The University of the State of New York

The State Education Department
State Review Officer
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No. 22-025

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

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Ezra Zonana, Esq

Brain Injury Rights Group, Ltd., attorneys for respondents, by John Henry Olthoff, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to fund the costs of their son's tuition at the International Institute for the Brain (iBrain) for the 2021-22 school year. The parents cross-appeal from the IHO's determination which limited the amount of transportation and related services costs to be reimbursed and allege additional grounds for a finding that the educational program offered by the district was inappropriate. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

At the time of the impartial hearing the student was sixteen years old, had previously received diagnoses of cerebral palsy, seizure disorder, hydrocephalus, dystonia, and global developmental delay, and was legally blind, non-ambulatory, nonverbal, and had a shunt and a gastronomy tube (G-tube) (IHO Ex. 3 at p. 4, Dist. Ex. 3 at pp. 1, 55). The student had attended iBrain since March 2020 and was the subject of a prior impartial hearing resulting in an IHO decision dated November 9, 2021, which found that the district failed to offer the student a free

appropriate public education (FAPE) for the 2018-19, 2019-2020, and 2020-21 school years (prior proceeding) (IHO Ex. 3 at p. 28).

A neuropsychological independent education evaluation (IEE) was conducted on January 18, 2021 during which the student was administered the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), resulting in a full-scale IQ of 40 and reflecting that the student's verbal comprehension, visual-spatial, fluid reasoning, working memory, and processing speed were deemed extremely low relative to his peers (Dist. Ex. 2 at pp. 11-12).[1] Academically, due to a lack of language and cognitive skills, insufficient comprehension of task demands, and an inability to engage and sustain attention, the student scored in the extremely low range (id.). The psychologist indicated that the student's performance in verbal academic achievement was comparable to his verbal cognitive abilities, which highlighted the need for assistance and support with reading, spelling, math, and expressive and receptive language (id. at p. 16). The psychologist found that the student's communication disorder symptoms, attention and hyperactivity deficits, significant cognitive, language, and academic reading and spelling deficiencies with a presumed neurodevelopmental and neurocognitive etiologies, adaptive functioning and social skills difficulties "might continue to influence downstream cognitive performance and further hinder academic progress" (id.). The psychologist determined that the student met the criteria for diagnoses of major neurocognitive disorder due to multiple etiologies, cerebral palsy, seizures, intellectual developmental disorder, moderate, and social (pragmatic) communication disorder (id.). The psychologist found that, with evident parental dedication and an accommodating placement, it was reasonable to expect that the student would develop helpful coping strategies and progress towards personal and academic goals (id.).

On March 10, 2021, a CSE convened to conduct the student's annual review and formulate an IEP for the 2021-22 school year (see generally Dist. Ex. 3). The CSE reviewed the January 2021 neuropsychological report, as well as a March 2021 teacher and related services report, a December 2021 vocational assessment, a December 2020 social history update,[2] and a November 2020 progress report (id. at p. 1). Finding the student eligible for special education as a student with a traumatic brain injury (TBI), the CSE recommended a 12-month program consisting of a 6:1+1 special class for core academic subjects in a district specialized school with full-time individual school nurse services, individual occupational therapy (OT) four times per week for 60 minutes, individual physical therapy (PT) five times per week for 60 minutes, individual speech-language therapy five times per week for 60 minutes, individual vision education services three times per week for 60 minutes, and group parent counseling and training once per week for 60 minutes (id. at pp. 1, 48-49, 50). The March 2021 IEP also called for the student to receive full-time, individual health paraprofessional services, individual assistive technology services once per week for 60 minutes including the use of switches daily (with both voice output and computer interface), and special transportation including 1:1 nursing services and oxygen, transportation

[1] The January 2021 neuropsychological IEE at public expense was ordered as part of the prior proceeding (see IHO Ex. III at p. 13).

[2] The March 2021 IEP lists the assessment date for the social history update as December 1, 2021; however, the assessment date, as indicated on the actual social history update report, is December 1, 2020 (compare Dist. Ex. 3 at p. 1, with Dist. Ex. 9 at p. 1).

from the closest curb location to school, a wheelchair lift bus, and limited travel time (id. at pp. 49, 55). The March 2021 IEP had a projected implementation date of March 24, 2021.

In prior written notices dated March 16, 2021 and May 27, 2021, the district notified the parents of the March 2021 CSE's determination that the student was eligible for special education services, identified the evaluative information considered by the CSE and the special education program and related services recommended for the student, and advised the parents of their due process rights (Parent Ex. B at pp. 1-3; Dist. Ex. 4 at pp. 1-3). In school location letters dated March 16, 2021 and May 27, 2021, the district apprised the parents of the name and location of the particular public school site the student was assigned to attend (Parent Ex. B at pp. 7, 9; Dist. Ex. 4 at pp. 8, 10). The school location letters also notified the parents that they could visit the school and provided the parents with the name and contact information for someone who could assist in arranging a visit (Parent Ex. B at pp. 7, 9; Dist. Ex. 4 at pp. 8, 10).

By letter to the district dated June 23, 2021, the parents disagreed with the recommendations contained in the March 2021 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2021-22 school year, and notified the district of their intent to unilaterally place the student at iBrain for the 2021-22 school year and seek district funding of the cost thereof (Parent Ex. C).

In June 2021, an assistive technology evaluation was conducted at the request of the CSE (Dist. Ex. 5). The purpose of the evaluation was to determine whether the student required an augmentative and alternative communication (AAC) system to meet the communication expectations of his daily environment, and if so, the type of system to best meet his educational and community needs (id. at pp. 2-3, 20-21). According to the communication matrix used for the evaluation, the student received a total score of 41 out of 160, meaning that he was found to be in the 26th percentile (id. at pp. 13-14). Also, based on the evaluation, the student presented with significant challenges in all areas of communication, but most significantly expressive language (id. at pp. 18-19). Based on the evaluation, it was suggested that the student have the use of dynamic display speech-generating device with a two-panel Bluetooth switch and custom mounting system to assess his curriculum (id. at p. 21). The evaluators indicated that use of an AAC device would augment the student's current communication abilities, which at the time of the evaluation were limited to vocalizations and gestures, and provide him with a means to use language to meet his daily needs (id. at pp. 18-19).

A second neuropsychological IEE (bilingual) was conducted over a series of days in May and June 2021 (June 2021) (see Parent Ex. J).[3] The neuropsychologist found that that the student's cerebral palsy and global delays across his language, memory, attention, and executive functioning severely limited his ability to care for himself independently or learn on a "typical academic trajectory" (id. at p. 6). She found that he met the criteria for a diagnosis of a profound intellectual disability, and as a result, formal neuropsychological testing was limited and his full cognitive potential was difficult to accurately quantify (id.). The neuropsychologist found that the student demonstrated some receptive verbal comprehension and comprehended simple cause and effect associations (id.). The neuropsychologist recommended that the student continue to receive highly

[3] The June 2021 neuropsychological IEE was also ordered as part of the prior proceeding (see IHO Ex. III at p. 13).

specialized instruction provided to him at iBrain (id. at p. 7). She found that without the specialized, highly structured environment with a high frequency of services in a one-to-one setting, the student would likely experience skill regression (id.). The neuropsychologist recommended that the student stay in his then-current 6:1+1 special education class at iBrain for the remainder of his education, which she opined "[i]n contrast a 6:1:1 District 75 classroom placement c[ould] provide the high degree of individualized attention" that the student required to make functional gains (id.).[4] She noted that "D75 programs" often included children with a diagnosis of autism spectrum disorder, "a clinical presentation that require[d] different academic and supportive needs than those needed of child with an acquired brain injury" (id.). Also, the neuropsychologist recommended a 12-month educational plan, the highest number of hours possible for one-to-one related services in the form of one-hour long sessions of OT, PT, vision therapy, speech-language therapy, and assistive technology "weaved throughout his curriculum," as well as a nurse or health paraprofessional with the student throughout the entire school day and during transportation to and from school (id.). The neuropsychologist recommended that an emphasis be placed on the student's use of assisted technology in the form of his switch device (id. at p. 8).

On July 2, 2021, the parents executed a contract for the student's attendance at iBrain for the 2021-22 school year (Parent Ex. E; Dist. Ex. 7 at pp. 6-14). On July 15, 2021, the parents executed a contract with Sisters Travel and Transportation Services, LLC (Sisters), for the transportation of the student to and from school during the 2021-22 school year (Parent Ex. K).

After the student had been placed at iBrain for the 2021-22 school year, the CSE reconvened a meeting on August 19, 2021, which was attended by district personnel, however the parents and iBrain staff did not attend (Parent Ex. N at pp. 57, 60). The CSE recommended the same program and services as recommended in March 2021, except that the CSE removed the recommendation for individual assistive technology services once per week for 60 minutes, changed the recommendation for assistive technology from the use of switches to a tablet with the support of dynamic display speech generating device, and changed the student's eligibility classification from TBI to multiple disabilities (compare Dist. Ex. 3 at pp. 1, 48-49, with Parent Ex. N at pp. 1, 51-52).

A. Due Process Complaint Notice

In a due process complaint notice dated October 7, 2021, the parents alleged that the district denied the student a FAPE for the 2021-22 school year (see Parent Ex. A). First, the parents argued that the district denied the parents' meaningful participation in the CSE process by failing to secure the attendance of the parents or iBrain staff at the August 2021 CSE meeting, alleging that the district failed to provide the parents notice "i.e. via a telephone call or physical letter sent to their home," stating instead that a notice sent by email "went to the parents' junk mail box," and alleging that iBrain staff was not notified of the August 2021 CSE meeting despite the district's "prior practice and procedure" of notifying iBrain staff of any new CSE meetings for their students (id. at p. 3). The parents then alleged that both the March 2021 and August 2021 CSEs reviewed a "flawed" and inappropriate neuropsychological evaluation that "misdiagnosed" the student, "mischaracterized" his educational needs and abilities, and failed to make appropriate program

[4] District 75 or "D75" is terminology specific to this school district and generally refers to a specialized school.

recommendations or consider the impact of the student living in a bilingual household (id. at p. 4). According to the parents, the district failed to review the June 2021 bilingual neuropsychological IEE that appropriately diagnosed the student and made appropriate program recommendations to which the district had access as it was ordered by an IHO and conducted as part of the prior proceeding (id.). Next, the parents contended that the CSE incorrectly changed the student's classification from TBI to multiple disabilities on the student's August 2021 IEP (id.). The parents also contended that the IEPs' annual goals failed to meet the student's needs, stating that the March 2021 CSE "disregarded goals for services and devices for [assistive technology]" and both the March and August 2021 CSEs "disregarded goals for services such as [m]usic [t]herapy" (id.). Additionally, the parents asserted that the IEPs: failed to recommend supports or training for the school staff who would work with the student who was "medically-fragile"; failed to include assistive technology supports such as AAC wheelchair mounts, relevant software, and adaptive seating; failed to recommend music therapy; and did not properly recommend individual parent training and counseling as the IEPs only included group counseling (id. at pp. 4-5, 6).

Next, the parents argued that the district failed to recommend an appropriate school location, specifically alleging that the district's recommended 6:1+1 special class placement was for students who had received diagnoses of autism spectrum disorders and the specialized public school program did not offer the extended school day necessary to implement the related services mandated on the student's IEP (Parent Ex. A at p. 5). The parents asserted that, had the student attended the assigned public school site, he would not have been grouped with other students with impairments caused by brain injuries who have "unique needs which cannot be wholly met through other instructional means" (id. at pp. 5, 6). Further, the parents "reserve[d] the right to raise any other procedural or substantive issue that may come to their attention during the pendency of the litigation of this matter, including, but not limited to" challenges regarding the qualifications of district staff and providers, and the district's ability to maintain an appropriate student-to-staff ratio and provide the student with all related services needed to make meaningful progress (id. at p. 7). The parents also argued that the district failed to recommend an appropriate public school placement because the school was only partially accessible, which was a concern because the student was "non-ambulatory and wheelchair-bound," and a building condition assessment survey showed that some of the ramps were rusting and in fair to poor condition (id. at p. 6).

For relief, the parents requested an order declaring that the district denied the student a FAPE during the 2021-22 school year and that iBrain was appropriate, direct funding for the cost of tuition at iBrain for the 2021-22 school year including related services, nurse services, and a 1:1 paraprofessional, and reimbursement and/or prospective funding of special education transportation with limited travel time, ventilator, air conditioning, lift bus/wheelchair accessibility, and a transportation nurse and paraprofessional, and related services as required (Parent Ex. A at p. 7). Additionally, the parents requested a reconvened CSE meeting to address changes if necessary, an order compelling the district to provide assistive technology services and devices and AAC to assist the student with communication, and an order directing the district to fund an independent evaluation of the student in all areas of need (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 8, 2021 and concluded on December 14, 2021 after three days of proceedings (Tr. pp. 1-174).[5] In a final decision dated February 9, 2022, the IHO determined that the district failed to offer the student a FAPE for the 2021-22 school year, that iBrain was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 11-15).

Initially, the IHO stated that it was "undisputed" that the parents agreed with the March 2021 CSE recommendations, with the exception of the recommended "D75" specialized public school placement and noted that the "August IEP mirrored the March IEP except that it included the report on [assistive technology] and changed the classification" (IHO Decision at p. 11). With respect to the parents' participation claim, the IHO found that the parents "did not have the opportunity to have meaningful participation in the process" as the parents were not present at the August 2021 CSE meeting, noting the parents' arguments that the meeting notice went to his "junk email" and iBrain was not notified of the August meeting (id. at pp. 11-12).

With respect to the March 2021 CSE's recommendation for a 6:1+1 special class placement with related services in a "D75" specialized public school program, the IHO found that "[b]ased on the evidence presented the recommendations were appropriate" for the student (IHO Decision at p. 12). In addition with respect to the assigned public school's capacity to implement the IEP, the IHO cited testimony of a district witness that the "services could be implemented in the D75 school day" as "typically the students are self-contained for 4 periods a day which would allow a provider to push in 60 minute intervals" and there were five available 6:1+1 classes in the student's age range for the 2021-22 school year that "the student could have enrolled in" (id.). Ultimately, however, the IHO found that "[t]he placement in the D75 environment would not be appropriate for the student" stating that "[s]ignificant safety issues involving other students, and the need for highly intensive instruction which is different than his classmates makes the placement in a D75 6:1:1 with children on the autism spectrum inappropriate" (id. at pp. 12-13). In particular, the IHO referenced testimony of the evaluator who had conducted the June 2021 neuropsychological evaluation that she was concerned for the student's safety given his visual impairment and lack of mobility in a classroom with students who were ambulatory, "on the autism spectrum [and] who would have stereotypical maladaptive behaviors" (id. at p. 12).

In addition, with respect to the student's classification, the IHO found that, as the change from TBI to multiple disabilities was made by the August 2021 CSE when the parents were not present "through no fault of [their] own" and there was nothing in the record to warrant the change, that "the classification should be changed back" and reflected on the student's IEP (IHO Decision at pp. 13, 15). With regard to transportation, the IHO found that the parents were entitled to transportation costs to and from school for 2021-22 school year; however, with respect to the Sisters transportation contract the IHO found that the cost was "excessive" and the hearing record did not show that the provider billed monthly as required by the contract, thereby voiding the

[5] At the December 13, 2021 hearing date, the parties agreed that the basis for the student's pendency lay in the unappealed IHO decision dated November 9, 2021 (Tr. pp. 26-27; see IHO Ex. 3). The IHO issued a interim decision dated December 13, 2021 finding the student's pendency program at iBrain retroactive to October 7, 2021, the date of the due process complaint notice (Dec. 13, 2022 Interim IHO Decision).

contract; the IHO opined that the parties did not know the "true costs" of transportation for the student and the amount charged was "exorbitant" (id. at pp. 13-14,15). With respect to tuition and related services fees, the IHO noted that the contract contemplated that the cost of related services would be calculated on an hourly basis on top of a base tuition and noted that "in any given day the providers are with the [student] for more than 4 hours per day, which [called into] question[] the reasonableness of the base tuition plus an additional amount equal to more than half of the base rate to be paid for related services" (id. at p. 14).

As relief, the IHO ordered the district to: (1) pay the base cost of the student's tuition at iBrain for the 2021-22 school year; (2) pay for the related services of any independent service providers upon receipt of invoices and proof of independent contractor status at the rate of $104 per hour, except that if the providers were employees of iBrain, upon receipt of invoices, pay the pay rate charged if funded by Medicaid for the same service; and (3) upon receipt of invoices, pay 150 percent of the rate the transportation provider would receive for the same services if funded by Medicaid (IHO Decision at p. 16).

IV. Appeal for State-Level Review

The district appeals and asserts that the IHO erred in finding that the district failed to offer the student a FAPE for the 2021-22 school year. The district argues that the IHO erred to the extent she determined the parents were denied meaningful participation in the IEP process because they did not attend the August 2021 IEP meeting, as the district complied with CSE meeting notice requirements, the parents conceded receipt of the meeting notice in their junk email folder, and the CSE called the parents on the day of the meeting. The district contends that the IHO erred in admitting the June 2021 neuropsychological IEE into evidence as the parents failed to provide it to the CSE and the CSE was not required to consider it. Next, the district asserts that the IHO erred in changing the student's classification from TBI to multiple disabilities as either classification would have been appropriate based on the student's diagnoses and the IHO found the recommended program was substantively appropriate.

In addition, the district asserts that the IHO erred in finding the assigned public school site inappropriate as the IHO's reasoning was based on impermissible "retrospective functional grouping evidence," first, based on speculation that students with autism "might pose a danger to the [s]tudent based on their physical and social differences and management needs" and second, based on speculation regarding "supposed differences in the academic and instructional programs both would require." The district further asserts that, even if the June 2021 neuropsychological IEE and related testimony were to be considered, they should be given no weight because the opinions were unsupported as the evaluator had never visited the school, was unable to discuss specifics of the student's program, and made speculative assumptions regarding the student's safety, among other things. The district also notes that no testimony from the assistant principal from the assigned public school site suggested that it was unsafe for the student or otherwise inappropriate.

The district requests that the IHO's finding that the district denied the student a FAPE for the 2021-22 school year be reversed and that the IHO's award of relief be annulled in its entirety as it was capricious and contradictory. Alternatively, if the SRO finds that the district did not

provide a FAPE, the district requests that the case be remanded for reconsideration of the relief awarded.

In an answer and cross-appeal, the parents assert that the IHO correctly found that the district denied the student a FAPE during the 2021-22 school year, noting among other things, that the IHO properly admitted the June 2021 neuropsychological evaluation, which the district was aware of because it was ordered by the IHO in the prior proceeding and was funded by the district, as well as properly considered the neuropsychologist's expert testimony. The parents also assert that the IHO properly ordered the district to change the student's disability classification back to TBI, properly considered testimony relating to the June 2021 neuropsychological IEE regarding the inappropriateness of the district's assigned school placement, and properly found the assigned school to be inappropriate for the student based on safety concerns and the make-up of the class with a majority of students having received diagnoses on the autism spectrum. As for a cross-appeal, the parents assert that there were additional bases upon which the IHO should have found that the district denied the student a FAPE. Specifically, the parents contend that the IHO should have found that the August 2021 CSE's removal of assistive technology services from the IEP and failure to provide the student with an assistive technology device while attending iBrain denied the student a FAPE because he is nonverbal and needs the services and device in order to better communicate. In addition, the parents contend that the IHO should have found that it was "mathematically impossible" to provide the services on the March and August 2021 IEPs at the district's assigned public school site and that testimony that the services could be implemented within the school day should have been given no weight. The parents further allege that the IHO should have found that the district's failure to recommend music therapy denied the student a FAPE. Finally, the parents allege that the IHO erred by not awarding the full cost of related services and transportation for the student and improperly determined that these costs should be linked to Medicaid rates for reimbursement. For relief, the parents request that the district be required to directly fund the costs of the student's attendance at iBrain, including tuition, related services, assistive technology devices, and transportation.

In an answer to the cross-appeal, the district asserts that: the parents were not aggrieved by issues not addressed in the IHO's FAPE determination; once the student was unilaterally placed the district was no longer required to provide assistive technology services; the record supports that the district's placement was capable of providing related services in the frequency and duration required by both IEPs; music therapy was not required to provide the student with a FAPE; and the IHO's award was capricious and contrary.

In a reply, the parents respond to the district's answer to the cross-appeal.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192).

The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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

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

VI. Discussion

A. Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulation governing practice before the Office of State Review requires that a cross-appeal "clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate the relief sought by the respondent (8 NYCRR 279.4[f]). Additionally, State regulation provides that a pleading must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be

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

deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]).

Initially, there is no merit to the district's argument in its answer to the cross-appeal that the parents were not aggrieved by the IHO's failure to reach certain issues and therefore that the parents could not properly allege within a cross-appeal alternative basis for a finding that the district denied the student a FAPE. Contrary to the district's position, it is incumbent on a party to raise any additional bases for finding a denial of FAPE not addressed by the IHO in a cross-appeal lest the issues be deemed waived (see 8 NYCRR 279.8[c][4]). When State regulations governing appeals before the Office of State Review were last amended, it was specifically contemplated that a prevailing party would be chargeable with the knowledge that they may have to defend themselves in an appeal and that might require a cross-appeal of any underlying determinations made by the IHO (or failures to rule) that were unfavorable to the prevailing party (see N.Y. State Register Vol. 38, Issue 26, at p. 49 [June 29, 2016]; Application of a Student with a Disability, Appeal No. 18-131). Here, the parents have properly cross-appealed from the IHO's decision not to address certain issues raised in their due process complaint notice.

However, turning to the claims included in the parents' cross-appeal, aside from alleging that the IHO should have found that the March 2021 CSE failed to recommend music therapy for the student and that the August 2021 CSE inappropriately removed assistive technology services from the student's programming, the parents have not appealed from the IHO's determinations that the recommendations (including the 6:1+1 special class and related services) in the IEPs were appropriate (see IHO Decision at p. 12). In addition, although the parents interpose a cross-appeal identifying additional grounds upon which they allege the IHO should have relied upon to find the district denied the student a FAPE, there were several allegations in the parents' October 2021 due process complaint notice that the IHO did not address that the parents have not pursued on appeal (see Parent Ex. A; IHO Decision). In particular, on appeal, the parents have not alleged that the IHO erred by failing to address their claims that the CSEs inappropriately considered the January 2021 neuropsychological IEE or failed to consider the June 2021 neuropsychological IEE, or that the annual goals included in the IEPs were inadequate, that the IEPs failed to include supports for school personnel, extended school day services, individual parent counseling and training services, or recommendations for assistive technology devices (see Parent Ex. A at pp. 4-6).[7] The parents have also not pursued their claims that the assigned public school site was only partially accessible (id. at p. 6). Accordingly, as the parents have not pursued these claims on appeal, they are deemed abandoned and will not be further discussed.

B. March 2021 IEP—Music Therapy

At the outset, I note that, while the parents set forth several claims pertaining to the August 2021 IEP in their October 2021 due process complaint notice (see Parent Ex. A), the evidence is

[7] With respect to the IEEs, in response to the district's allegation in the request for review, the parents in their answer argue that the IHO correctly admitted and considered the June 2021 neuropsychological IEEs; however, the parents do not revive their claims regarding the August 2021 CSE's alleged failure to consider the evaluation (see Answer ¶¶ 28-30). In addition, although the parents allege that the IHO erred by not addressing the August 2021 CSE's removal of assistive technology services from the IEP, they do not pursue their claim about the appropriateness of assistive technology devices recommended in the IEPs (see Answer ¶¶ 43-47).

clear that the March 2021 IEP was the IEP in place at the time the parents rejected the public school proposal and made their decision to unilaterally place the student at iBrain—demonstrated by the parents' June 2021 letter notifying the district of their intention to unilaterally place the student based on their disagreement with the March 2021 IEP and the particular public school site that the district had identified in March and May 2021 school location letters (Parent Ex. C; see Parent Ex. B at p. 7; Dist. Ex. 4 at pp. 9-10). When the August 2021 CSE convened, the student had already started attending iBrain for the 2021-22 school year. Thus, the March 2021 IEP was the operative program at the time the parents "decide[d] whether to make a unilateral placement . . . [and] [t]he appropriate inquiry is into the nature of the program actually offered" (R.E. 694 F.3d at 187-88).

However, reviewing the claims that remain at issue on appeal, the only surviving allegation regarding the appropriateness of the March 2021 IEP relates to the CSE's failure to recommend music therapy. The parents allege in their cross-appeal that the IHO should have found that the district's failure to recommend music therapy denied the student a FAPE. The district asserts that music therapy was not required to provide the student with a FAPE.

The iBrain school report relied upon by the March 2021 CSE recommended that the student receive two 60-minute sessions of music therapy on a push-in and pull-out basis (Dist. Ex. 13 at p. 38). According to the school report, the student had been receiving music therapy services during the 2020-21 school year (id. at p. 14). The report reflected that the student appeared to enjoy music and responded to various instruments and sounds (id.). The report further described a 60-minute session of music therapy as consisting of a hello song, "improvisational music" to support expression and relatedness, exploration of instruments, and a goodbye song, as well as time allotted for transitioning, transfers, preparing and setting up activities and equipment, rest breaks, demonstrations, repetition, and processing/response time (id.). According to the report, the student's received music therapy services to work on goals related to sensorimotor, cognition, and speech-language skills (id.). Annual goals recommended in the report indicated the student would use upper extremities to play an instrument, participate in interpersonal interactions by attending to the same instrument as the therapist, and increase expression and communication skills by playing an instrument or vocalizing to complete a phrase (id. at pp. 37-38). The director of special education at iBrain testified that music "accesse[d] a different pathway for processing information," which for the student was "not as impacted as his processing of language," thereby providing him "another way of receiving and responding to information" (Tr. p. 104).

While the March 2021 IEP did not include a recommendation for music therapy services (see Dist. Ex. 3 at pp. 48-49), a school district is not required to mirror the same services in its IEP that were privately obtained by parents in a private school (see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "'the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent'"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]). A review of the IEP as a whole reflects that the CSE addressed the goals underlying the recommendation for music therapy

services included in the iBrain school report through other related services rather than by replicating iBrain's music therapy approach.

Within the description of the student's present levels of performance and individual needs, the IEP acknowledged in several places that the student enjoyed and responded to music (see Dist. Ex. 3 at pp. 8-10, 13-15, 17, 24), included the description of the music therapy services almost verbatim from the iBrain school report, and reflected the underlying goals for the service identified in the report (compare Dist. Ex. 3 at pp. 13-14, 15, with Dist. Ex. 13 at pp. 14, 37-38). Here, while the IEP did not include a recommendation for music therapy goals or services specifically, the annual goals and the identified supports for the student's management needs included in the IEP targeted the cognitive (attending), communication (expression), and sensory motor (use of upper extremities) skills underlying iBrain's recommendation for music therapy (see Dist. Ex. 3 at pp. 26-47; see also Dist. Ex. 13 at pp. 14, 27-28). For example, the IEP included an annual goal to improve participation in play by meeting short-term objectives relating to motor activities that involved bilateral hand coordination (Dist. Ex. 3 at p. 30). An additional annual goal targeted the student's ability to reach for an object with each hand (id. at p. 32). With respect to attention and communication, the IEP included annual goals that indicated the student would increase his attention span by engaging in reading activities, develop his social skills and effectively work with adults, and increase his expressive language skills by requesting desired items and activities (id. at pp. 39-40, 42-43). As identified supports for the student's management needs, the IEP also indicated that the student's interests should be incorporated into his school day (id. at p. 26). In addition, the IEP included music as part of "age appropriate activities and social opportunities" to which the student should be exposed, along with games and videos (id.).

Accordingly, review of the March 2021 IEP reveals that it provided related services—albeit different than those the parents may have preferred—and supports to address the student's needs that iBrain addressed through music therapy (see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 592-93 [S.D.N.Y. 2013] [finding that, although the evidence may have supported that music therapy was beneficial for the student, it did not support the conclusion that the student could not receive a FAPE without it]).

C. August 2021 CSE Process and IEP

As noted above, the March 2021 IEP was in place when the parents made their decision to unilaterally place the student. There is authority that indicates that a later-developed IEP is operative; however, those cases tend to arise when a school district attempts to defend a later-developed IEP that includes additional recommendations in line with a course of action discussed with the parents at an earlier date (see M.P. v. Carmel Cent. Sch. Dist., 2016 WL 379765, at *5 [S.D.N.Y. Jan. 29, 2016] [concluding that a later-developed IEP was the operative IEP as the operative IEP is the IEP the district chooses to defend at the end of the resolution period]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013] [finding the later developed IEP to be "the operative IEP" where it "incorporate[d] recommended classes, accommodations, and goals that were presented to Parent prior to her unilateral decision to enroll" the student in a private school]; see also M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *25 n.3 [S.D.N.Y. Sept. 28, 2018] [finding the later developed IEP to be operative even though it was developed during the first weeks of school]). Here, the parents largely rely on the alleged procedural shortcomings of the August 2021 CSE

meeting—and, in particular, the district's alleged failure to secure the parents' and the iBrain staff's attendance at the August 2021 CSE meeting—to argue that the district denied the student a FAPE; however, to the extent that the parents participated in the development of the March 2021 IEP and the substantive recommendations thereof were largely carried over, the procedural concerns with the August IEP, without more, are insufficient to invalidate the district's offer of FAPE when the parents already followed through with their decision to unilaterally place the student for the 2021-22 school year beginning in July 2021.

In any event for the benefit of a reviewing court, if any, the parents' main allegations pertaining to the August 2021 CSE meeting and resultant IEP are addressed in the alternative. In their cross-appeal, the parents argue that, as with the March 2021 IEP, the August 2021 IEP was inadequate due to the lack of a recommendation for music therapy services. However, as the August 2021 IEP includes no modifications to the services or underlying goals relevant to music therapy, no further discussion of this issue beyond the above is warranted, and the conclusion remains that the lack of music therapy in the IEP does not support a finding that the district denied the student a FAPE. The remaining issues specific to the August 2021 CSE and IEP relate to the parents' opportunity to participate in the August 2021 CSE meeting and the change to the student's eligibility classification and removal of assistive technology services from the student's programming.

1. Parent Participation

The district argues that the IHO erred to the extent she determined the parents were denied meaningful participation in the IEP process because they did not attend the August 2021 IEP meeting, as the district complied with CSE meeting notice requirements, the parents conceded receipt of the meeting notice in their junk email folder, and the CSE called the parents on the day of the meeting.

The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate, 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; 8 NYCRR 200.5[d]). 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]).

Here, the circumstances of this matter are unlike a case in which the CSE has not yet conducted a required annual review or reevaluation meeting, has not yet completed an IEP, or in which the parent has not already participated in the development of the IEP (see, e.g., Application of a Student with a Disability, Appeal No. 19-076). Thus, even assuming that the district took insufficient steps to ensure that the parents attended the August 2021 CSE meeting, this failure

does not rise to the level of a denial of a FAPE given that the CSE was a reconvene and the parents actively participated in the March 2021 CSE meeting at which the majority of the program recommendations for the student were formulated.[8] As to the changes made to the student's program at the August 2021 CSE meeting, none resulted in a denial of a FAPE to the student. The parents do not challenge the recommendation for the assistive technology device, and the remaining changes—to the eligibility classification and assistive technology services—did not affect the appropriateness of the overall program as discussed below.

2. Disability Classification

The district asserts the IHO erred in finding that the student's classification in the August 2021 IEP as a student with multiple disabilities was not proper. The parents contend that the IHO did not err in ordering the district to change the student's disability classification back to TBI as was reflected in the March 2021 IEP.

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 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

[8] Given this determination, it is unnecessary to review whether the district took sufficient steps to ensure the parents' attendance at the CSE meeting or consider the district's additional evidence, attached to its request for review, which it submits in support of its position that it complied with meeting notice requirements.

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 local education agency (LEA) and State reporting requirements than it is to determine an appropriate IEP for the individual student (see Carrillo v. Carranza, 2021 WL 4137663, at *15 [S.D.N.Y. Sept. 10, 2021] [finding that a where a student "plainly suffer[ed] from multiple disabilities . . . . [w]hether one or more of those disabilities was caused by 'an external physical force or by certain medical conditions,'" as specified in the regulatory definition of TBI, was unproven, "beside the point," and "irrelevant"]).[9]

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

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

(34 CFR 300.641[d]). The LEA must, in turn, annually submit this information to the SEA though its special education data collection, analysis, and reporting (SEDCAR) system (see, e.g., "Verification Report 3: School Age Students by Disability and Race/Ethnicity," available at https://www.p12.nysed.gov/sedcar/forms/vr/2021/

In June 2020, the CSE changed the student's classification from multiple disabilities to TBI (Parent Ex. N at pp. 2-3; IHO Ex. 3 at p. 7). At the March 2021 IEP meeting, the CSE kept the student's classification as TBI (Dist. Ex. 3 at p. 1). Then, in August 2021, when the CSE reconvened, the student's classification was changed back to multiple disabilities (Parents Ex. N at pp. 1-3). Specifically, the August 2021 IEP noted that the student's "educational disability appears to be congenital or related to prenatal and postnatal complications—e.g., complications of prematurity—rather than acquired by an external injury to the brain" (id. at p. 2). It was also noted in the August 2021 IEP that multiple disabilities was the student's initial classification for many years prior to the June 2020 IEP in which it was changed to TBI (id. at p. 3). Therefore, the CSE team, "after careful consideration" agreed that multiple disabilities was the most appropriate classification for the student (id.).

A brief overview of the student from the present levels of performance included in the March 2021 and August 2021 IEPs shows that the student has demonstrated severe impairments in cognition, language, memory, attention, reasoning, abstract thinking, judgement, problem-solving, sensory, perceptual, and motor abilities, psycho-social behavior, physical functions, information processing, and speech (see generally Parent Ex. N at pp. 1-27; Dist. Ex. 3 at pp. 1-26). The student's primary diagnoses, as reflected on the March 2021 and August 2021 IEPs are major neurodevelopmental disorder due to multiply etiologies, cerebral palsy, seizures, intellectual developmental disorder, moderate, and social pragmatic communication disorder (Parent Ex. N at p. 2; Dist. Ex. 3 at p. 1). The August 2021 IEP also reflected that, as part of a December 2020 social history update, the parents reported that the student had received diagnoses of cerebral palsy, seizure disorder, hydrocephalus, global developmental delay, dysphagia, retinopathy of prematurity, asthma, and was legally blind, had a shunt and a G-tube, was non-verbal, and used a wheelchair (Parent Ex. N at p. 2; Dist. Ex. 3 at p. 1; see Dist. Ex. 9 at p. 2). The district does not contend that the student's needs changed in any significant way between the March 2021 and August 2021 CSE meetings.

The district school psychologist testified that, at the March CSE meeting, the committee could have easily found the student eligible for special education as a student with multiple disabilities, as he had challenges in both academic and physical realms (Tr. p. 36). Further, when asked on redirect, the district school psychologist stated that the 13 disability classifications enumerated in State regulation did not affect how a student was educated (id. at 44).[10]

Here, the lack of parental attendance at the August 2021 CSE meeting seems to have colored the IHO's analysis of this issue and dominates that parents' argument related to the issue (see IHO Decision at p. 13; Answer & Cr.-Appeal ¶ 31). However, putting aside the procedural question of the parents' nonattendance, there is no reason to find that the disability classification

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. 46,550 [Aug. 14, 2006]).

[10] See 8 NYCRR 200.1(zz)(1)-(13).

issue in this case is anything other than "a red herring" as one district court recently described it (Carrillo, 2021 WL 4137663, at *15). The August 2021 CSE's determination to change this student's disability category did not impact the goals, accommodations, or special education services in the student's IEP and, therefore, had no impact on the district's offer of a FAPE to the student for the 2021-22 school year. Accordingly, I decline to find that the district denied the student a FAPE on this ground even if the classification change was improperly made without the parents participation.

As a final point, even if the IHO had correctly found that the August 2021 CSE should not have changed the student's eligibility classification to multiple disabilities, to the extent her decision could be read as ordering the CSE to change the student's classification back to TBI on a going-forward basis, this was error. That is, an award of prospective relief in the form of IEP amendments, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). Rather than ordering the CSE to change the student's IEP, the IHO could have ordered the CSE to reconvene and consider the eligibility classification. Accordingly, the IHO's order in this regard is reversed.

3. Assistive Technology Services

In their cross-appeal, the parents allege that the IHO erred by not finding that the August 2021 CSE's removal of assistive technology services from the student's programming denied the student a FAPE.[11] In its answer to the parents' cross-appeal, the district largely focuses on the timing of the August 2021 CSE meeting after the parents had already unilaterally placed the student but does not engage with the parents' allegations about the appropriateness of the August 2021 CSE's actions.

Federal and State regulations describe an assistive technology device as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability" and assistive technology service as "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device" (34 CFR 300.5, 300.6; 8 NYCRR 200.1[e]; [f]). Furthermore, State regulations consider assistive technology

[11] The parents also argue that the district's failure to provide the student with an assistive technology device at iBrain denied the student a FAPE (Answer & Cr.-Appeal ¶ 48). However, as the parents rejected the March 2021 IEP and placed the student at iBrain for the 2021-22 school year, the district was under no obligation to implement any aspect of the recommendations contained in the public school IEP at the parents' private unilateral placement. Once it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

services to be a related service defined as a "developmental, corrective, and other supportive services as are required to assist a student with a disability" (8 NYCRR 200.1[qq]).[12]

During the 2020-21 school year the student had been receiving assistive technology services at iBrain and those services consisted of a trialing of "a variety of low-tech, mid-tech, and high-tech options" (Dist. Ex. 3 at p. 13; see Dist. Ex. 13 at p. 13). The March 2021 IEP indicated that assistive technology sessions would "continue to target finding a consistent access point for [the student] in order to better participate in classroom and therapeutic activities throughout his day" (Dist. Ex. 3 at p. 13). Within the management needs section, the March 2021 IEP indicated that the student should have access to a tablet / computer-based communications tool, an AAC, and an instructional laptop with resources and software about literacy and math skills (see id. at pp. 26-27). In addition, the IEP recommended switches for the student (using both voice output and with computer interface) (id. at p. 49). The March 2021 CSE recommended one 60-minute session per week of assistive technology services (id.). The district school psychologist testified that the assistive technology services were important because a lot of options were being trialed at that time (Tr. pp. 40-41).

However, an assistive technology evaluation was completed on June 10, 2021 with participation from the parents, the student, and staff from iBrain (Dist. Ex. 5 at pp. 1, 3, 23). The evaluators recommended that the student be provided with "a dynamic display speech-generating device (e.g., tablet with Snap + Core First and Bluetooth amplification, Blue2 Switch, and an adjustable table clamp mount . . .)" (id. at p. 18). During the evaluation, the student was "observed to access the device successfully" (id.). The evaluators recommended that the parents and school-based team implement the use of the device throughout the day across all settings (id at p. 19).

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[12] Examples of the term assistive technology service include:

> (1) the evaluation of the needs of a student with a disability, including a functional evaluation of the student in the student's customary environment;
>
> (2) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by students with disabilities;
>
> (3) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
>
> (4) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
>
> (5) training or technical assistance for a student with a disability or, if appropriate, that student's family; and
>
> (6) training or other technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that student

(8 NYCRR 200.1[f]).

The evaluation report indicated that the "[p]arents and staff expressed an understanding of the device and how to implement it" (id.). The evaluation report did not include a recommendation for assistive technology services.

Consistent with the evaluation, the August 2021 CSE added the tablet with the support of dynamic display speech generating device to the IEP for use on a full-time basis in the school, home, and related environments, as well as the proposed annual goals, but did not continue assistive technology services on the IEP (compare Parent Ex. N at pp. 28, 48-49, 52, with Dist. Ex. 3 at p. 49).

There is no evidence in the hearing record regarding the August 2021 CSE's explicitly describing rationale for removing the assistive technology services from the student's programming.[13] However, based on the foregoing evidence, the original rationale for the assistive technology services in the March 2021 IEP—so that the student could trial various devices—no longer supported the services since an appropriate device had been identified. Absent further explanation as to the student's need for the services, the evidence in the hearing record does not support a finding that the lack of the services on the August 2021 IEP denied the student a FAPE.[14] I will underscore one more time that the problems raised by the parent with the August 2021 CSE, while revealing a less than exemplary process, nevertheless occurred after they participated in the March 2021 CSE process and had decided to part ways with the district's programing.

D. Assigned Public School Site

The crux of the dispute between the parties, and the issue upon which the IHO rested to determine that the district denied the student a FAPE, relates to the capacity of the assigned public school site to implement the student's IEP(s).

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" (id. at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [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

[13] In its post-hearing brief, the district appeared to argue that removal of the student's assistive technology services may have been a clerical error (IHO Ex. IV at p. 13); however, there is no documentary or testimonial evidence that supports this characterization.

[14] In their answer and cross-appeal, the parents allude to a description in the June 2021 neuropsychological evaluation that assistive technology "should include parent instruction on how to use [assistive technology] within the home and greater community" (Parent Ex. J at p. 8; Answer & Cr.-Appeal ¶ 44). Even if this evaluation had been before the CSE, it would not have dictated that assistive technology services be included on the IEP since the June 2021 assistive technology evaluation reflected that the parents understood the recommended device and how to implement it (Dist. Ex. 5 at p. 19) and, in any event, the August 2021 IEP recommended parent counseling and training services (Parent Ex. N at p. 51).

York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).[15] However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. 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 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., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F. 659 Fed. App'x at 5). 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 M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; 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]).

1. Related Services

The parents contend in their cross-appeal that the IHO should have found it "mathematically impossible" to provide the services on the March and August 2021 IEPs at the district's assigned public school site and that testimony that the services could be implemented within the school day should be given no weight. The district argues that the district's placement was capable of providing related services in the frequency and duration required by the IEP.

Initially, the school psychologist testified as to whether the school the student was assigned to attend would be able to provide all the related services in 60 minute intervals as provided in the student's IEP, stating that related services for students, such as the student here, "[we]re largely supposed to be push-in services into the classroom" as "we want him to reach his academic goals"

[15] 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]).

and that "many of the related services [we]re sort of a prerequisite to [the student] being able to reach those academic goals" (Tr. pp. 44-45). The school psychologist further testified that "many of the providers co-treat" however, even if "everything had to be pull-out, because for some reason [the student] was dysregulated" he could still complete his related services "within a regular school day" (Tr. p. 45).

The assistant principal of the assigned school testified as to the school's ability to implement the program recommended in the March 2021 IEP (Tr. pp. 54-76). With respect to the parents' specific assertions, the assistant principal initially testified that the length of the school day was "six hours and fifty minutes" running "from 8 o'clock to 2:50" p.m. each day and that there were nine periods in the school day each running 45 minutes (including the lunch period), except that the last period of the day was "dismissal" the length of which was 30 minutes (Tr. pp. 58-59, 63-64). The assistant principal testified that to accommodate the frequency and duration of related services within the school day, "the services were recommended to be provided both in a separate location or within the classroom. So services could have been provided in the classroom so as not to have the student miss an extended amount of instructional time in the classroom" (Tr. p. 59). As to how the student's 60-minute services would fit in a period that was 45 minutes long, the assistant principal testified that:

> students typically . . . have a self-contained class that they're in with a self-contained teacher. So they're typically with that teacher in that classroom for four periods out of the day.
>
> So they may be in the same classroom for a block longer than 45 minutes. After the 45 minutes . . . of ELA the teacher might transition into a math lesson, but the student would still be in the same location.
>
> And if the provider was there providing occupational therapy, or physical therapy, they could continue to support the student in that classroom for 15 minutes into the next instructional period

(Tr. pp. 65-66).

The assistant principal further testified that, outside of the four periods of the day that the students were in the classroom, the rest of the day was spent in "cluster classes" including adaptive physical education, visual arts, performing arts, culinary arts, and health class, and that all of those cluster teachers had their own classroom in separate locations from their typical classroom (Tr. pp. 66).

As the student's recommended program consisted of up to 18 hours of related services per week—including four hours per week of OT, five hours per week of PT, five hours per week of speech-language, three hours of vision education services, and one hour of assistive technology services—the hearing record supports the district's position that 15 hours of the student's recommended program could be accommodated in the manner described by the assistant principal for fitting 60 minute related service sessions into four 45-minute classroom periods (three hours per day for five days per week). The remaining three hours per week of the student's related services could be accommodated within the 11.25 hours of time spent in "cluster classes" for the

week, albeit perhaps not exactly in the same manner as described by the assistant principal. However, I do not find that it would be mathematically impossible to do so.[16] The proposed IEP itself aligns with the school psychologist's statements that the related services providers could work with the student while he was attending his special education classes (Dist. Ex. 3 at p. 48-49), and I decline to find that the student was denied a FAPE on this basis.

2. Functional Grouping

The district asserts that the IHO erred in finding that the district's recommended placement was inappropriate, as the IHO's reasoning was based on impermissible "retrospective functional grouping evidence," including speculation that students with autism "might pose a danger to the [s]tudent based on their physical and social differences and management needs" and speculation regarding "supposed differences in the academic and instructional programs both would require."

Regarding the 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]).[17] State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students must be considered to ensure beneficial growth for each student, although neither may be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary, so long as the modifications, adaptations, and other resources provided to students do not "consistently detract from the opportunities of other students" in the class to benefit from instruction (8 NYCRR 200.6[a][3][iv]). SROs have often referred to grouping in the areas of academic or educational achievement, social

[16] With respect to the school psychologist's testimony that, even if the student's services had to be pull-out, he could still complete his related services within a regular school day, I note that the March 2021 IEP provides for a special class of 35 periods per week and 18 hours per week of related services to be provided in the special education classroom or separate location, which could accommodate the student's program (Dist. Ex. 3 at pp. 48-49).

[17] 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.

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).

Here, the student never attended the assigned public school site, under the proposed IEP and he was unilaterally placed at iBrain for the 2021-22 school year. Therefore, any claim that the student would have been inappropriately grouped is impermissibly speculative. Indeed, deficiencies in functional grouping when a student has not yet attended the proposed classroom at issue tend to be speculative in nature (J.C. v New York City Dep't of Educ., 643 Fed.App'x 31, 33 [2d Cir. March 16, 2016] [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP"], quoting R.E., 694 F.3d at 195). Various district courts have followed this precedent post M.O. (G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016] [same]; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at *4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"], citing M.O., 793 F.3d at 245).

Although the student was not placed at the assigned public school site due to the parents' unilateral placement at iBrain and I find that the parents' argument regarding functional grouping is impermissibly speculative, I will the review evidence in the hearing record regarding functional grouping for the sake of thoroughness. In this case, the evidence in the hearing record does not support the IHO's conclusion that the school was incapable of appropriately grouping the student.

The assistant principal testified as to the school's ability to implement the program recommended in the March 2021 IEP with respect to class grouping (Tr. pp. 54-76). Initially, the assistant principal testified with respect to whether there was a 6:1+1 class available for the student in the 2021-22 school year, stating that there were "at the start of this school year, 13 total classes, and five of those would have been in the student's age range" (Tr. p. 58). With respect to the parents' specific assertions, regarding the other students in the class being classified with autism and ambulatory, the assistant principal testified that the "majority of the students in [their] 6:1:1 program [we]re students on the autism spectrum" with a "range of cognitive impairments, and speech impairments, and other behavioral considerations," some of whom were assigned a behavioral management paraprofessional, and the "majority" of whom were ambulatory (Tr. pp. 61-63).

In finding that the student would not have been appropriately grouped, the IHO relied heavily on the opinion of the neuropsychologist who conducted the June 2021 neuropsychological IEE (IHO Decision at pp. 12-13).[18] The neuropsychologist testified that "a traditional 6:1:1 class

[18] On appeal, the district argues that IHO erred in admitting the June 2021 neuropsychological IEE into evidence as the parents failed to provide it to the district prior to the CSE meetings at issue; however, the IHO only relied upon the June 2021 neuropsychological IEE, as well as the testimony of the neuropsychologist, in making her determination that the assigned public school site was not appropriate because of safety concerns related to grouping the student in a class with students with autism (IHO Decision at pp. 7, 12-13). The IHO did not err in

within a D75 setting, can be really appropriate for a lot of kids, particularly if they're on the autism spectrum" but opined that the student's "academic learning, cognitive profile [wa]s vastly different from that of the children" who she had observed in district 6:1+1 special classes (Tr. pp. 134-35). The neuropsychologist further testified that "children who are on the autism spectrum require a different type of instruction than children who have brain injuries" (Tr. pp. 150-51). Additionally, as noted by the IHO, the neuropsychologist testified as to her "concerns for [the student's] physical safety within that setting, given that he has very little gross motor control" (Tr. p. 135; see IHO Decision at p. 12). She indicated that "there could be potential dangers within a traditional 6:1[+1] class in a D75, because children who have autism, and particularly those who are severely autistic, tend to have stereotyped movements[, and] . . . . oftentimes have maladaptive or disruptive behaviors in the classroom (Tr. p. 135). Therefore, she indicated there was "a safety issue there because [the student] d[id]n't have the sort of safety awareness[,] . . . torso control[,] . . . spatial or. . . processing speed to be able to get himself out of a situation if he was in some physical risk" (Tr. pp. 135-36).

However, as noted by the district, the neuropsychologist also testified that she had not visited the proposed classroom or school site in this case and had no specific information regarding the students in the proposed class, nor had she visited iBrain (see Tr. pp. 136, 137-38, 139). Nor was there any testimony by the assistant principal that the proposed school site would be unable to implement the student's IEP based on safety concerns or instructional needs (Tr. pp. 54-76).

While the parents are free to choose private schooling like iBrain in which all of the children in the classroom are very similar, overall this is not a case in which the evidence shows that the public school site is "factually incapable" of implementing the IEP. The evidence does not support the IHO's finding that the assigned school was not an appropriate placement and would not have been able to implement the March 2021 IEP. The parents objections to the classification of other students with autism or the fact that the other students were ambulatory are subjective and speculative and do not support a conclusion that the school lacked the capacity to implement the student's IEP, and therefore constitute an impermissible attempt to enact a parental veto over the district's assignment of the student to a public school site. Additionally, the testimony of the neuropsychologist who conducted the June 2021 neuropsychological evaluation as to the appropriateness of grouping the student in a class with students with autism was entirely speculative as the neuropsychologist had no specific information regarding the students in the proposed class (see Tr. pp. 136-138). To the contrary I find that the testimony of the neuropsychologist is rife with generalizations and unsupported hypotheticals about other classrooms, different years, and safety concerns, and stereotypes of students with different disability classifications, which are particularly unconvincing given that the neuropsychologist did not conduct an observation of the proposed classroom or of this student (Tr. pp. 134- 139). Accordingly, based on the above, the district presented sufficient evidence to show that the assigned school would have been capable of implementing the March 2021 IEP with an appropriate functional grouping.

admitting the evaluation for the purposes of considering the expert opinion of the neuropsychologist; however, the opinion should have been accorded little probative weight as discussed herein.

VII. Conclusion

Having determined that the evidence in the hearing record does not support the IHO's determination that the district failed to offer the student a FAPE for the 2021-22 school year, the necessary inquiry is at an end.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated February 9, 2022, is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 21-22 school year, ordered funding of the unilateral placement at iBrain and transportation from Sisters for the 2021-22 school year, and found that the student's IEP should reflect an eligibility classification of TBI.[19]

Dated: **Albany, New York**
April 20, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER

[19] Nothing in this decision shall relieve the district of its funding obligations that arose pursuant to the student's pendency placement through the date of this decision.