 15, 2019 email, the student's parent notified the CSE that he would be attending the student's CSE meeting and provided dates and times he was available (Parent Ex. G). In a March 19, 2019 letter, the CSE notified the parents of a scheduled CSE meeting, to be held on April 10, 2019 (Dist. Ex. 10).

In an April 8, 2019 letter, which was also sent via email, the parents' counsel notified the CSE that the April 10, 2019 CSE meeting could not proceed (Parent Ex. H at p. 2). The parents objected to the meeting because the CSE had not provided them with the actual names of the participants scheduled to participate in the CSE meeting (id.). The parents also asserted that they—and iBrain—had not been provided with proper medical accommodation and transportation forms prior to the CSE meeting, which according to the parents was required by the district's operating procedures manual (id. at pp. 2-3). Finally, the parents informed the CSE that in accordance with regulations, they had made it clear that the CSE needed to convene in person, and that they would not agree to a telephonic meeting (id. at p. 4).

In an April 23, 2019 letter, the CSE notified the parents that the CSE meeting was rescheduled for June 3, 2019 at 10:00 a.m. (Dist. Ex. 11). The notice provided the parents with the names of those persons from the district and iBrain who were scheduled to attend the meeting

(id. at pp. 1-2). The only title of scheduled attendee who was not identified by name was the school physician (id. at p. 2).

According to the district's SESIS log, on May 1, 2019 the CSE again sent the parents a letter notifying them of the upcoming CSE meeting on Monday, June 3, 2019 at 10:00 a.m. (Dist. Ex. 1 at pp. 7-8). In a May 8, 2019 email to the parents, the CSE provided the parents with "important documents" attached, and further notified the parents that the documents and the student's assessments were also being mailed to them (id. at p. 7). In a May 23, 2109 email to the parents, the CSE provided the parents with assessment and medical forms for the parents to fill out in advance of the upcoming CSE meeting (id.). The CSE also noted it was again providing copies of the student's recent assessments for the parents' convenience (id.).

In a Friday, May 31, 2019, 4:45 p.m. email to the CSE, the parents counsel requested that the upcoming Monday, June 3, CSE meeting be rescheduled (Dist. Ex. 1 at p. 6). In an 8:30 a.m., June 3, 2019 response email, the CSE informed the parents, their counsel, and iBrain staff that "On June 3rd., 2019, we are in receipt of your request sent last Friday night to reschedule today's IEP meeting", and as the parents had already canceled the April 10, 2019 meeting, and as they had requested a full CSE, including a school physician, school social worker, and a parent member, the CSE had no alternative but to move forward with the CSE meeting and asked that all parties involved please respond if they wished to attend the meeting via teleconference (id. at p. 5).

The June 3, 2019 CSE proceeded to develop an IEP for the student (Dist. Ex. 12 at p. 26). Attendees included the district representative, a district special education teacher/related services provider; a district social worker; a parent member; a district general education teacher; and a Health Department physician (id. at p. 29). The physician and district representative participated via telephone (id.). Of note, the student's father "called but did not participate"; instead the parent "cited his right to [a department of health] doctor in person" (id.). The CSE attempted to call iBrain to arrange participation from the student's teachers and related service providers, but the voice mail was full, and no message was able to be left (id.).

A review of the June 3, 2019 IEP shows that the CSE reviewed the February 2019 psychoeducational reevaluation and the social history update, as well as the March 2019 classroom observation (Dist. Ex. 12 at p. 1). The CSE recommended that the student be classified as a student with multiple disabilities and that he be placed in a 6:1+1 special class in a specialized school and receive related services consisting of three 40-minute sessions of 1:1 OT per week; five 40-minute sessions of 1:1 PT per week; five 40-minute sessions of 1:1 speech-language therapy per week; two 40-minute sessions of 1:1 vision education services per week; and two periods of adapted physical education per week (id. at pp. 1, 22, 26). The CSE also recommended that the parents receive one 40-minute session of parent counseling and training, in an individual and/or group setting per month (id. at p. 22). The CSE further recommended that the student be provided with a full-time 1:1 paraprofessional, as well as a travel paraprofessional with a special education transportation bus (id. at pp. 23, 25). The CSE also recommended that the student receive an augmentative and alternative communication device/speech-generation device, specifically noting a Dynavox T-15 and associated software and armchair mount (id.). In addition, the CSE recommended that the student receive a 12-month program (id. at pp. 23).

On June 21, 2019, the parents provided the district with notice of the parents' intent to unilaterally place the student at iBrain for the 2019-20 school year and to seek district funding for the student's tuition and related costs (Parent Ex. J).

On June 25, 2019, the district provided the parent with prior written notice of the June 3, 2019 CSE recommendations and a rationale for options that were considered and rejected (Dist. Ex. 14). On the same day, the district provided the parents with notice of the public school site the district assigned the student to attend and to implement the June 2019 IEP (id. at p. 5). It appears that the district also emailed the parents a copy of these documents on June 25, 2019 (see Dist. Ex. 1 at p. 4).

On June 26, 2019, the parents entered into a contract with iBrain to enroll the student at iBrain starting July 8, 2019 (Parent Ex. C at p. 7). On July 8, 2019, the parents also signed a transportation contract for special education transportation services beginning July 1, 2019 (Parent Ex. D at pp. 1, 5).

A. Due Process Complaint Notice

In a July 8, 2019 due process complaint notice, the parents requested an impartial hearing, asserting the district denied the student a free appropriate public education (FAPE) for the 2019-20 school year (see Parent Ex. A). The parents first requested an interim order for pendency funding at iBrain, based on an unappealed March 27, 2018 IHO decision (id. at pp. 1-2).

With respect to their 2019-20 school year claims, the parents asserted that the CSE failed to hold an annual review meeting that complied with the parents' written requests, specifically noting a request to have the district physician and the parent member "physically present" at the CSE meeting (Parent Ex. A at p. 2). With respect to the June 2019 IEP, the parents asserted that the IEP was inappropriate because the "significant and unsubstantiated" reduction in recommended related services would expose the student to substantial regression; the student was not classified as a student with a traumatic brain injury and the IEP was not reflective of the student's needs as a student with a brain injury; the recommended program was inadequate to address the student's highly intensive management needs; the recommended placement was not in the least restrictive environment (LRE) for the student; the recommended 6:1+1 special class would not have provided for 1:1 instruction and support that the student required to make progress; and the district did not offer extended school day services, which the student required (id. at pp. 2-3).

To remedy the asserted violations, the parents requested that the district directly fund the full cost of the student's tuition at iBrain for the 2019-20 school year, including the cost of a 1:1 nurse during the school day and special education transportation with a 1:1 nurse (Parent Ex. A at p. 3).

B. Impartial Hearing Officer Decision

As more fully explained in Application of the Dep't of Educ., Appeal No. 21-060, the parents filed multiple suits in federal court regarding the student's pendency during this proceeding (see Araujo v. New York City Dep't of Educ., 2020 WL 5701828 [S.D.N.Y. Sept. 24, 2020],

reconsideration denied, 2019 WL 6392818 [S.D.N.Y. Nov. 2, 2020]; E. v. Carranza, 19-cv-8401 [S.D.N.Y., filed Sept. 10, 2019]).

An impartial hearing convened on July 30, 2020 (Tr. pp. 1-48). In a decision dated January 12, 2021, the IHO initially assigned to the proceeding (IHO 1) determined that iBrain was the student's stay-put placement during the pendency of these proceedings and that as pendency covered the relief requested by the parents, the parents claims regarding the 2019-20 school year were moot (see January 12, 2021 IHO Decision). The January 12, 2021 IHO Decision was appealed to the Office of State Review and in a decision dated March 17, 2021, the undersigned reversed IHO 1's decision and remanded the matter for a decision on the merits (Application of the Dep't of Educ., Appeal No. 21-060).[1] It appears as though IHO 1 recused himself. A new IHO (IHO 2) was appointed to hear this matter in May 2021. Thereafter an impartial hearing convened on June 4, 2021 and concluded on August 16, 2021, after four dates of hearings on the merits (Tr. pp. 49-381).

In an August 30, 2021 decision, after reviewing the evidence in the hearing record to make factual determinations, IHO 2 applied his factual findings to the parents' contentions and found that the district offered the student a FAPE for the 2019-20 school year (IHO Decision at pp. 5-27). With respect to the parents' allegation regarding the timing and the composition of the June 2019 CSE, IHO 2 determined that the district rescheduled the CSE meeting at the parents' initial request and that the parents' insistence on having a district physician physically present at the CSE meeting revealed a lack of good faith on the part of the parents (id. at pp. 21-23). Having found that the parents did not come up with any valid reason for requiring the physical presence of the district physician at the CSE meeting, IHO 2 found that even if it were a procedural violation, it did not result in a denial of FAPE (id.). IHO 2 then determined that the June 2019 CSE had sufficient evaluative information, including a classroom observation, a social history update, and a psychoeducational evaluation (id. at p. 23). According to IHO 2, while the parents alleged that the June 2019 CSE did not have sufficient information regarding the student, the parents undermined the CSEs attempts to gather updated progress reports from iBrain (id.). Next, IHO 2 found that the student's classification was not changed from his prior IEP and that, whatever disability category the student was classified under, the June 2019 IEP would have conveyed a meaningful educational benefit to the student (id. at pp. 23-24). According to IHO 2, neither the parents nor the iBrain director challenged the related services recommendations or the annual goals contained in the June 2019 IEP (id. at p. 24). IHO 2 found this was because many of the recommendations were the same as those made in the student's iBrain IEP (id.). To the extent that the parents argued there was a reduction in the duration of the student's related services from 60-minute sessions to 45-minute sessions, IHO 2 found that neither the parents nor the iBrain director were able to articulate how the reduction might have adversely impacted the student, while the district witnesses both testified that the June 2019 IEP was appropriate for the student (id.). Turning to the appropriateness of the 6:1+1 special class recommendation, IHO 2 determined that the parents did not object to the class ratio, but only objected to the composition of the classroom,

[1] The parents appealed to federal district court from the decision issued in Application of the Dep't of Educ., Appeal No. 21-060, and represent that the matter remains pending as of the filing of the request for review in this matter (Req. for Rev. ¶17).

specifically the classification of the other students in the class (id. at pp. 25-26). IHO 2 determined that the parents' allegations regarding the composition of the class were entirely speculative (id.). As a final note, IHO 2 found that the parents were "hyper focus[ed]" on the student's classification; however, IHO 2 determined that the June 2019 CSE's classification of the student as having multiple disabilities was more accurate than a classification of traumatic brain injury, and that nevertheless, the CSE was rightfully more concerned with how it could assist the student in having a meaningful educational experience than on classification (id. at pp. 26-27).

Having found that the June 2019 IEP offered the student a FAPE, IHO 2 decided it was not necessary to make determinations as to whether iBrain was an appropriate unilateral placement for the student or whether equitable factors would have favored the parents' request for relief (IHO Decision at p. 27).

IV. Appeal for State-Level Review

The parents appeal, asserting that IHO 2 erred in finding that the district offered the student a FAPE for the 2019-20 school year. The parents also appeal from the IHO's decision not to address the appropriateness of iBrain as a unilateral placement and whether equitable factors favored the parents' request for relief. The parents assert that the IHO erred in finding that the district did not deny the parents meaningful participation in the development of the student's IEP by holding the June 2019 CSE meeting without the parents' participation, in failing to find that the timing of the prior written notice and school location letter did not afford the parents a reasonable time to investigate the appropriateness of the placement, in failing to find that the lack of an evaluation of the student in all areas of suspected disability led to a denial of FAPE, in failing to find that the lack of a recommendation for a 1:1 nurse (both in school and during transportation) resulted in a denial of FAPE, in failing to address a change in recommendation from a nonpublic school for the 2018-19 school year to a district school for the 2019-20 school year, and in failing to find that the school the student was assigned to attend was not appropriate for the student because the other students in the proposed class were classified with autism and were ambulatory which would have endangered the student's health.[2]

The parents request that the IHO's decision be reversed in its entirety and a finding that the district denied the student a FAPE for the 2019-20 school year, that iBrain was an appropriate placement for the student for the 2019-20 school year, that equitable considerations support the parents' request for relief, and that the parents be awarded the full cost of the student's tuition at iBrain for the 2019-20 school year, including transportation.

The district answers asserting that the IHO's decision should be upheld and raising an additional allegation that the parents' request should be denied based on equitable considerations. In addition, the district asserts that the parents' allegations regarding the lack of a recommendation for a 1:1 nurse during the school day, the June 2019 CSE not following the recommendation for a nonpublic school from the prior year IEP, and the recommended transportation accommodations

[2] The due process complaint notice also included a challenge to the duration of the student's related services, contained within the parents' evaluative information claim. This issue is discussed in detail below.

were not raised in the parents' due process complaint notice and are therefore outside the scope of the hearing.

The parents proffer a reply to the district's answer. The parents assert that the allegation that the district did not recommend 1:1 nursing services fits within the due process complaint notice allegation that there was a significant and unsubstantiated reduction in the student's related services mandates.[3]

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

[3] A reply is authorized when it addresses "claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). Accordingly, to the extent that the parents' reply reiterates arguments raised in the request for review, it is not a proper reply and will not considered.

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

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

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

VI. Discussion

A. Preliminary Matter - Scope of Impartial Hearing

The district asserts that the parents' allegations regarding the lack of a recommendation for a 1:1 nurse during the school day, the June 2019 CSE not following the recommendation for a nonpublic school from the prior year IEP, and the recommended transportation accommodations were not raised in the parents' due process complaint notice and are therefore outside the scope of the hearing. In their reply, the parents contend that the allegation that the district did not recommend 1:1 nursing services fits within the due process complaint notice allegation that there was a significant and unsubstantiated reduction in the student's related services mandates. The parents did not respond to the district's other contentions—regarding the allegations that the June 2019 CSE did not follow the prior year's recommendation for a nonpublic school or that the recommended transportation accommodations were not appropriate—being outside the scope of the hearing.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of

Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or even inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then base his or her determination on new issues raised sua sponte (see Dep't of Educ., Hawai'i v. C.B., 2012 WL 220517, at *7-*8 [D. Haw., Jan. 24, 2012] [finding that the administrative hearing officer improperly considered an issue beyond the scope of the parents' due process complaint notice]).

A review of the parents' due process complaint notice shows that the allegations raised on appeal related to 1:1 nursing services, the recommendation for a public school, and the transportation accommodations were not included in the due process complaint notice (see Parent Ex. A). The parent asserts that the allegation regarding 1:1 nursing services fits within the allegation that the June 2019 IEP would "expose [the student] to substantial regression due to the significant and unsubstantiated reduction in the related services mandates and the student-to-teacher ratio of the recommended class size" (Reply ¶37). Although school nurse services are included in the definition of related services, the definition also includes "speech-language pathology, audiology services, interpreting services, psychological services, physical therapy, occupational therapy, counseling services, including rehabilitation counseling services, orientation and mobility services, medical services as defined in this section, parent counseling and training, school health services, . . . school social work, assistive technology services, appropriate access to recreation, including therapeutic recreation, other appropriate developmental or corrective support services, and other appropriate support services" (8 NYCRR 200.1[qq]). Accordingly, an allegation referencing only related services is over-broad to incorporate the much more specific claim that the student required nursing services as 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 Davis v. Carranza, 2021 WL 964820, at *7 [S.D.N.Y. Mar. 15, 2021] [rejecting parents' argument that allegation regarding 1:1 nursing services fit within general allegation that the district did not offer "an appropriate school program and placement that meets [the student's] highly intensive management needs"]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *5 [S.D.N.Y. Feb. 11, 2016] [allegation raised in due process complaint notice not specific enough to raise allegation as to class size]).

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, although the iBrain director testified that the student received 1:1 nursing services at iBrain, the allegation of a lack of 1:1 nursing services in the district's recommended program was not raised during the hearing (Tr. pp. 254-55). The first time nursing services was raised as an issue was in the parents' post-hearing brief (Parent Post-Hr'g Brief at pp. 17-18). Accordingly, the issue of 1:1 nursing services, along with the allegations regarding the June 2018 CSE recommendation for a public school placement

and the transportation accommodations, were not properly raised and they are outside the scope of the hearing and will not be discussed further.[5]

B. CSE Process

1. Scheduling of CSE Meeting and CSE Composition

Much of the disagreement between the parties stems from the parents' participation, or lack thereof, in the development of the student's IEP for the 2019-20 school year. The parents appeal from IHO 2's finding that the district did not deny the parents the opportunity to participate in the development of the student's IEP.

With respect to scheduling the CSE meeting and the requirements regarding a parent's participation, federal and State regulations require school districts to take steps to ensure parent participation in CSE meetings, including: notifying the parent prior to the meeting, scheduling the meeting at a mutually agreed upon time and place, and "[i]f neither parent can attend an [CSE] meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls" (34 CFR 300.322[a], [c]; 8 NYCRR 200.5[d][1][iii]). A district may conduct a CSE meeting without a parent in attendance if it is unable to convince the parents that they should attend; however, in such instances, the district is required to maintain detailed records of its attempts to ensure the parents' involvement and its attempts to arrange a mutually agreed upon time and place for the meeting (34 CFR 300.322[d]; 8 NYCRR 200.5[d][3], [4]).

A review of the communications leading up to the June 2019 CSE meeting and the conversations at the meeting confirms the IHO's determination that the district provided the parents with an opportunity to participate in the development of the student's IEP for the 2019-20 school year.

Beginning in January 2019, the district communicated its intention to evaluate the student to the parents; the parents consented to an evaluation of the student in February 2019, resulting in the completion of a social history update, a psychoeducational evaluation, and a classroom observation of the student at iBrain by March 2019 (see Dist. Exs. 2-8). The student's father participated in the social history update and reported that there had not been any changes in the student's adaptive behavior, communication, daily living skills, socialization, or motor skills (Dist. Ex. 6 at p. 1).

[5] The parents' challenge to the recommendation for a public school placement is so devoid of merit that it can also be easily dispensed with on the merits. As previously determined in the proceeding involving the 2018-19 school year, the May 2018 IEP included a recommendation for placement in a district specialized school; however, in the recommended programs section, the IEP also noted a recommendation for a nonpublic school, which notation was found to be a typographical error (Application of the Dep't of Educ., Appeal No, 19-117; compare Dist. Ex. 9 at p. 27, with Dist. Ex. 9 at p. 3). As there was no recommendation for a nonpublic school for the prior school year, there was no change in the recommendation in continuing to recommend placement in a district specialized school.

In a March 15, 2019 email to the CSE, the student's father indicated that he would be attending the student's CSE meeting and requested that it be held at 10:00 a.m. on either April 8, 2019, April 10, 2019, or April 19, 2019 (Parent Ex. G).[6] As requested, the CSE scheduled the student's CSE meeting for April 10, 2019 at 10:00 a.m. and sent the parents a notice of the scheduled meeting on March 19, 2019 (Dist. Ex. 10).[7]

In a letter dated April 8, 2019, the parents' notified the CSE that the April 10, 2019 CSE meeting could not proceed (Parent Ex. H at p. 2).[8] Specifically, the parents objected to the meeting notice because it did not identify the actual names of the CSE meeting participants and the parents also indicated that they had not been provided with medical accommodation and transportation forms, which the parents believed were required to be completed by the student's physician prior to the CSE meeting (id. at pp. 2-3). Finally, the parents' informed the CSE that they expected that a district physician and parent member would attend the CSE meeting in person (id. at pp. 3-4).

The district rescheduled the student's CSE meeting for June 3, 2019 at 10:00 a.m. and notified the parents of the rescheduled meeting in an April 23, 2019 letter (Dist. Ex. 11 at p. 1). The April 2019 notice identified the names and titles of the CSE participants; the only participant who was identified only by title was the district physician (id. at pp. 1-2). Additionally, according to the district's events log, on May 1, 2019 the CSE sent the parents a letter notifying them of the upcoming June 3, 2019 CSE meeting; on May 5, 2019 the district sent the parents an email with "important documents" and notified the parents that the documents and the student's assessments were also being mailed to them; on May 7, 2019 the district mailed the parents the student's assessments and medical forms; and on May 23, 2019 the district sent the parents an email reminding them of the June 3, 2019 CSE meeting and again including the student's recent assessments and medical accommodation forms (Dist. Ex. 1 at pp. 7-8).

In an email to the district, sent at 4:45 p.m. on May 31, 2019, the Friday prior to the scheduled June 3, 2019 CSE meeting, the parents requested that the June 3, CSE meeting be rescheduled (Dist. Ex. 1 at p. 6).[9] In response, the CSE sent an email on the morning of June 3, 2019, informing the parents, their counsel, and iBrain staff that the CSE received the request to

[6] In their request for review the parents stated that the district unilaterally scheduled a CSE meeting for April 10, 2019 (Req. for Rev. ¶4). However, it is clear from the parents March 15, 2019 email and the notice of the April 10, 2019 CSE meeting, that the meeting was scheduled based on the parents' preferences (see Parent Ex. G; Dist. Ex. 10).

[7] In a March 25, 2019 email to the iBrain director, the district requested the names of the student's current providers and the iBrain director responded the next day (Dist. Ex. 1 at p. 9).

[8] The April 8, 2019 letter references a February 19, 2019 letter that the parents sent to the district and indicates that in the February letter, the parents had requested a "Full Committee along with a DOE School Physician and Parent Member to participate in person" (Parent Ex. H). A copy of the referenced February 19, 2019 letter was not included in the hearing record and it is not shown in the district's events log (see Dist. Ex. 1).

[9] The May 31, 2019 letter, identified as an attachment to the May 31, 2019 email, was not included as a part of the hearing record.

reschedule the CSE meeting; however, the CSE had no alternative but to move forward with the CSE meeting (id. at pp. 5-6).[10]

The CSE proceeded to hold a meeting for the student on June 3, 2019 (see Dist. Exs. 12; 13). The CSE called the parents at the start of the meeting and the student's father informed the CSE that he wanted to reschedule the meeting (Dist. Exs. 12 at p. 29; 13 at pp. 1-2). Initially, the student's father indicated that he did not have the student's updated medical forms; however, the district special education teacher advised the student's father that the CSE could proceed without the forms (Dist. Ex. 13 at p. 1).[11] The student's father then objected to the district physician being on the phone and not being at the CSE meeting in person as he had previously requested, also noting that the CSE had "changed the classification" (id. at p. 2). The district special education teacher informed the student's father that his concerns would be noted; however, the CSE would proceed in order to ensure that the student would have an IEP for the 2019-20 school year (id.). During the meeting, the CSE chairperson noted the parents' objection to the lack of the medical accommodation forms and the presence of the district physician by telephone; the district physician indicated that it appeared the IEP was adequate for the student and that he was unsure what the difference was for him to appear in person or over the telephone (id.). Finally, the CSE attempted to call iBrain to arrange participation from the student's teachers and related service providers, but the voice mail was full, and no message was able to be left (Dist. Ex. 12 at p. 29).

On June 21, 2019, the parents sent a letter to the district notifying the district that the parents were unilaterally placing the student at iBrain for the 2019-20 school year (Parent Ex. J). The 10-day notice "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Here, the district did not attempt to reconvene the CSE or evaluate the student. Instead, on June 25, 2019, the district sent the parents notice of the June 2019 CSE's recommendations for the 2019-20 school year together with notice of the public school the district assigned the student to attend for that school year (see Dist. Ex. 14).

Based on the above, the district scheduled the initial CSE meeting at a time requested by the parent and after the parent canceled the initial meeting the CSE rescheduled the meeting for June 3, 2019 (Parent Exs. G-H; Dist. Exs. 10-11).[12] The district notified the parents of the June 3, 2019 CSE meeting in an April 23, 2019 letter (Dist. Ex. 11). The district then proceeded to send

[10] The June 3, 2019 email indicated that the CSE meeting was scheduled for 9:00 a.m.; however, the meeting notice had scheduled the meeting for 10:00 a.m. (compare Dist. Ex. 10 at p. 1, with Dist. Ex. 1 at p. 5). Although it is unclear as to what time the June 3, 2019 CSE started, the student's father was on the telephone with the CSE at the start of the meeting (see Dist. Ex. 13 at pp. 1-2).

[11] It appears that the student's physician completed the medical accommodation forms on June 10, 2019 (Parent Ex. I).

[12] The district sent the first CSE meeting notice to the parents on March 19, 2019 and the parents did not send the letter cancelling the meeting until April 8, 2019—two days before the scheduled April 10, 2019 CSE meeting (Parent Ex. H; Dist. Ex. 10).

multiple letters and emails to the parents with documentation and reminders of the upcoming CSE meeting (Dist. Ex. 1 at pp. 7-8). The parents then attempted to cancel the June 3, 2019 CSE meeting on the Friday afternoon prior to the scheduled Monday meeting (id. at p. 6). The CSE made a further attempt to include the parents, reaching the student's father by telephone on the morning of the CSE meeting; however, the student's father refused to participate insisting on the physical presence of a district physician at the CSE meeting (Dist. Exs. 12 at p. 29; 13).

With respect to the parents' refusal to participate in the June 2019 CSE meeting without the physical presence of a district physician, IHO 2 noted that "the Parent did not come forward with a single valid reason for insisting on the physical presence of a physician" (IHO Decision at pp. 21-22). While the parents are correct that they may request the attendance of a school physician in writing 72-hours prior to the CSE meeting (8 NYCRR 200.3[a][1][vii]), State regulation provides CSE members with the ability to make other arrangements for CSE participation (see 8 NYCRR 200.5[d][7]["When conducting a meeting of the committee on special education, the school district and the parent may agree to use alternative means of participation, such as videoconferences or conference telephone calls"]; Application of the Dep't of Educ., Appeal No. 19-107). Thus, having the district physician participate via phone, absent a specific reason why the physician needed to attend the meeting in person, should have been sufficient to ensure the parents' ability to participate in the meeting.

Notably, on appeal the parents have not provided a rational explanation for why a district physician could not participate in the CSE meeting via telephone. In fact, the request for review does not include any reason as to why a district physician was required to attend the CSE meeting but instead indicates that the CSE meeting "had been cancelled for other reasons" (Req. for Rev. ¶23). In their memorandum of law, the parents assert that the presence of the physician was important in order to have a discussion about the student's classification (Parent Mem. of Law at pp. 12-13). This follows the student's father's testimony during the hearing in that he believed the student's classification had been changed in the prior year without a medical consultation and having been informed by his attorney that he could require the physical presence of a physician at the CSE meeting, he was "upset enough" that he wanted "to exercise [his] complete due process right" (Tr. pp. 281-82, 299-300). However, there is no reason as to why the district physician could not have had this discussion over the telephone (see Dist. Ex. 13 at p. 2).

With respect to the "other reasons" for the cancellation, the only other reason expressed by the parents during the hearing or on appeal was the lack of medical accommodation forms being completed by the student's physician (see Tr. pp. Parent Ex. H at p. 2; see also Parent Mem. of Law at pp. 12-13). The forms were completed on June 10, 2019, one week after the CSE meeting (see Parent Ex. I). However, it does not appear that the completion of the forms was necessary for the CSE meeting to proceed (see Dist. Ex. 13 at p. 1). During the hearing, the student's father testified that one of the reasons he attempted to cancel the CSE meeting was because he was waiting for medical documentation; however, it was not clear what documentation the parent was waiting for as in response to a follow up question he responded he "wasn't waiting for any documentation, although [he] would have wanted to make sure that all of the school documentation

was provided should we have had the meeting" (Tr. pp. 278-79, 283-84).[13] However, according to the June 2019 CSE meeting minutes, the student's father specifically asked about not having updated medical forms and was told that they were not necessary to proceed with the meeting (Dist. Ex. 13 at p. 1).

Overall, throughout the process, the CSE reached out to the parents through email, letters, and by phone to confirm the June 2019 CSE meeting (Dist. Exs. 1 pp._7-8; 11; 13). Moreover, the district events log and evidence in the hearing record shows the district's compliance with the federal regulation described above requiring detailed records of the district's attempts to ensure the parent's attendance at the June 2019 CSE meeting. In light of the above, and especially considering the suspect reasoning provided by the parent for attempting to cancel the June 2019 CSE meeting—as well as the timing of the attempted cancellation, the hearing record supports the IHO's finding that the district provided the parent with the opportunity to participate in the development of the student's IEP.[14] Even assuming that there was a procedural violation by the district in having the school physician attend by telephone, it is not a sufficient basis to overturn the IHO's determination regarding the provision of a FAPE.

2. Prior Written Notice and School Location Letter

The parents assert that while the district transmitted the prior written notice and school location letters to them prior to the start of the 12-month school year, they were left with insufficient time to have reasonable notice of the placement and were not able to investigate the appropriateness of the school placement, which deprived them a meaningful opportunity to participate in the placement of the student resulting in a denial of FAPE.

In general, the IDEA 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; Tarlowe, 2008 WL 2736027, at *6).[15] The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 560 U.S. 904 [2010]; see also Deer Val. Unified Sch. Dist. v L.P.,

[13] The June 2019 CSE did not receive any information from iBrain regarding the student's progress during the 2018-19 school year (Tr. pp. 108-11; Dist. Ex. 1 at pp. 5-13). However, the iBrain IEP, which included a detailed report of the student's progress in the areas of academics, speech-language, OT, PT, vision education, use of assistive technology, self-care skills, as well as reports of the student's social and physical development, was completed on April 19, 2019, well in advance of the scheduled June 2019 CSE meeting (see Tr. pp. 241-47; Parent Ex. B).

[14] Although not necessary for reaching a determination in the present matter, the parents went through a similar process in the development of the student's IEP for the 2018-19 school year, in which the parents' refused to participate in the development of the student's IEP without the physical presence of a district physician at the CSE meeting (see Application of the Dep't of Educ., Appeal Np. 19-117).

[15] In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (N.Y. Educ. Law § 2[15]).

942 F. Supp. 2d 880, 889 [D. Ariz. 2013]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). [13-150] Additionally, a district "must ensure that . . . [t]he child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation" (34 CFR 300.323[d][1]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *13 [S.D.N.Y. May 27, 2014]).

Although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format describing the "bricks and mortar" location to which a student is assigned and where the student's IEP will be implemented, once an IEP is developed and a parent consents to a district's provision of special education services, the IDEA is clear such services must be provided to the student by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 420; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6). To be clear there is no requirement in the IDEA that a student's IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Moreover, parents generally do not have a procedural right in the specific locational placement of their child (see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x. 1, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191-92 [finding that a district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection]).

Thus, although not explicitly stated in federal or State regulation, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016] ["a parent must necessarily receive some form of notice of the school placement by the start of the school year"]; Tarlowe, 2008 WL 2736027, at *6 [a district's delay does not violate the IDEA so long as a public school site is found before the beginning of the school year]).

While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation, it nonetheless follows that it must be shared with the parent before the student's IEP may be implemented.[16]

This analysis also fits within the concept that while a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]), there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

With the above framework in mind, the CSE timely provided the parents with prior written notice of the June 2019 CSE's recommendations and notice of the public school the student was assigned to attend at the start of the 2019-20 school year. The district mailed a copy of the June 2019 IEP to the parents on June 19, 2019 (Dist. Exs. 1 at. p. 5; 17 at ¶36). Both a prior written notice and a school location letter were mailed to the parents on June 25, 2019 (Dist. Exs. 14 at pp. 1, 5; 17 at ¶37). In addition, the district's events log indicates that the prior written notice and school location letter were also emailed to the parents on June 25, 2019 (Dist. Exs. 1 at p. 4; 17 at ¶37). The parent testified that he received the school location letter in the mail and received the student's IEP through email; however, he was hesitant in answering and indicated a few times that he would have to check his email for dates (Tr. pp. 315-17). In addition, after the parents received the school location letter, the student's father was able to get in touch with someone at the assigned public school and was able to set up a visit at the school in July 2019 (Tr. pp. 316-17). Accordingly, this was not the situation where the parents were unaware of where to send the student at the start of the school year as they received the school location letter and were in contact with school staff prior to the start of the school year.

[16] If this matter involved a school district similar to the Long Lake Central School District in rural, upstate New York, which in the 2019-20 school year had approximately 59 students enrolled in kindergarten through twelfth grade, the rule regarding the notification of the location of services might not apply with equal force, but as State-published data shows, New York City is much larger with over one million students enrolled in the public school during the same period (see https://data.nysed.gov).

C. June 2019 CSE

1. Evaluative Information

The parents assert that IHO 2 erred in finding that the district did not lack evaluations of the student in all areas of suspected disability. According to the parents, the June 2019 CSE only had a social history update, a classroom observation, and a psychoeducational evaluation available to it in developing the student's IEP. The parents assert that the district did not have any evaluative information in the areas where the student received related services. In addition, the parents assert that the tests used in the psychoeducational evaluation were not appropriate assessments for students with a similar profile to the student.

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]).

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][2]; 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 otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). 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]; 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]). 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]).

Review of the June 2019 IEP shows that the CSE reviewed a February 2019 social history update, a February 2019 psychoeducational evaluation and a March 2019 classroom observation (Dist. Ex. 12 at p. 1; see Dist. Exs. 6-8). The CSE also reviewed the student's prior IEP for the 2018-19 school year and copied the student's present levels of performance from the 2018-19 school year IEP into the June 2019 IEP (Dist. Ex. 14 at pp. 1-8; see Dist. Ex. 9). According to the

June 2019 IEP, the prior CSE had reviewed a January 2018 quarterly progress report, a classroom observation from the 2017-18 school year, a 2018 social history update, an April 2018 assessment of the Vineland, and the student's IEP for the 2017-18 school year (Dist. Ex. 14 at p. 1).[17]

Despite the parents' contention that the district did not have any evaluative information regarding the student's performance in his related services areas, the June 2019 IEP included a detailed description of the student's performance in these areas—albeit, a description that was approximately one year old at the time of the meeting (compare Dist. Ex. 12 at pp. 3-8, with Dist. Ex. 9 at pp. 3-9). As noted above, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). Additionally, a CSE is required to convene annually to review a student's educational progress and to revise the student's program to reflect the student's progress and anticipated needs (20 U.S.C. §1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). While State regulations define that certain assessments must be performed as part of an initial evaluation of a student to determine initial eligibility (8 NYCRR 200.4[b][i]-[v]), it is left to the collaborative process of the CSE to determine what additional data is needed during a reevaluation of a student (8 NYCRR 200.4[b][5]).[18]

The district special education teacher, who attended the June 2019 CSE meeting, testified that the CSE did not want to make any changes to the student's programming at the June 2019 CSE meeting because the parents were not present and the nonpublic school did not participate (Tr. pp. 135-27). However, as noted by the IHO, the CSE attempted to obtain updated progress reports from the parents and directly from iBrain but the updated progress reports were never provided to the district (see IHO Decision at p. 23). For example, in it's initial January 2, 2019 email to iBrain, the CSE requested that updated progress reports be provided at least two weeks prior to scheduled CSE meetings; in a February 6, 2019 email to the parents, the CSE indicated it would be requesting updated progress reports and evaluations from the school; in a March 2019 email to iBrain and the parents, the CSE provided notice of the scheduling of a CSE meeting for April 10, 2019 and requested, among other things, teacher and related service provider progress reports; and, in a May 23, 2019 email to iBrain and the parents, the CSE requested assistance in obtaining updated progress reports to be considered at the June 3, 2019 CSE meeting (Dist. Ex. 1 at pp. 7, 9, 11, 13). Despite these efforts and the fact that the April 2019 iBrain IEP had been completed well over a month prior to the June 2019 CSE meeting, the iBrain IEP was never delivered to the June 2019 CSE (Dist. Ex. 18 at p. 11; see Parent Ex. B). Additionally, the student's providers at iBrain were invited to participate in the June 3, 2019 CSE meeting; however, they did not appear and the CSE's

[17] In addition, rather than providing information from the classroom observation conducted in March 2019, the June 2019 IEP reported the same classroom observation as was reported in the prior 2018-19 school year IEP (compare Dist. Ex. 12 at p. 1, with Dist. Ex. 9 at p. 1).

[18] State regulations provide that "[t]he reevaluation shall be conducted by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of the student's disability" and that "the reevaluation shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]).

contact person at the nonpublic school did not answer the telephone on the day of the meeting (Dist. Exs. 11 at pp. 1-2; 12 at p. 29).

The iBrain director testified that part of her role included providing the CSE with progress reports from iBrain; however, she did not recall providing the CSE with the student's April 2019 iBrain IEP (Tr. pp. 242-45). She also testified that there were not too many circumstances where she would not send the updated progress reports, noting that there could be a misunderstanding, or a scheduling issue, or a meeting that might have been canceled (Tr. p. 245).[19] The student's father testified that iBrain would not release the iBrain IEP to the CSE unless he signed a waiver and that he "assumed" he signed a waiver to release the iBrain IEP, but he did not remember doing it (Tr. pp. 312-13). Based on the above, the hearing record supports the IHO's determination that the iBrain IEP, including the student's updated progress reports, was not provided to the district in advance of the June 2019 CSE despite the districts efforts to obtain them (IHO Decision at p. 23). Additionally, as explained by the IHO: "The Parent cannot simultaneously (whether deliberately or otherwise) undermine the IEP team's good faith efforts to acquire information about the Student's present levels of performance while also claiming that the information at the IEP team's disposal was sufficiently deficient to prevent the IEP team from developing an appropriate IEP" (id.). I am not persuaded that the IHO erred in finding that the reevaluation of the student was insufficient, especially when the parent refused to participate in the process and iBrain failed to address the district's requests for more recent reports regarding the student.

Moreover, the parents have not actually indicated any specific area where the student's needs were not appropriately identified in the present levels of performance included in the June 2019 IEP (Req. for Rev. ¶¶27-29). While it is not an SRO's role to research and construct the appealing parties' arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]), even a brief review of the April 2019 iBrain IEP in the hearing record—the report of the student's progress over the course of the 2018-19 school year that would have been available to the June 2019 CSE if it had been turned over to the CSE as requested—shows that the student's needs had not changed so drastically that they would have caused the CSE to recommend different programming for the student (compare Dist. Ex. 12 with Parent Ex. B at pp. 1-18; see Dist. Ex. 18 at ¶¶ 7-13). For example, while the student showed some improvement in the areas of speech-language, OT, and PT, the description of the student's academic functioning and his functioning in areas such as assistive technology and oral motor skills as well as some aspects of the student's communication and speech-language skills were either identical or showed little change between the descriptions included in the April 2019 iBrain IEP and the May 2018 IEP, which was copied into the June 2019 IEP (compare Parent Ex. B at pp. 1-18, with Dist. Exs. 9 at pp. 1-9; 12 at pp. 1-8). Moreover, a number of the proposed annual goals included in the April 2019 iBrain IEP were similar to the annual goals included in the June 2019 IEP—even though they had been copied from the student's May 2018 IEP (compare Parent

[19] The parents' attempt to cancel the June 3, 2019 CSE meeting should not have impacted whether iBrain sent the updated progress reports to the CSE, as the CSE had requested them two weeks in advance of the CSE meeting and the attempted cancellation occurred at the end of the business day prior to the day of the meeting (see Dist. Ex. 1 at pp. 5-7, 13).

Ex. B at pp. 26-28, 30-32, 35-37, with Dist. Ex. 12 at pp. 10-11, 15-17, 19-20). To this point, the district special education teacher testified that the CSE had sufficient information to develop the student's IEP, but it was not "ideal" to develop an IEP without the presence of the parents or the student's teacher, or the provision of progress reports, and that the CSE was constrained in what it could do without their participation (Tr. p. 153).

Accordingly, while the lack of updated progress available to the June 2019 CSE is something that merits some scrutiny, review of the hearing record shows both that the reason for the evaluative information not being available lies squarely with the parents' decision not to participate in the CSE process and that the student's functioning had not changed so significantly over the course of the 2018-19 school year such that copying the present levels of performance and annual goals from the student's May 2018 IEP did not render the June 2019 IEP insufficient to offer the student a FAPE.

Finally, to the extent that the parents assert that the tests used in the psychoeducational evaluation were not appropriate assessments for students with a similar profile to the student, this argument is based entirely on documents that were not timely disclosed or admitted into evidence during the impartial hearing.[20] Specifically, the parents assert that the IHO erred in not considering what the parents describe as "assessments of independent professionals regarding the inappropriateness of [the district's] practices concerning evaluations" (Req. for Rev. ¶27).[21] However, review of the exchange that took place on the final hearing date shows that IHO 2 properly exercised his discretion in excluding those attachments from consideration as they were available to the parents during the hearing, the parents chose not to submit them until after the evidentiary phase of the impartial hearing concluded, and consideration of them after the close of the hearing would have prevented the district from being able to contest the allegations contained within the documents or to cross-examine the evaluators (see Tr. pp 344-80). The IHO's concerns were supported and well-reasoned. Accordingly, this allegation does not present a basis for departing from the IHO's determinations as to the sufficiency of the evaluations.

2. Disability Classification

The parent asserts the IHO erred in finding that the student's classification as a student with multiple disabilities was proper.

[20] A party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). Further, State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

[21] According to the parents, those "assessments" were attached to their post-hearing brief; however, while the parents' post-hearing brief referenced three attachments described as reports from independent neuropsychologists in other proceedings involving different students—not the student in this proceeding. The attachments themselves were rejected by IHO 2 and were not included with the hearing record or otherwise submitted to the Office of State Review.

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.[22]

Initially, it is notable that in May 2018, the CSE changed the student's classification from traumatic brain injury to multiply disabled, a decision that was upheld through State level review (see Application of the Dep't of Educ., Appeal No. 19-117). As discussed above, when the CSE convened in June 2019, the CSE based the student's June 2019 IEP on the prior May 2018 IEP (see Dist. Ex. 12). Accordingly, the June 2019 CSE based its classification of the student on the similar information that supported a finding that the student presented with multiple disabilities for the prior IEP.[23]

A brief overview of the student from the present levels of performance included in the June 2019 IEP shows that the student demonstrated complex educational needs related to academics, speech-language development, functional communication, fine and gross motor development, functional vision, feeding, and ADLs, as well as challenges related to attention and distractibility (Dist. Ex. 12 at pp. 1-8). The student sustained an injury at birth "resulting in hypoxic damage to the basal ganglia and to the thalamus" (id. at p. 1). In addition, he was diagnosed as having, among other things, "severe gastrointestinal disorder, spastic quadriplegia, cerebral palsy, dystonia, microcephaly, bilateral congenital dislocated hips, bilateral congenital foot deformities, global

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[22] 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]).

[23] As noted above the district had also completed a new psychological evaluation, but it did result in any change in the student's eligibility.

developmental delays, Cortical Visual Impairment, Strabismus, Hyperopia and Astigmatism" (id.). The student is g-tube dependent, non-verbal, and non-ambulatory (id.). Based on the presentation of the student's needs and complex medical history, the hearing record supports a finding that the student had "concomitant impairments" "the combination of which cause[d] such severe educational needs that they [could not] be accommodated in a special education program solely for one of the impairments, and as such the student [met] the criteria for classification as a student with multiple disabilities (Dist. Ex. 12 at pp. 1-9; see 8 NYCRR 200.1[zz][8]). Accordingly, the June 2019 CSE's classification of the student as a student with multiple disabilities was proper.

As a final point on this issue, while the parents appeared at times to be focused on the student's disability classification, almost to the exclusion of all other issues (see Tr. pp. 281-82, 300-01, 306), a recent district court decision has explained that this issue "is a red herring" (Carrillo v. Carranza, 2021 WL 4137663, at *15 [S.D.N.Y. Sept. 10, 2021]). A CSE is not supposed to rely on the disability category to determine the needs, goals, accommodations, and special education services in a student's IEP (id.). Accordingly, as the district court explained, because "[n]o one disputes that this child qualifies for special education services under IDEA. . . for our purposes, the precise disability category in which [he] is classified is irrelevant." (id.).

3. Related Services

The parents appeal from the IHO's determination that the June 2019 CSE's recommendation for 40-minute sessions of related services was reasonable and contend that the student required 60-minute sessions of related services instead.

Initially, the parents assert that the recommendation for 40-minute sessions of related services was a "reduction" in the student's related services from the student's program at iHope during the 2017-18 school year. When asked if he agreed with the recommendations included in the June 2019 IEP, the student's father testified that he "recall[ed] agreeing with the therapy recommendations and goals. [He] believe[d] there was still a contest over [the student's] medical diagnosis, still listed as, you know, multiply disabled, . . . [He] didn't necessarily agree, of course, with the school placement" (Tr. p. 289). Only when asked if he remembered the length of the related service sessions on the June 2019 IEP did the student's father respond that he remembered them "being switched to 45 minutes rather than the one hour [the student] previously had" and that this was a "point of contention" (Tr. p. 290).

However, the June 2019 CSE repeated the recommendations for speech-language therapy, OT, PT, vision education services, and parent counseling and training from the May 2018 IEP, and did not reference the student's program during the 2017-18 school year (compare Dist. Ex. 12 at p. 22, with Dist. Ex. 9 at p. 24). During the hearing, the district special education teacher explained that the June 2019 CSE adopted the related services recommendations from the May 2018 IEP, including the 40-minute duration for the related services, and IHO 2 explained that a comparison of the recommendations contained in the June 2019 IEP to the program the student received at his nonpublic school was therefore not relevant (Tr. pp. 137-42).

Additionally, the parents presented this same argument—that the related service recommendations were reduced from the program the student received in his nonpublic school—

in a prior proceeding involving the student's May 2018 IEP and after review of the information in front of the May 2018 CSE, as well as the district's justifications for providing this student with related services with a duration of 40 minutes per session, an SRO found that the hearing record in that proceeding supported a conclusion that the 40-minute sessions as recommended in the student's May 2018 IEP were appropriate for the student (Application of the Dep't of Educ., Appeal No. 19-117).

Finally, iBrain did not provide the April 2019 iBrain IEP that called for 60-minute sessions of related services to the June 2019 CSE and neither the parent nor the student's providers attended the June 2019 CSE meeting to discuss the student's needs or advocated with the members of the CSE for a need for 60-minute sessions of related services.

Accordingly, the hearing record in this matter does not support deviating from the IHO's position that the related services recommendations included in the June 2019 IEP were appropriate.

D. Assigned Public School Site

The parents assert that the IHO erred in finding that their arguments related to the assigned public school were speculative. The parents contend that the assigned school would not have provided an appropriate grouping for the student because the proposed class included students classified with autism and did not include any students who were not ambulatory. According to the parents it "would have endangered [the student's] life to attend [the assigned school]" (Req. for Rev. ¶37).

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]).[24] 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

[24] The Second Circuit has held that a district's assignment of a student to a particular public school site is an administrative decision that 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 (R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [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 district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

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]).[25] 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

[25] 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.

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).

As noted by IHO 2, the principal of the school the student was assigned to attend testified as to the school's ability to implement the program recommended in the June 2019 IEP (Tr. pp. 166-67, 171-86; IHO Decision at p. 15). With respect to the parents' specific assertions, regarding the other students in the class being classified with autism and not being ambulatory, the principal testified that the possible classes for the student consisted of a "mix of students," with abilities ranging from the students being "totally verbal" to nonverbal, all of the students being ambulatory, the majority of the students who had paraprofessionals had them because they were medically fragile, none of the students would have been characterized as aggressive, and all of the students had a math and reading ability between kindergarten and second grade; he also testified that the school was "100 percent wheelchair accessible" (Tr. pp. 178, 182, 187-89, 192-93). The principal further testified that all of the students in the proposed class had autism, but also noted that the students had "a range of communicative, cognitive, behavioral and social emotional issues" and that the students had comorbid features such that at least one of the students in the proposed class was classified as having multiple disabilities (Tr. pp. 190-91, 200-01). Additionally, although none of the students in the proposed class were classified as having a traumatic brain injury, one or two students in the school carried that disability classification (Tr. p. 199). Finally, the principal testified that the school could have accommodated a student with a traumatic brain injury with the proposed 6:1+1 special class (Tr. pp. 201-02).

The student's father testified that he visited the proposed school in July 2019 and had a slightly different description than the school principal (Tr. pp. 285-86).[26] According to the parent, the particular person he met with was "a bit surprised," because the program was geared towards students on the autism spectrum (Tr. p. 286). The student's father said the person he met with indicated the student would be the only student at the school in a wheelchair and the only student without an autism classification; however, he also "explained that they would do their best to educate any child" (Tr. p. 287). Additionally, the parent indicated that the person from the school pointed out areas that "would potentially be problematic," such as that classrooms were small and also indicated that the school had students who had behavioral issues (Tr. pp. 287-88). The student's father expressed his fear that the student would have been "immersed in an environment with kids with, you know, significant behavioral problems," which the parent explained had happened to the student in a public school in another school district earlier in the past (Tr. pp. 288-89).

While the parents are free to choose private schooling like iBrain in which all of the children in the classroom are very similar and I am sympathetic to the parents' concerns and

[26] The student's father testified that he met with the principal; however, the name the parent provided was not the name of the principal, who testified during the hearing (Tr. p. 286). It is assumed that the parent met with another staff member at the proposed school.

desires, overall, this is not a case in which the evidence shows that the public school site is "factually incapable" of implementing the IEP. Balancing the parent's testimony with the testimony of the principal, the evidence does not support deviating from IHO 2's finding that the district presented sufficient evidence to show that it would have been able to implement the June 2019 IEP. The parents objections to the classification of other students with autism or the fact that the other students are ambulatory do amount to an inability to implement the student's IEP, and therefore fall too closely to an impermissible parental veto over the district's assignment of the student to a public school site. Additionally, as noted by IHO 2, the testimony of the iBrain director as to grouping the student in a class with students with autism was entirely speculative as the iBrain director had no specific information regarding the students in the proposed class (IHO Decision at pp. 17, 25; see Tr. pp. 224-35). Accordingly, based on the above, the district presented sufficient evidence to show that the assigned school would have been able to implement the June 2019 IEP with an appropriate functional grouping.

VII. Conclusion

Having determined that the hearing record supports IHO 2'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 the student's unilateral placement at iBrain was appropriate or whether equitable considerations support the parents' claim.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 12, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER