



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-055

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

Appearances:

Brain Injury Rights Group, attorneys for petitioner, by Sarah Khan, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied in part her request to be reimbursed for her son's tuition costs at the International Institute for the Brain (iBrain) for the 2020-21 and 2021-22 school years. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for those school years. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student in this matter has been the subject of prior impartial hearings, as well as appeals to the Office of State Review, related to the 2018-19 school year (see Application of a Student with a Disability, Appeal No. 19-132; Application of the Dep't of Educ., Appeal No. 19-019; Application of a Student with a Disability, Appeal No. 18-116). The student first began attending iBrain during the 2018-19 school year (Parent Ex. X at p. 1). Turning to the time period at issue in this proceeding, the student did not attend school for much of the 2020-21 school year over concerns with the Covid-19 pandemic and was enrolled in iBrain for approximately 15 days;

however, the student returned to iBrain on or about June 8, 2021 and continued to attend iBrain during the 2021-22 school year (Tr. pp. 253-54, 258-59; Parent Exs. D at p. 1; X at pp. 2-4).

The student is described as a "friendly, engaging . . . young man" who has previously received diagnoses of cerebral palsy, a seizure disorder, scoliosis, and a "CVI" [cortical visual impairment]; he receives all nutrition, hydration, and medications via a G-tube (Parent Exs. C at pp. 1, 6; D at pp. 1, 3). The student is nonverbal and non-ambulatory and communicates through a variety of communication modes such as vocalizing, body movements, assistive technology, and eye gazing (Parent Ex. D at p. 4). The student exhibits severe impairments in his cognition, language, vision, memory, attention, reasoning, abstract thinking, judgment, problem solving, and information processing and speech (id. at p. 1).

On May 15, 2020, iBrain completed a private school IEP for the student for the 2020-21 school year (Parent Ex. N at p. 1). The private iBrain IEP included recommendations that the student receive a 12-month program in a nonpublic school and instruction in a 6:1+1 special class with the support of a full-time 1:1 paraprofessional and a full-time 1:1 nurse (id. at pp. 36-40). iBrain indicated that the student presented with very significant academic, communicative, and social/interpersonal needs due to the extensive nature of his brain-based disability and thus required the intense support and continual adult supervision that placement in a 6:1+1 special class provided (id. at pp. 2). The iBrain IEP also recommended that the student be provided with assistive technology including, among other things, a Tobii Dynavox eye gaze device (id. at p. 19). With regard to related services, iBrain recommended five 60-minute sessions per week of individual occupational therapy (OT), five 60-minute sessions per week of individual physical therapy (PT), five 60-minute sessions per week of individual speech-language therapy, two 60-minute sessions per week of individual vision education services, one 60-minute session per month of individual parent counseling and training, and one 60-minute session per week of individual indirect assistive technology services, as well as other supports for school personnel on behalf of the student (id. at pp. 38-40). iBrain also recommended transportation services to include bussing with supervision provided by a nurse, air conditioning, a lift bus/wheelchair ramp, a wheelchair (regular size), and limited travel time of 60 minutes (id. at p. 37).

On May 19, 2020, a CSE convened for the student's annual review and developed a proposed public school IEP for the student with a projected implementation date of June 3, 2020 (Parent Ex. Q at pp. 1, 36). The May 2020 CSE found the student eligible for special education and related services as a student with a traumatic brain injury and recommended a 12-month program in a 6:1+1 special class in a specialized school (id. at pp. 1, 30-33, 36-39). The CSE also recommended that the student be provided with an assistive technology dynamic display speech generating device (SGD) among other assistive technology devices, two 60-minute sessions per week of individual assistive technology support, five 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, two 60-minute sessions per week of individual vision education services, one 60-minute session per month of parent counseling and training, five 60-minute sessions per week of individual speech-language therapy, along with the support of a full-time 1:1 health paraprofessional for activities of daily living, feeding, and safety, a full-time 1:1 school nurse, and supports for school personnel on behalf of the student (id. at pp. 1, 30-33). The CSE also found that the student needed specialized transportation which included transportation from the closest safe curb location to school, 1:1 nursing services, a lift bus, air conditioning, and limited travel time (id. at pp. 35-36).

In a prior written notice and school location letter, both dated July 7, 2020, the district identified the evaluative information relied on by the May 2020 CSE, described the proposed actions of the CSE, and informed the parent of the public school site the student had been assigned to attend (Dist. Ex. 9 at pp. 1-14).

On June 8, 2021, the parent signed an enrollment contract with iBrain for the student's attendance from June 7, 2021 to June 25, 2021 (Parent Ex. R at pp. 1, 7). The student began to attend iBrain on June 8, 2021 and continued to attend iBrain during the 2021-22 school year (Tr. pp. 253-54, 258-59; Parent Exs. D at p. 1; X at pp. 2-4).

On June 18, 2021, iBrain completed a private school IEP for the student for the 2021-22 school year (Parent Ex. C at p. 1). The June 2021 iBrain IEP included recommendations that the student receive a 12-month program in a nonpublic school and placement in a 6:1+1 special class with the support of a full-time 1:1 paraprofessional and a full-time 1:1 nurse (*id.* at pp. 41). The iBrain IEP stated that the student required specialized settings with no more than 6 students with a 1:1 paraprofessional to support him in remaining engaged in a task (*id.* at p. 2). The iBrain IEP noted that the student did his best academic work when shielded from visual distractions and in a modified environment with reduced noise (*id.*). It further noted that he required constant praise, frequent redirection, and short breaks when appropriate in order to attend to academic tasks (*id.*). According to the iBrain IEP, with these supports in place, the student was able to make progress in all areas of academic achievement (*id.*). With regard to assistive technology, the iBrain IEP noted that although the student had a Tobii Dynavox eye gaze device it was not "currently functional for communication use" and that the student used a "Big Mack" switch with voice output (*id.* at p. 5). With regard to related services, iBrain recommended that the student receive five 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, four 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of group speech-language therapy, two 60-minute sessions per week of individual vision education services, two 60-minute sessions per week of individual music therapy, one 60-minute session per month of individual parent counseling and training, one 60-minute session per week of individual indirect assistive technology services, as well as other supports for school personnel on behalf of the student (*id.* at pp. 43-44). iBrain also recommended transportation services to include bussing with the supervision of a nurse, air conditioning, a lift bus/wheelchair ramp, a wheelchair (regular size), and limited travel time of 60 minutes (*id.* at p. 43).

On June 21, 2021, a CSE convened for the student's annual review and to develop an IEP for the student with a projected implementation date of July 5, 2021 (Parent Ex. D at pp. 1, 38). The June 2021 CSE found the student eligible for special education and related services as a student with a traumatic brain injury and recommended a 12-month program in a 12:1+(3:1) special class in a specialized school (*id.* at pp. 1, 31-34).¹ The CSE also recommended that the student be provided with an assistive technology dynamic display speech generating device (SGD)

¹ The hearing record included several manifestations of the continuum of service description of the staff to student ratio: "the maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students. In addition to the teacher, the staff/student ratio shall be one staff person to three students. The additional staff may be teachers, supplementary school personnel and/or related service providers" (*see* 8NYCRR 200.6[h][4][iii]; IHO Decision at p. 7; Req. for Rev. at ¶ 15). For purposes of consistency in this decision, the notation "12:1+(3:1)" will be used.

among other assistive technology devices, 60 minutes of individual assistive technology support per week, five 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, two 60-minute sessions per week of individual vision education services, one 60-minute session per month of group parent counseling and training, four 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of group speech language therapy, a full-time 1:1 health paraprofessional for activities of daily living, feeding, and safety, a full-time 1:1 school nurse, and supports for school personnel on behalf of the student (*id.* at pp. 1, 31-34). The CSE also found that the student needed specialized transportation which included transportation from the closest safe curb location to school, 1:1 nursing services, a lift bus, air conditioning, and limited travel time (*id.* at pp. 37).

In a letter dated June 23, 2021, the parent provided the district with notice of her rejection of the district proposed program and placement, as well as her intent to unilaterally place the student at iBrain for the 2021-22 "extended school year" and to seek public funding for that placement (Parent Ex. E at pp. 1-2). The letter indicated in part that the parent "remain[ed] willing and ready to entertain an appropriate [district] program and an appropriate public or approved non-public school placement that c[ould] provide the required intensive academic and related services program [the student] require[d]" (*id.* at p. 2).

In a prior written notice and school location letter, both dated June 24, 2021, the district identified the evaluative information relied on by the June 2021 CSE, described the proposed actions of the CSE, and informed the parent of the public school site the student had been assigned to attend (Parent Ex. F at pp. 1-6; Dist. Ex. 13 at pp. 1-14). The assigned public school site was the same as for the prior school year (compare Parent Ex. F at p. 5; Dist. Ex. 13 at p. 7, with Dist. Ex. 9 at p. 7).

On June 30, 2021, the parent signed an enrollment contract providing for the student to enroll at iBrain for the period from July 7, 2021 to June 24, 2022 (Parent Ex. G at pp. 1, 7).

A. Due Process Complaint Notice

In a due process complaint notice, dated July 6, 2021, the parent alleged that the district procedurally and substantively denied the student a free appropriate public education (FAPE) based on the May 2020 and June 2021 IEPs (Parent Ex. A at pp. 1, 3).² Initially, the parent requested the student be allowed to remain at iBrain at public expense pursuant to pendency and, accordingly, the parent requested direct payment for the costs of school tuition, related services, and special transportation services and support to and from iBrain (*id.* at p. 2).

The parent alleged that during the 2020-21 and 2021-22 school years the district failed to provide a program and placement that was uniquely tailored to meet the student's needs (Parent Ex. A at p. 3). Specifically, the parent asserted that the district's IEPs failed to adequately address the student's management needs and contained inappropriate goals and inadequate transition and vocational goals (*id.* at pp. 3-4). Next, the parent asserted that the district's IEPs failed to mandate

² On July 26, 2021, subsequent to the filing of the due process complaint notice, the parent executed a transportation services agreement which was to be effective from July, 1, 2021 to June 30, 2022 (Parent Ex. K at pp. 1, 5).

an appropriate class size, contending first that the student required a "6:1:1" class in order to address his highly intensive management needs (*id.* at p. 4). The parent argued that the "proposed 12:1:3+1 [wa]s insufficient" because it was "too large a ratio" for safety and did not "offer the 1:1 direct instruction" the student required and further argued that a district 6:1+1 special class placement would also have been inappropriate because such placements were for "students who [we]re on the Autism spectrum" (*id.* at pp. 4-5).

The parent also argued that the district failed to recommend sufficient related services, identifying deficiencies with respect to PT, OT, speech-language therapy, vision education services, assistive technology, music therapy, and parent counseling and training (Parent Ex. A at pp. 5-6). The parent's concerns with related services were focused on a claim that the district could not implement the number of sessions per week that the student required, or implement the sessions for their duration, without an extended school day, as was provided at iBrain, because the district did not recommend an extended school day (*id.*). The parent expressed additional related services concerns, specifically that the district failed to recommend certain assistive technology devices the student required, failed to recommend any music therapy, and failed to offer parent counseling on an individual basis along with the group sessions (*id.*).

The parent also asserted that the district had failed to recommend appropriate special transportation, because the student required "oxygen and a ventilator" to address his asthma, failed to recommend an appropriate public school placement, because the recommended school was not fully accessible and would not have provided a suitable functional grouping, and failed to conduct mandated evaluations because the district did not conduct evaluations "across all relevant related service and psycho-social domains" (Parent Ex. A at pp. 7-8).

Lastly, the parent contended that the unilateral placement of the student at iBrain was appropriate and there were no equitable considerations which would bar reimbursement (Parent Ex. A at p. 8). For relief, the parent requested direct payment of the cost of tuition at iBrain for the 2020-21 and 2021-22 extended school years as well as the cost of related services, nurse services, and a 1:1 paraprofessional (*id.* at pp. 8-9). The parent also requested prospective funding of special transportation with specific accommodations, a reconvene of the CSE, an order compelling the district to provide assistive technology devices and services, 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

The parties and the IHO convened on August 19, 2021 to determine the student's pendency placement (Tr. pp. 1-6). Following the August 19, 2021 appearance, the IHO issued an interim decision on pendency, which determined that the parties did not dispute that a May 23, 2021 IHO decision in a prior proceeding regarding the 2019-20 school year governed the student's pendency placement in this proceeding (Interim IHO Decision at p. 3; *see* Parent Ex. B). The IHO directed the district to fund the student's attendance, related services, and special transportation at iBrain from the date the due process complaint notice was filed until a final resolution of the matter is reached (Interim IHO Decision at p. 5).

An impartial hearing on the merits commenced on September 15, 2021, and concluded on February 10, 2022, after five days of proceedings (Tr. pp. 7-264).

In a final decision dated March 27, 2022, the IHO found that although the student's May 2020 and June 2021 IEPs could have provided the student with a FAPE as drafted, the district failed to establish how it could have implemented the "extensive list of related services on a push-in/pull-out basis and the required hours of academic instruction" during the course of a normal school day as opposed to an extended school day as was provided at the unilateral placement at iBrain (IHO Decision at pp. 6-15, 24).

More specifically, the IHO reviewed the contents of the May 2020 and June 2021 IEPs and determined that, as a whole, including the goals, management needs, related services, paraprofessional, assistive technology, the support of school personnel, and the recommended transitional and vocational needs proposed a "thoughtful, reasonable basis upon which the student could derive an educational benefit for each of the school years" (IHO Decision at pp. 6-8). The IHO also addressed specific concerns attested to by iBrain's director of special education with respect to the 6:1+1 and 12:1+(3:1) special class sizes and found those concerns unpersuasive (id. at pp. 7-10). Similarly, the IHO addressed specific arguments raised with respect to annual goals and vocational/transitional goals and found the goals to be adequate (id. at pp. 10-11). The IHO also addressed the parent's claim that the IEPs failed to offer a FAPE by omitting music therapy, finding that there was no expert testimony in the hearing record showing that music therapy was "clinically necessary" for the student and further that some of the goals in the IEPs proposed by iBrain's music therapist were intended to develop skills that were also addressed by other disciplines and goals (id. at pp. 11-12). The IHO also rejected the parent's contention that the district failed to conduct sufficient evaluations, finding that the evaluative information produced by iBrain providers was sufficient to develop a program for the student and that neither any teachers nor the parent had requested additional evaluations or pointed to a suspected disability that had not been evaluated (id. at pp. 12-13).

Nonetheless, the IHO found that the district had failed to demonstrate that the particular public school the student was assigned to attend for both the 2020-21 and 2021-22 school years could implement the IEPs (IHO Decision at pp. 13-15). The IHO agreed with the district that some of the parent's claims concerning the assigned school were speculative, and the IHO noted that he "continued to be unpersuaded by [iBrain's director of special education's] inexpert testimony" (id. at p. 13). However, the IHO found that despite the district assistant principal's "repeated assertions that the school could have fully implemented the IEPs, the lack of an extended school day at [the assigned school] [wa]s critical for this student, and that actual enrollment at [the assigned school] would have placed this student into a chaotic nightmare" for either of the school years at issue (id.).

The IHO found that the district did not account for the "required amount of academic instruction" that it must legally provide, citing Education Law § 175.5, rendering the district's claim that it could accommodate all of the academics and related services mandates "mathematically impossible" (IHO Decision at pp. 13-15). The IHO reasoned that in order to implement the mandated related services they would all need to be "push-in" to the classroom, which, according to the IHO, would not comport with the IEPs' recommendation for use of a "push-in/pull-out model" (id. at p. 14). The IHO also held that the district had failed to explain how it would implement "these 60-minute services" in a regular school day which employed 45-minute periods (id.). Lastly on this point, the IHO found that the hearing record "paint[ed] a picture" of the program recommended for the 2021-22 school year of a classroom with 12 students, 11 adults

and a "myriad of push-in related service providers all falling all over each other" and that this "potential bedlam" would render the push-in services "virtually useless" and impede an educational benefit for the student (id. at p. 15).

With respect to the unilateral placement of the student at iBrain, the IHO concluded that the record established that the placement was appropriate for the student, was individualized to meet his needs, and that the student made progress while attending the school (IHO Decision at pp. 15-20).

With respect to equitable considerations, the IHO determined that although the district noted that the parent had not provided the requisite 10-day notice of her intent to unilaterally place the student at iBrain, the district nonetheless had "sufficient time" to address the parent's concerns (IHO Decision at pp. 20-22). The IHO "agree[d] with the district's concerns that the costs the parent is seeking for iBrain for the 2021-22 school year are excessive, on an equitable basis" (id. at p. 22). The IHO stated that with respect to the "base tuition" of \$163,000 charged by iBrain, the IHO could not "justify, absent more specificity provided by the parent" such an amount in light of the fact that it covered only a portion of the student's program and services, and determined that as an "exercise of my discretion" he would "reduce, as a matter of equity, the base tuition to be awarded by \$30,000" (id. at pp. 22-23).

Turning to the relief requested by the parent, the IHO ordered full payment for the "base" and "supplemental" tuition and costs at iBrain for the "two weeks of enrollment" during the 2020-21 school year (IHO Decision at pp. 23-25). With respect to the parent's request for payment of the private transportation services for the 2021-22 school year, the IHO denied the request, finding that the parent had failed to put evidence in the hearing record about the student's need for the specific services, and instead ordered the district to provide transportation for the student between the student's home and iBrain "with appropriate accommodations in order for the student to be transported safely" (id. at pp. 22-25). The IHO denied the parent's request for "additional nursing fees" sought for nursing during school hours, noting that iBrain's base tuition included a school nurse and that he declined to order the payments "absent evidence by [the parent] that two sets of nurses are required" (id. at p. 23). The IHO ordered the district to "fund the costs of [assistive technology] devices and equipment" because they were not included in iBrain's direct or supplemental tuition (id. at pp. 23, 25). The IHO ordered a reduced portion of the 2021-22 base tuition, as set forth above, but ordered the full costs of the supplemental tuition, which covered related services (id. at pp. 22-25). Lastly, the IHO ordered the district to "offer an appropriate school location for the 2022-23 school year, either in a public school or a private school" (id. at pp. 23, 25).

Although the IHO issued a final decision the IHO nevertheless issued a "superseding" findings of fact and decision dated April 4, 2022 which included some additional reasoning for certain findings and specified that the district's order to provide special education transportation to the student with appropriate accommodations included the following accommodations: "transportation from the closest safe curb location to school, 1:1 nursing services, a lift bus, air conditioning, and limited travel time" (IHO Decision dated April 4, 2022 at pp. 23, 25).

IV. Appeal for State-Level Review

The parent appeals and asserts that although the IHO correctly determined that the student's IEPs could not be implemented at the public school the student was assigned to attend for the 2020-21 and 2021-22 school years, the IHO erred in failing to find additional grounds for determining that the May 2020 and June 2021 IEPs failed to offer a FAPE to the student.

More specifically, the parent alleges that the district did not conduct its own evaluations to support the decision to move the student from a 6:1+1 placement to a larger 12:1+(3:1) placement or for deciding not to recommend music therapy for the student. The parent further claims that the change to a 12:1+(3:1) placement in the June 2021 IEP was inappropriate because the student was able to make academic progress, so a "rehabilitation" setting was not required, the student would be too distracted in such a busy setting, the student would not receive a sufficient amount of 1:1 instruction in that setting, the student had "highly intensive management needs," and the student had previously not made progress in a 12:1+(3:1) placement. The parent also contends that the IEPs inappropriately failed to include music therapy or an annual goal for music therapy. The parent asserts that the IEPs should have recommended individual parent counseling and training in addition to group parent counseling and training. The parent also argues that the district failed to recommend adequate transportation accommodations because it did not recommend oxygen and a ventilator to address the student's medical needs despite knowing that the student had asthma and required oxygen and medications for it. The parent also contends that the IHO erred in failing to give sufficient weight to the testimony of iBrain's director of special education regarding the student's needs.

Moving on from the student's IEPs, the parent contends that the IHO correctly determined that the assigned school could not have implemented the student's IEPs without an extended school day, and correctly determined that iBrain was an appropriate unilateral placement for both the 2020-21 and 2021-22 school years.

However, the parent argues that upon fashioning relief, the IHO erred in reducing the funding of the base tuition at iBrain for the 2021-22 school year on equitable grounds, because the hearing record contained evidence of the amount of academic services, the extended school day, and the extended school year that iBrain provided justifying the full tuition, and the IHO had already determined that equitable considerations favored tuition funding. The parent also contends that the IHO erred in failing to order funding for the transportation services the parent had contracted for because the parent was obligated to pay for the services, and neither the IHO nor the district were a party to the contract. The parent asserts that the IHO also erred in failing to order funding for the student's 1:1 nursing services at iBrain because although there was a school nurse available to all students under the base tuition, the student in this proceeding required a 1:1 nurse both in school and during transportation.

For relief, the parent requests an order for full funding of the student's program at iBrain, including related services, nursing services, and transportation.

In an answer and cross-appeal, the district asserts that the IHO erred in finding that the district did not offer the student a FAPE during the 2020-21 and 2021-22 school years. At the outset, the district contends that the IHO correctly determined that the May 2020 and June 2021

IEPs recommended programs that offered the student a FAPE, because the CSE meetings were properly conducted, the CSEs relied on sufficient evaluative information, and the IEPs contained sufficient instruction, adequate annual goals, and sufficient related services to meet the student's individual special education needs. Regarding the parent's concerns with the change from a 6:1+1 to a 12:1+(3:1) special class setting in the June 2021 IEP, the district asserts that the hearing record contains evidence showing that the student's needs had changed while he was at home rather than attending school during most of the 2020-21 school year and the 12:1+(3:1) setting appropriately provided more intensive services to address those needs.

In its cross-appeal, the district contends that the IHO erred in finding that the public school the student was assigned to attend for the 2020-21 and 2021-22 school years could not have implemented the May 2020 and June 2021 IEPs. The district notes that the IHO recognized that many of the parent's claims concerning the assigned school were speculative and argues that the IHO should have found the argument that an extended school day would have been needed to implement all the services recommended in the student's IEPs to be speculative as well. Alternatively, the district alleges that the hearing record shows that the staff at the assigned school could have implemented the IEPs without an extended school day because teachers and providers can make individualized schedules for students and the student's related services could have been provided within the classroom during instruction, rendering the IHO's finding that it was "mathematically impossible" to fit all of the services into a standard school day error.

In the event that the IHO's finding of a denial of FAPE is upheld, and with respect to the relief ordered by the IHO, the district contends that the IHO had the discretion to reduce the amount of tuition funding at iBrain as a matter of equity. However, the district asserts that the IHO erred in ordering the district to fund assistive technology devices for the student because prospective funding of assistive technology devices amounts to compensatory education and the relief the parent is due for a denial of FAPE in a tuition reimbursement case is the payment for the unilateral placement, not compensatory education.

The district requests a dismissal of the parent's appeal and for its cross-appeal to be sustained by vacating the IHO decision.

In a reply and answer to the district's cross appeal, the parent requests that her appeal be sustained and the district's cross-appeal be dismissed. The parent reiterates her claims concerning the May 2020 and June 2021 IEPs as well as the contentions that the assigned school could not implement the IEPs. The parent also asserts that the district issued a "late" prior written notice and school location letter for the 2020-21 school year and, accordingly, did not provide the parent with reasonable notice of the student's placement. In addition, the parent raises further arguments concerning the evaluative information used by the CSEs and the June 2021 CSE's recommendation for a 12:1+(3:1) class placement. The parent contends that the CSE could have recommended an extended school day and erred in failing to do so. The parent also asserts that the district did not allow the parent to visit the assigned school, which itself denied a FAPE to the student. Next, the parent asserts that the IHO exercised appropriate discretion in ordering the district to provide the student with assistive technology devices and equipment despite the fact the iBrain had such devices available for the student. The parent reasserts that the IHO did not have a basis to reduce the amount of the awarded tuition funding because the district admitted no evidence of an appropriate rate for comparable services. Lastly the parent reiterates her contention that the IHO

erred in failing to order funding for the individual nursing services because the record supports a need for those services.

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]).³

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).

³ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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

VI. Discussion

A. Amended Decision—IHO's Retention of Jurisdiction

Prior to addressing the merits, it is necessary to first address the IHO's authority to issue an amended decision and the effect, if any, the issuance of the amended decision has on this appeal. As noted above, the IHO issued a second decision titled "Superseding Findings of Fact and Decision" dated April 4, 2022.

An IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of the Dep't of Educ., Appeal No. 17-009; Application of the Dep't of Educ., Appeal No. 16-065; Application of a Student with a Disability, Appeal No. 16-035; Application of the Dep't of Educ., Appeal No. 15-073; Application of a Student with a Disability, Appeal No. 15-026; Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also J.T. v. Dep't of Educ., 2014 WL 1213911, at *10 [D. Haw. Mar. 24, 2014]; Application of the Dep't of Educ., Appeal No. 08-041). Rather, the IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

In this instance, the IHO issued a final written decision on March 27, 2022, which ended his jurisdiction over the matter. The IHO erred by rendering an amended decision on April 4, 2022, which added to the rationale and substantively altered the relief awarded (compare April 4, 2022 IHO Decision at pp. 23, 25, with March 27, 2022 IHO Decision).

Allowing issuance of multiple final decisions with substantive changes would create confusion and throw the due process hearing system envisioned by Congress into disarray, resulting in multiple appeals from multiple final decisions.⁴ Accordingly, regardless of the IHO's intentions, the IHO's jurisdiction over this matter ended with the issuance of the March 27, 2022 decision and the IHO's subsequent April 4, 2022 decision is a nullity (see Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of a Student Suspected of Having a Disability, Appeal No. 10-021; Application of the Dep't of Educ., Appeal No. 08-041; Application of the Dep't of Educ., Appeal No. 08-024). Accordingly, the IHO's March 27, 2022 decision is the operative decision in this proceeding.

⁴ Additionally, if allowed, it would in essence result in an IHO unilaterally enlarging the timeline to appeal from an IHO decision.

Furthermore, the IHO's issuance of an amended decision has had no effect, as the parent correctly initiated the appeal within the regulatory timeline as measured from the March 27, 2022 IHO decision and there is no disagreement between the parties as to what relief was afforded to the parent by the IHO in the March 27, 2022 decision.

B. May 2020 and June 2021 IEPs

As set forth above, approximately two weeks of the 2020-21 school year are at issue in this matter, which was when the student began attending iBrain in June 2021 and during which the district's proposed offer of a FAPE was based upon the May 2020 IEP, and the period concluded when a new IEP was proposed by the CSE with a projected implementation date of July 5, 2021 (Tr. p. 253-54, 258-59; Parent Exs. Q at pp. 1, 36; R at pp. 1, 7). The May 2020 and June 2021 IEPs were quite similar, the primary difference being the recommended student-to-teacher ratio in a special class, and the IHO analyzed the two IEPs in a single discussion of the district's offer of FAPE to the student (see IHO Decision at pp. 6-13). The analysis below will proceed in a similar fashion, with a discussion of differences between the two IEPs where applicable.

The parent contends that the district failed to provide the student with a FAPE because it did not offer or provide a program that was uniquely tailored to meet the student's needs for the 2020-21 and 2021-22 school years. The parent argues that the student's management needs were highly intensive, and that the management needs must be developed in accordance with the factors identified in the areas of academic or educational achievement and the unique learning characteristics, social and physical development of the student. The parent stated that although the CSE gave a list of human, environmental, and material management needs, the proposed IEP would be unable to address all of the student's needs. In addition, the parent argues that the IEP contained goals that were not measurable, and it failed to meet the student's needs as well as it lacked goals in all areas including but not limited to the lack of music therapy goals. With respect to transition and vocational goals, the parent contends that the goals were inadequate. With respect to related services, the parent contends that the district could not implement the therapies as recommended by licensed therapists.

The evidence shows that in this case, with respect to the 2020-21 school year, the parent did not enroll the student in iBrain until June 8, 2021 due to her concerns for his health during Covid-19; thus the student did not attend any other school for the 2020-21 school year prior to enrolling in iBrain (Tr. p. 253; Parent Exs. D at p. 1; V at p. 2). The iBrain contract related to the 2020-21 school year indicated that the student started enrollment on June 7, 2021, and the 2020-21 school year ended on June 25, 2021 (Parent Ex. R at p. 1; see also Parent Ex. S at p. 1). The parent asserted that the student was denied a FAPE for the 2020-21 school year; an allegation which, for this student consisted of about 15 school days of tuition reimbursement.

There is no question that the IEP in effect when the parent unilaterally placed the student at iBrain was the May 2020 IEP (see Parent Ex. Q). Accordingly, the starting point of this analysis requires a review of the student's present levels of performance at the time of the May 2020 CSE meeting. According to the July 2020 prior written notice, the May 2020 CSE reviewed the following evaluative information as part of its decision-making process: a February 2019 psychological evaluation report, a May 2019 assistive technology procurement, the student's June 2019 IEP, a March 2020 social history update, May 2020 classroom observations, and multiple

reports of the student's progress from the May 2020 iBrain IEP (Dist. Ex. 9 at p. 2; see Parent Ex. N; Dist. Exs. 2-5).

The May 19, 2020 IEP described the student's functional performance as assessed by a variety of tools including the Dynamic AAC Goals Grid (DAAG-2), the Communication Function Classification System (CFCS), the Pediatric Evaluation of Disability Inventory (PEDI), a Feeding and Swallowing Evaluation checklist (Swigert, 2010), the Gross Motor Function Measure (GMFM-88), and the Vineland Adaptive Behavior Scales – Third Edition (Vineland 3) (Parent Ex. Q at pp 1-17).

With regard to academic achievement, functional performance and learning characteristics, the IEP indicated that the student was non-verbal and non-ambulatory (Parent Ex. Q at p. 3). He communicated in a variety of different ways including looking at symbols and through the use of AAC devices (id.). According to the IEP, the student was an eager participant in class activities and liked to learn and show people what he was able to do (id. at p. 4). The IEP noted that the student's instructional/functional level for reading was a prekindergarten level (id. at p. 1) and in terms of literacy, the student was working on his listening skills (id. at p. 4). The IEP stated that the student was making progress toward his literacy IEP goal and was able to answer key explicit comprehension questions with an average of 50% accuracy (id.). The student required practice answering implicit questions, identifying the key idea or concept of a text, and expressing his opinion (id.). The IEP indicated that the student had been working on identifying pictures of words of family members, familiar staff, and commonly used items and he was motivated by this task (id.). The student liked story time and answered yes/no questions by moving his head left to right and right to left and smiling to respond "yes" (id. at p. 5). In terms of math, the IEP stated that the student's instructional/functional level was at a prekindergarten level (id. at p. 1) and noted that with verbal prompts, tangible visual and/or auditory cues, and/or hand over hand assistance the student developed number, letter, shape and color recognition skills (id. at p. 4). The student played building games and started working on his understanding of currency, although his teacher had not yet seen progress in this area (id. at p. 5). The IEP indicated that for academic tasks the student followed directions and responded to questions using eye gaze, gesture, switches and communication devices (id. at p. 4). With regard to the student's participation in the school environment, the IEP stated that the student required a high amount of adult support (id.). According to the IEP, it was challenging for the student to do academic tasks in a large group, and he performed best in a modified environment with reduced noise and movement (id. at p. 4). The student also responded well to positive feedback and incorporation of motivating activities, such as music, in order to remain engaged during academic tasks (id.).

The IEP indicated that the student had made gains in many areas of academic achievement and that he was able to recognize familiar objects, people, and places and showed anticipation of regularly occurring events in everyday care (Parent Ex. Q at p. 4). The student was able to participate in simple games (id.). He was also able to use his hands and eyes in coordination, explore with his hands, and make a choice between two objects (id. at p. 5). The student could express his needs with the use of a sound communication device (id.).

The May 2020 IEP indicated that the student received individual speech-language therapy for five 60-minute sessions per week (Parent Ex. Q at p. 5). The student's primary modes of communication included facial expressions, body language, turning toward or away from a person

speaking or audio stimuli, and using a small "jelly" switch connected to a "Big Mack" switch with voice output (id.). According to the IEP the student was able to activate the jelly switch with the upper portion of either hand or wrist or with the left side of his head for a variety of communicative functions including greeting/closure, requesting rejecting, directing action, commenting, and answering simple "wh" questions (id.).⁵ The IEP indicated that when provided with partner assisted scanning, the student was able to make consistent selections, given 2-4 options, via activation of his switch, facial expressions and vocalizations (id.). The student demonstrated an understanding of core words and phrases during familiar activities and exhibited an interest in social interactions with adults, although he required additional cues and support to take additional turns during a conversation or when commenting (id.). The IEP noted that the student's participation and performance during speech-language therapy sessions was highly dependent on his level of arousal, fatigue, and interest, as well as his overall state of well-being (id. at p. 7). Methods employed to keep the student alert included frequent breaks, sensory stimulation and co-treatment sessions with occupational therapy (id.).

The IEP indicated that the student was on level 3 of the CFCS, meaning he was an effective sender and receiver of communication with familiar partners (Parent Ex. Q at p. 6). He was able to communicate a "small range of messages and topics to familiar people" including his wants and needs and comments about things happening in the present but required assistance with unfamiliar people/topics and environments (id.). Based on the DAGG-2 the student was functioning at the "Emergent Transitional" level and was able to respond to common gestures, show understanding of the use of common objects, and "may be" starting to follow simple directions with familiar routines and activities (id.). The student also demonstrated scattered skills within the "Context Dependent" level including understanding photographs or picture symbols representing objects, common actions, people or situations, and understanding and following general conversations (id.). The IEP indicated that the student was in possession of a Tobii Dynavox Compass dynamic device with eye gaze and scanning programming; however, did not attend to the device and therefore it was not used during therapy sessions (id.).

Turning to the student's oral motor and feeding skills, the May 2020 IEP indicated that the student exhibited a habitual open mouth posture and a high, narrow palate with misaligned but sufficient dentition (Parent Ex. Q at p. 7). As a result, the student had poor secretion management in which there was anterior pooling and spilling of secretions that required frequent suctioning (id.). The IEP noted that the student was able to tolerate oral motor massages to increase awareness, coordination, and mobility of his oral motor muscles to aid in secretion management but had difficulty following directions to produce the appropriate movements to strengthen and coordinate for secretion management (id. at pp. 7-8). With respect to feeding, the IEP stated that the student received all nutrition, hydration, and medications via g-tube (id.).

Turning to the student's social development, the May 2020 IEP indicated that student was very popular and had a great sense of humor (Parent Ex. Q at pp. 9, 11). According to the IEP, the student appeared to be cognitively aware of his environment at individual and group sessions when he was expected to take turns giving responses about the weather and acknowledge the presence

⁵ In a different section, the IEP noted that due to the student's numerous orthopedic impairments his hands/wrists were not a reliable access point for switch activation and therefore the left side of his head was also used to activate switches (Parent Ex. Q at p. 7).

of his peers in the classroom (*id.* at p. 9). The IEP indicated that the student demonstrated enjoyment of an activity or person by facial expressions or vocalization (*id.*). He also demonstrated interest in stories read aloud or audio versions, an understanding that illustrations and print conveyed meaning, a growing interest in reading related activities such as arts and crafts, and discussions (*id.*). The student was able to follow rules when making a choice, following directions, or playing a game and was able to interact positively with others regardless of personal differences (*id.*). According to the IEP, the student had a good relationship with all school staff and enjoyed greeting everyone and often joked around with staff and peers (*id.*). The student enjoyed following the conversations of others by using his eyes to track speakers and enjoyed participating in school events and field trips (*id.*). As assessed by the DAGG-2 and PEDI, as well as clinical observation and team consultation, the student showed a clear preference for certain activities, objects and people and was starting to show an interest in social interactions (*id.* at p. 10). In addition, the student initiated conversations and social interaction with familiar partners given AAC set-up and the support of cues, benefitted from help to take additional turns in conversation, and answered routine questions appropriately with familiar partners (*id.*). The student also presented with skills related to comprehension of word meaning, comprehension of sentence complexity, functional use of communication, complexity of expressive communication, social interactive play with adults, and peer interactions but a majority of the student's skills in these areas were highly dependent on pre-planning and programming the student' AAC device (*id.*). The IEP stated that the student presented with limited to no skills in the areas of problem-resolution, self-information, time orientation, household chores, self-protection, and community function (*id.*).

With respect to vocational skills, the IEP indicated that the student practiced doing tasks in the school and around the classroom on an occasional basis (Parent Ex. Q at p. 10).

Turning to the student's physical development, the May 2020 IEP indicated that the student had asthma and took medication and used oxygen when needed (Parent Ex. Q at p. 11). The student also took medication to control seizures (*id.*). The student's neuro ophthalmologist recommended that he wear glasses, but the student would not (*id.*). The IEP stated that the student received occupational therapy fives per week for 60-minute sessions (*id.* at p. 15). According to the IEP, the student required maximal assist for the movement of his trunk and pelvis (*id.*). He was able to move his upper and lower extremities within minimal ranges of motion (*id.*). The IEP indicated that in supine the student was able to initiate a chin tuck but could not clear the back of his head off the mat, while in prone the student could extend his head without support and bear weight on his upper extremities (*id.*). The IEP noted that the student had bilateral contractions in his hands and hypertonicity in his elbows (*id.* at p. 12). The IEP described the student's typical occupational therapy session as beginning with bilateral upper extremity stretching, while out of his wheelchair lying supine and side-lying, to increase range of motion, strength, and functional endurance (*id.* at p. 11). As the student was highly prone to skin breakdown, a visual skin check was performed (*id.*). After stretching the student used his AAC to choose two to three activities to create a therapy schedule (*id.*). The IEP indicated that on a good day the student would require minimal to moderate verbal and tactile cueing to access his switch while on "bad" days the student would require maximal cueing with additional stimulation and arousal techniques to remain alert and engaged in the task (*id.*). The IEP indicated that the student's rate of progress had been inconsistent due to his inconsistent arousal level (*id.*).

According to the IEP the student was dependent for all dressing needs including donning and doffing socks and shoes, and all fastener management (Parent Ex. Q at p. 12). He required the assistance of a 1:1 aide due to limited range of motion, motor control, visual motor skills and strength (id.). The student participated in dressing tasks by choosing preferred clothing using his assistive technology device or by visual gaze (id.). With regard to toileting the IEP indicated that the student was dependent for changing and hygiene management and with regard to grooming the IEP indicated that the student was dependent for toothbrushing, hair brushing and hand washing (id.). The student required two-person transfers (id. at p. 15). In terms of fine motor skills, the IEP indicated that the student was unable to independently grasp or manipulate everyday school objects and required the assistance of a 1:1 paraprofessional to access the educational environment (id.). The student could hold a switch down for 2-3 seconds with maximum prompting and release the switch in 5-10 seconds upon command (id.).

Next, the IEP indicated that the student received physical therapy for five 60-minute sessions per week (Parent Ex. Q at p. 13). The IEP noted that the student required maximal assistance to move between positions including rolling, transitioning from prone or supine to sitting, and transfers from wheelchair to bench with two-person total assist (id. at p. 15). The student was able to rotate his cervical spine further to the left than right (id.). The student was able to maintain short sitting with minimal assistance at his pelvis and sometimes trunk and could maintain his head in midline with minimal trunk support (id.). The IEP indicated that the student required standing in the supine stander daily with bilateral AFOs and knee immobilizers to improve circulation, bone density, and participation (id.). The IEP stated that the student had made progress toward his annual PT goals and was able to ride a therapeutic tricycle and pedal one full revolution when motivated and engaged (id. at p. 13). The student was able to turn his head bilaterally to initiate rolling while lying on a mat (id.). According to the IEP, a typical PT session began with 10 minutes spent transitioning the student to the mat, passive stretching of bilateral lower extremities and donning AFOs to ready the student for therapy (Dist. Ex. 7 at p. 16). The student spent the next 20 minutes short sitting on a bench or bolster to work on trunk and head control while the therapist administered chest PT to allow for more upright posture and to help increase respiration (id.). The next 20 minutes were spent on functional activities to activate the student's core (id.). The final ten minutes were spent putting the student in a supine stander which he then used for one hour after his physical therapy session (id.). The IEP noted that environmental modifications needed to be made to ensure the student's safety throughout his physical therapy sessions, but also throughout the day (id.). These included, but were not limited to, adjusting chest and pelvic harnesses for appropriate fit and using knee immobilizers and AFOs as well as postural assessment to prevent injury (id.). According to the IEP, the student was motivated by his social nature to hang out with peers and friends on the mat (Dist. Ex. 7 at p. 16).

According to the May 2020 IEP, the student's mother reported that she had seen progress in the student's ability to tolerate physical therapy as well as to maintain attention and engage with teachers and related services providers for longer periods of time (Parent Ex. Q at p. 8). The parent further reported that through intensive therapy at iBrain the student was being transitioned to a gait trainer to help build up his muscle tone in order for him to develop the ability to walk in the future (id. at p. 8). The student's mother informed the May 2020 CSE that the student still aspired (id.).

The May 2020 IEP indicated that the student was legally blind due to a cortical visual impairment and received vision education services for five 60-minute sessions per week (Parent

Ex. Q at p. 16). According to the IEP, the student made progress toward goals that targeted his ability to establish and sustain visual fixation with greater consistency (id. at p. 14). The May 2020 IEP indicated that the student could visually fixate on a presented item for five minutes and showed a visual field preference toward his central visual field, at eye level (id. at pp. 16). The student showed a latent response to stimuli presented in his far left and far right peripheral fields (id. at p. 14). The student recognized familiar faces and made eye contact (id. at p. 16). He attended to objects and people who were moving rather than stationary (id. at p. 14). The IEP noted that the student could shift his gaze between two pictures and could track horizontally, moving both eyes in unison, independent of head movement (id.). The student attended best within near space (four feet) and performed well when visual information was minimized with visual details in materials simplified and cluttered background material masked (id.). The student's visual performance was best when he was working 1:1 without background distractions (id.). The IEP stated that when alert the student attended to social dynamics in the classroom and preferred to look toward his 1:1 aide and nurse and would usually follow their actions (id.). The student's challenges included limited visual curiosity toward objects and academic materials (id.).

With regard to assistive technology services, the May 2020 IEP indicated that the student received one 60-minute session per week (Parent Ex. Q at p. 14). At the time the IEP was developed the student was using a Tobii Dynavox in conjunction with a switch mounted above his left wrist and a switch next to his head, along with auto-scanning for his communication needs (id.). However, the IEP also indicated that the student's device was outdated and no longer provided updates or supports for the software the student used; this resulted in "glitches" that frustrated the student (id.). The student's strengths included his ability to perform two-switch scanning when alert and motivated, while his needs included that he required moderate to maximum cueing to perform tasks and also required updated equipment and software to access the curriculum consistently throughout his day (id. at p. 15).

The May 2020 IEP indicated that the student was approved for a 1:1 nurse (Parent Ex. Q at p. 16). The May 2020 CSE recommended the following resources to address the student's management needs: a 1:1 paraprofessional; repetitive additional processing time; repetition of verbal clues with physical clues to increase comprehension; overall support of verbal, visual, and tactile cues; aided language stimulation; partner assisted scanning to provide choices to for activities and communication; verbal cues, praise and sufficient motivation to remain engaged and interested in activity; one-on-one instruction using direct instructional model; highly structured classroom or corner room with less stimulus from visual and auditory distractions; direct instruction, multisensory supports, sensory breaks during instruction, and repeated directions; a quiet and non-distracting environment; rest breaks every 20 minutes due to fatigue during physical activity; speech generating dynamic display device communications tool; Jelly Bean "twist"; string switch; yes/no switches; access to AAC; incorporate student interested into school day in order to maximize interest and make skills relevant to student's future; instruction with resources and software about literacy and math skills; educational applications and sites; Big Mack switch and Jelly switch positioned on left side of head or upper portion of left hand/wrist; mount for static access point; AFOs to be worn during the day to prevent deformity and contracture; and standing program one hour daily to maintain range of motion in lower extremities, increase bone density and improve bowel and bladder function (id. at p. 17).

With regard to special factors, the May 2020 IEP indicated that the student needed a particular device or service to address his communication needs, that he needed an assistive technology device or service and that the device was recommended for use in the student's home (Parent Ex. Q at p. 18). The IEP included post-secondary goals related the student's use of his communication device in the community, work within a supported work environment that included interacting with people, and development of ADL skills – especially with communication (*id.*). The IEP indicated that the student would be assessed using New York State Alternative Assessment, more specifically Dynamic Learning Maps (DLM) and teacher observation, or, if he was unable to access DLM, a data folio would be created to assess his skills (*id.* at pp. 19, 34).

The May 2020 IEP included measurable goals and corresponding objectives/benchmarks related to increasing reading readiness skills with respect to comprehension and developing letter recognition skills; recognizing, identifying, and comparing two dimensional shapes; developing a basic awareness of self as an individual, within the context of family, and within the context of community; establishing and maintaining visual fixation on large brightly colored objects with movement properties; visually locating to illuminated objects in all four visual quadrants; increasing receptive language skills in order to identify core language and interact functionally with items/people in his environment; increasing expressive language skills in order to request/reject, create novel comments, and answer/ask questions; ambulating 25 feet using the least restrictive device and maximum assistance; sitting on a bench with minimal assistance at his trunk while using his assistive technology device for 30 minutes; increasing participation in leisure activities; increasing participation in self-care activities; increasing participation in academic and classroom activities; increasing functional math skills related to money; and increasing independence and proficiency with switch use; (Parent Ex. Q at pp. 19-26; 29-30). The IEP also included an annual goal related to parent counseling and training and two annual goals related to the duties of the student's paraprofessional (Parent Ex. Q at pp. 26-28).

For the 12-month 2020-21 school year the CSE recommended that student attend a 6:1+1 special class and receive related services of five 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, five 60-minute sessions per week of individual speech-language therapy, two 60-minute sessions per week of individual vision education services, full-time 1:1 school nurse services, and one 60-minute session per week of parent counseling and training (Parent Ex. Q at p. 31). The CSE also recommended that the student be provided with the support of a full time 1:1 paraprofessional for health, ADLs, feeding and safety (*id.*). With respect to assistive technology devices and services, the CSE recommended that the student have access to a dynamic display speech generating device, switches, switch interface, and position mount throughout the school day, and receive two 60-minute sessions per week of individual assistive technology support (*id.* at pp. 31-32). In addition, in terms of supports for school personnel on behalf of the student the CSE recommended two-person transfer training, training for vision adaptations and functioning, seizure safety training, and training for assistive technology use throughout the day (*id.* at p. 32).

The May 2020 IEP also included a coordinated set of transition activities (Parent Ex. Q at pp. 33-34). The IEP indicated that the student was not able to participate in a regular classroom or general education classroom environment for non-academic tasks due to his severe physical and cognitive impairments; however, he was able to participate in trips to the community given appropriate supports from the school and its staff (*id.* at p. 35). The IEP included the following

special transportation accommodations/services: transportation from the closest safe curb location to school, adult supervision in the form of 1:1 nursing services, a lift bus, air conditioning, and limited travel time (id. at p. 35). The IEP indicated that the student had limited mobility, used a wheelchair and walking aids, and required an accessible school building (id. at p. 38).

The IEP stated that the parent accepted the CSE recommended "class size" but rejected the "D75" placement as the student had been at iBrain for a long time and she did not know how he would react to a change in program because it had been "so hard to get him to where he is now" (Parent Ex. Q at p. 38). According to the IEP the parent indicated that starting in a new environment would not be favorable to the student's progress and she was afraid he would regress (id.). The parent noted that she did not feel it was appropriate that the recommended assistive technology devices would not be procured if she chose to unilaterally place the student in a school (id.).⁶

Initially, as noted above, the student only attended school for 15 days at the end of the 2020-21 school year (see Parent Ex. R). Accordingly, it is not surprising that the private iBrain IEP completed in June 2021 contained a nearly identical description of the student in comparison to the private iBrain IEP completed in May 2020, which the May 2020 CSE had relied on (compare Parent Ex. C, with Parent Ex. U). The June 2021 prior written notice indicated that the June 2021 CSE relied on the same February 2019 psychological evaluation report and March 2020 social history update as was relied on by the May 2020 CSE (compare Dist. Ex. 13 at p. 2, with Dist. Ex. 9 at p. 2); the June 2021 IEP noted that the social history was updated at the meeting (Parent Ex. D at p. 1). In addition, the June 2021 CSE relied on multiple reports of the student's progress as set forth in the June 2021 iBrain IEP (Dist. Ex. 13 at p. 2; see Parent Ex. U). Considering the similarity of the two iBrain IEPs, it is not surprising that, upon careful examination, the May 2020 IEP and June 2021 IEPs were also very similar except where brief updates from iBrain staff were included in the June 2021 IEP (Parent Ex. D at pp. 1-2, 5, 7-9, 11, 17). An additional difference noted between the district IEPs is that the June 2021 IEP indicated that the student would receive one 60-minute group session of speech-language therapy per week in addition to four 60-minute sessions of individual speech-language therapy, whereas the May 2020 IEP indicated that the student would receive five 60-minute sessions of individual speech-language therapy per week (compare Parent Ex. D at p. 32, with Parent Ex. Q at p. 31). When compared with the district's May 2020 IEP, the significant difference in the district's June 2021 IEP was the recommendation for a 12:1+(3:1) special class placement, an issue which will be addressed separately below (compare Parent Ex. D at p. 32, with Parent Ex. Q at p. 31). As further discussed below the public and private IEPs developed by the CSE and iBrain respectively were alike in many ways, and parties' disputes focus on the areas of music therapy as a related service and music therapy goals; iBrain's recommendation that the student should receive an extended school day, and the district June 2021 CSE recommendation for placement in a 12:1+(3:1) special class rather than the 6:1+1 special class recommended in the iBrain IEP for the 2021-22 school year (compare Parent Ex. N, with Parent Ex. Q; and compare Parent Ex. C, with Parent Ex. D).

⁶ The parent did not agree with the district's assertion that an AT device would not be provided if she chose to unilaterally place the student in a different school (Parent Ex. V at p. 2).

Review of the evidence in the hearing record supports the IHO's finding that the district's May 2020 and June 2021 IEPs provided the student a FAPE for the 2020-21 and 2021-22 school years (see IHO Decision).⁷ Further, the IHO found that in viewing the district's IEPs as a whole—including goals, management needs, related services, paraprofessional services, assistive technology, the support of school personnel, the recommended transitional and vocational needs—that they were a thoughtful, reasonable, and viable basis upon which the student would have derived an educational benefit for each of the school years (IHO Decision at pp. 6, 8). In light of the discussion in greater detail below, I find no reason, upon careful examination of the evidence regarding the May 2020 and June 2021 IEPs to disturb these findings.

1. Sufficiency of Evaluative Information

With respect to the sufficiency of evaluations conducted, the parent alleges that the June 2021 CSE did not conduct any formal evaluations of the student prior to recommending a change from placement in a 6:1+1 special class to placement in a 12:1+(3:1) special class and relied on the evaluative information supplied by iBrain, which the parent alleges only supported a determination that the student required placement in a 6:1+1 special class. The IHO "reject[ed] the [p]arent's contention that the [d]istrict inappropriately failed to conduct additional evaluations or that it made its IEP recommendations based on insufficient evaluative data" (IHO Decision at pp. 12-13). As discussed below, the hearing record does not support disturbing the IHO's findings that both the May 2020 CSE and the June 2021 CSE considered the available appropriate evaluative materials for this student (IHO Decision at p. 13).

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

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]).

Additionally, any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR

⁷ The IHO ultimately went on to find that the district denied the student a FAPE because, although the IEPs provided a FAPE, the IEPs could not be implemented at the assigned specialized school for the 2020-21 or 2021-22 school years.

300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

Although the parent's argument on this point may be better cast as a claim that the evaluative information available to the June 2021 CSE did not support its recommendation for a 12:1+(3:1) classroom placement, prior to reaching the adequacy of the recommended class placement, a brief review of the sufficiency of the evaluative information available to the June 2021 CSE is warranted.

According to the June 2021 IEP, the CSE considered the previous IEP (May 2020), an assistive technology evaluation, a social history which was updated at the meeting, a psychoeducational evaluation, and teacher and related service reports (Parent Ex. D at pp. 1, 9; see Parent Ex. Q). The June 2021 IEP listed assessments used to evaluate the student on June 2, 2021 including the DAAG-2, CFCS, and PEDI, along with the scores/results of these assessments (Parent Ex. D at pp. 1, 5, 6-7). In addition, the June 2021 IEP noted that the GMFM was updated in June 2021, the student's fine motor skills were assessed and updated with "MACS," and the student's feeding was assessed using a feeding and swallowing evaluation checklist (*id.* at pp. 2-4, 8). Results from a February 2019 psychoeducational evaluation, specifically the results from the student's performance on the Vineland-3, were included in the June 2021 IEP (*id.* at p. 4).

A June 24, 2021 prior written notice indicated that the evaluative information used in developing the June 2021 IEP included June 18, 2021 OT, PT, speech-language, teacher, vision education services, assistive technology, and music therapy reports, as well as the February 2019 psychoeducational evaluation report, and the March 2020 social history update (Parent Ex. F at p. 2). The June 18, 2021 OT, PT, speech-language, teacher, vision education services, assistive technology, and music therapy reports in the prior written notice is a reference to the reports of the student's progress included in the June 2021 iBrain IEP (see Parent Exs. C; F at p. 2).

Both the director of special education at iBrain and the district school psychologist testified that no additional evaluations were requested; the district school psychologist, who attended the student's May 2020 and June 2021 CSE meetings, stated that the CSE had all of the information necessary to formulate viable IEPs for both school years in that they had the iBrain provider reports and the prior year's IEP (Tr. pp. 107, 234-35; Parent Ex. W at p. 1; Dist. Ex. 14 at pp. 2-3). In preparation for the June 2021 CSE meeting, the district school psychologist noted that she reviewed the student's May 2020 IEP; a June 18, 2021 OT progress report; a June 18, 2021 PT progress report; the February 10, 2019 psychoeducational evaluation report; a June 18, 2021 speech-language progress report; a June 18, 2021 teacher report; a June 18, 2021 vision education services report; a June 18, 2021 music therapy report; the March 4, 2020 social history update, and a June 18, 2021 assistive technology report (Dist. Ex. 14 at p. 3). In addition, the school

psychologist testified that evaluations were not required in order to change a classroom size recommendation to a larger classroom size (Tr. pp. 114-15).

The parent's argument that the district never conducted its own evaluations to support its recommendation for a larger classroom for the student, a 12:1+(3:1) special class, for the 2021-22 school year is without merit. Implicit in the parents' argument is a presumption that a change in the ratio for a student's special class cannot be effectuated and placed on a student's IEP unless the student is also formally reevaluated. That presumption is not buoyed by federal or State law, especially when no one participating in the CSE process requested that the district conduct a formal reevaluation; however, I will nevertheless address the factual appropriateness of the recommendation for the 12:1+(3:1) special class placement in light of the student's then current circumstances below. As indicated above, in developing the May 2020 and June 2021 IEPs, the district considered sufficient evaluative information regarding the student, including evaluations, assessments, reports, and updated reports from iBrain staff in the student's areas of need. I find no evidence in the hearing record to reverse the IHO's finding that the June 2021 CSE considered sufficient evaluative material.

2. Management Needs

Specifically, the parent argues that the student's management needs were highly intensive, and that management needs must be developed in accordance with the factors identified in the areas of academic or educational achievement and the unique learning characteristics, social and physical development of the student and that although the CSE gave a list of human, environmental, and material management needs, the proposed IEP was unable to address all of the student's needs (Parent Ex. A at p. 4).⁸ Additionally, the parent alleged that the student's management need for individualized attention in an environment "devoid of distractions" could have not been met in a 12:1+(3:1) special class in a specialized school due to the class size being too large and it having too many distractions, which is addressed below (Req. for Rev. at ¶15).

Management needs are defined by State regulations as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic achievement, functional performance and learning characteristics, and social and physical development (8 NYCRR 200.1[ww][3][i][d]).

The parent's objections to the student's management needs relate more to the June 2021 CSE's recommendation for a 12:1+(3:1) special class and the lack of a recommendation for an extended school day, which will be discussed below. The parent does not identify, in her request for review, any specific environmental modifications or human or material resources that were omitted from the May 2020 or June 2021 IEPs. Nevertheless, review of the district's May 2020 and June 2021 IEPs show that they included many human, environmental and material resources that aligned with the student's management needs such as noting that in order to benefit from participation in an educational setting, the student required a 1:1 paraprofessional; repetitive

⁸ Here, the parent's argument is tethered to the notion that the district's list of management needs could not be implemented without an extended school day, which will be discussed below (Req. for Rev. at ¶ 15; Parent Ex. A at p. 4).

additional processing time; repetition of verbal cues with physical cues to increase comprehension; overall supportive verbal visual and tactile cues; aided language stimulation; and modeling of what was being demanded with repetition (Parent Exs. D at p. 15; Q at p. 17). The IEPs further indicated that the student required partner assisted scanning to provide choices for activities and communication; verbal cues, praise, and sufficient motivation to remain engaged and interested in an activity; one to one instruction using direct instructional models; and a highly structured classroom or corner room with less stimulus from visual and auditory distractions to address his management needs (*id.*). Additional resources required to address the student's physical development included rest breaks every 20 minutes due to fatigue during physical activity, AFOs to be worn during the day to prevent deformity and contracture, and a standing program one hour daily to maintain range of motion of lower extremities, increase bone density, and improve bowel and bladder function (*id.*). As indicated above, the resources/strategies identified in the May 2020 as well as June 2021 IEPs were sufficiently tailored to address the student's management needs and further were developed in accordance with the factors identified in the areas of academic or educational achievement, and the unique learning characteristics, social and physical development of the student (*id.*).

The IHO found that to meet the student's need for a high degree of individualized attention and intervention and in order for him to meet his social, academic, and physical needs throughout the school day, "the CSE recommended the management need that the student receive a one to one paraprofessional" (IHO Decision at p. 8). The IHO went on to note that the paraprofessional would aid the student's participation in the educational setting, assist with providing choices for activities, assist with communication, and help provide 1:1 instruction using a direct instructional model (*id.*). I find no reason or evidence in the hearing record to dispute the IHO's finding that the IEP strategies, goals, services and personnel addressed the student's management needs.

3. Annual Goals

Next, the parent argued that the proposed annual goals contained in the student's public school IEPs were inappropriate and failed to meet the student's needs; and that the IEP lacked "goals in all areas" (Parent Ex. A at p. 4). Upon review, I find no reason to overturn the IHO's finding that the May 2020 and June 2021 IEPs included annual goals that addressed the student's needs (IHO Decision at p. 8).

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (*see* 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; *see* 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The May 2020 and June 2021 IEPs contained targeted annual goals each with several short-term objectives to address the student's cognitive, academic, social and physical needs (Parent Exs. D at pp. 17-31; Q at pp. 19-30). As discussed above, the May 2020 and June 2021 IEPs included

several annual goals and their associated short-term objectives that targeted the student's reading comprehension readiness skills, upper-case letter recognition of his first name, pre-academic skills such as two-dimensional shape identification, and the development of self as an individual, within the context of family as well as within the context of community (Parent Exs. D at pp. 21, 24; Q at pp. 19-21). In addition, the IEPs included annual goals that targeted the student's ability to establish and maintain visual fixation at near range, visually locate illuminated objects in a controlled setting, and increase receptive language skills in order to identify core language and interact functionally with items/people within his environment (Parent Exs. D at pp.18-19, 27; Q at pp. 21-23). The IEPs included other annual goals that targeted the student's use of expressive language skills across all contexts, ability to ambulate using the least restrictive device and maximum assistance towards more independent transitions around the classroom and building, and ability to sit on a bench with minimal assistance while using his assistive technology device to interact with others (Parent Exs. D at pp. 19, 27-29; Q at pp. 24-25).

Additionally, the IEPs included goals that targeted the student's need to increase his participation in leisure and self-care activities, as well as in academic and classroom activities (Parent Exs. D at pp. 22-23; Q at pp. 25-26). The IEPs also included a parent counseling and training goal related to highlighted the need of the student improving the student's functioning in the home, expanding the student's ability to carryover skills, and addressing his and his family's social needs (Parent Exs. D at p. 31; Q at pp. 26-27). Two annual goals highlighted the role of the student's paraprofessional and their need to consult with the special education teacher, therapists and school nurse regarding the student's academic and therapeutic needs, as well as his ADLs and safety (Parent Exs. D at p. 30; Q at pp. 27-29). The IEPs included additional annual goals that targeted the student's functional math skills as they relate to money, and his proficiency and independence with switch use (Parent Exs. D at p. 29; Q at pp. 29-30). Further, the IEPs detailed the criteria to be used for determining if a goal had been achieved, the method for measuring progress, and a schedule for when progress would be measured (Parent Exs. D at pp.17-31; Q at pp. 19-30). Each annual goal included between two and nine short-term instructional objectives and/or benchmarks (Parent Exs. D at pp.17-31; Q at pp. 19-30).

The IHO found that the annual goals as part of the May 2020 and June 2021 IEPs "proposed a thoughtful, reasonable and viable basis upon which the [s]tudent could derive an educational benefit for each of the school years" (IHO Decision at p. 8). Based on the above, the hearing record supports the IHO's findings; the annual goals and their short-term objectives in both IEPs addressed the student's special education needs.

4. 6:1+1 and 12:1+(3:1) Placements

Turning to parties' dispute over the 6:1+1 special class CSE recommendation for the 2020-21 school year, the parent alleged before the IHO that the district's 6:1+1 special class was for students who are on the autism spectrum and would not be appropriate for the student, who presented with severe impairments across multiple domains caused by his brain injury (Parent Ex. A at p. 5). Further, the parent contended that the student required a class that would allow him access to similar peers, appropriate support, and 1:1 intervention appropriate to address his unique needs (*id.*). The IHO found that he was unpersuaded by the objections of a parent witness, the director of special education at iBrain, to the proposed class sizes and program recommendations, and that it was undisputed that the witness had not raised such objections at either CSE meeting,

that she was not a school psychologist, that she was not a service provider, that she was not the student's educator, and that she was not a direct supervisor of any of his educators or related service providers (IHO Decision at p. 9; Tr. pp. 235-37; Parent Ex. W).

As noted above, the student attended school at iBrain for about 15 days in the 2020-21 school year, beginning June 8, 2021, while the May 2020 IEP with the recommendation for placement of the student in a 6:1+1 special class was the operative IEP (Tr. p. 253; Parent Exs. D at p. 1; R; Q at p. 31; X at p. 2).

The assistant principal at the assigned public school, testified that although the primary diagnosis or disability classification for a district 6:1+1 special class was autism, it was not limited to that; and other disability classifications were in those classrooms including students with multiple disabilities with a range of abilities (Tr. 141, 151). The assistant principal testified that some of the students in the school's 6:1+1 special classes had behavior paraprofessionals, they were not necessarily the students with autism (Tr. p. 160).

As stated above, the IHO was unpersuaded by the iBrain director's testimony. She testified that she had taught in a 6:1+1 special class in a specialized public school for a little bit over a year, had observed other 6:1+1 classes in the building where she had worked, and had spoken to at least a dozen parents who had recently visited a 6:1+1 recommended placement; however, she had not observed those placements herself (Tr. p. 204). The director went on to testify that the students in the 6:1+1 district settings fall on the pretty severe end of the autism spectrum which impacted their language and social skills, and many were completely nonverbal, with a range of challenging verbal and other behaviors that she thought would be particularly harmful for the student (Tr. pp. 207-08). The iBrain director expressed concern that if the student were in a class where a lot of language was being heard and modeled that was not functional (such as echolalia), it could really be confusing for the student because he would be exposed to a lot of inappropriate peer models for the skills that he was trying to develop (Tr. pp. 208-09).

The parent's arguments—asserting that "[g]rouping [the student] in a classroom with severely autistic students who present with behavioral issues endangers his safety and well-being" (Parent Mem. of Law at p. 18)—on this issue and the iBrain director's testimony noted above appear to relate more to the assigned school's ability to group the student with appropriate peers, rather than the adequacy of placement of the student in a 6:1+1 special class; however, the director's testimony is too speculative to present a challenge to how the student would have been grouped at the assigned school (see Application of a Student with A Disability, Appeal No. 22-025 ["parents objections to the classification of other students with autism or the fact that the other students were ambulatory [we]re subjective and speculative and d[id] not support a conclusion that the school lacked the capacity to implement the student's IEP"]). Additionally, the student never attended the assigned public school site under the May 2020 IEP, as he did not attend school during the 2020-21 school year until he was unilaterally placed at iBrain on June 8, 2021. 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).

The evidence supports that the student could be provided his IEP services in a 6:1+1 special class setting in conformity with State regulations. The maximum class size for special classes containing students whose management needs are determined to be highly intensive and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction (8 NYCRR § 200.6[h][4][ii][a]). The student's management needs can be described as highly intensive and he required the support of a 1:1 paraprofessional as well as other resources, detailed above, to address them, supports that were in the May 2020 IEP from the CSE (Parent Ex. Q at p. 17). In addition, the recommended class size in the May 2020 and June 2021 iBrain IEPs, as well as, the district's May 2020 IEP was a 6:1+1 special class (Parent Exs. C at p. 43; N at p. 38; Q at p. 31). There is nothing in the continuum of services indicating a student who required the 6:1+1 special class must be a student with autism, and it would be speculative to assume what the specific disabilities and student needs may be present in such a class prior to attending the recommended program in the assigned school (see 8 NYCRR § 200.6[h][4][ii][a]). The iBrain director's testimony to the contrary was a fixed and oversimplified view of the district's proposed programming and the IHO, as the finder of fact was free to accord it less weight. Accordingly, consistent with the IHO's determination on this issue, the May 2020 CSE's recommendation for a 6:1+1 class was appropriate to meet the student's unique learning needs and intensive management needs.

Turning next to the recommendation made by the June 2021 CSE for placement of the student in a 12:1+(3:1) special class, the parent argues that the IHO erred in stating that a 12:1+(3:1) special class involved a more intense student to teacher ratio and offered more intensified and individualized instruction than the previously recommended 6:1+1 special class placement, claiming that the IHO confused the 12:1+(3:1) class to mean there would be four teachers in the classroom (see Request for Review at pp. 5-6). Initially, there is no indication in the IHO's analysis that he confused the class ratio to mean that there would be four teachers in the recommended 12:1+(3:1) special class, therefore, I am not persuaded by this argument (IHO Decision at pp. 6-15). Similarly, the parent opined that there is no guarantee there will even be four additional personnel or related service providers in the room, depending on how many students are assigned to that classroom.⁹ This allegation, is, of course, consistent with the definition of such a classroom.

⁹ In a footnote, the parent asserts that State guidance indicates that "other students' therapists or paraprofessionals are counted within that '4'"; however, review of the State guidance document does not appear to support the parent's assertion (Request for Review at p. 6 n. 5; see "Continuum of Special Education Services for School-Age Students with Disabilities," at p. 16, Office of Special Educ. [Nov. 2013], available at <https://www.p12.nysed.gov/specialed/publications/policy/schoolagecontinuum-revNov13.htm>).

So long as the student's IEPs are otherwise appropriately tailored to address the student's individualized needs, this is a student who could be placed in either a 6:1+1 special class or a 12:1+4 or 12:1+(3:1) setting. Under State regulations, the maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students. In addition to the teacher, the staff/student ratio shall be one staff person to three students. The additional staff may be teachers, supplementary school personnel and/or related service providers (8NYCRR 200.6[h][4][iii]).

The parent alleged that the student's need for individualized attention in an environment "devoid of distractions" could have not been met in a 12:1+(3:1) special class due to the class size being too large and the class having too many distractions. The parent went on to allege that a 12:1+(3:1) special class placement, subjected the student to half as much time with his teacher as he would have had in a 6:1+1 special class and that it was considered the most restrictive environment because there were potentially more adults in the room but there was not a greater teacher to student ratio.¹⁰ Although the iBrain director testified that the student required 1:1 direct instruction with the teacher on a daily basis, she did not indicate the amount of time that he was receiving instruction from his teacher at iBrain compared to what he would have been receiving in the recommended 12:1+(3:1) special class; the student's schedule indicated that the student received 30 minutes per day of 1:1 academic instruction at iBrain (Tr. p. 215; Parent Ex. M).

A 12:1+(3:1) special class has an intensive level of adult support that was designed to address the student's needs. The assistant principal of the assigned public school as well as the district school psychologist testified that placement of the student in a 12:1+(3:1) special class was an appropriate placement (Tr. pp. 183-84, 215-16; Dist. Ex. 14 at p. 4).¹¹

The iBrain director testified that she disagreed with the June 2021 CSE recommendation for a 12:1+(3:1) because she felt that the large class size would be challenging for the student to be able to function at the level that he could and in order to make progress; that his visual impairment would make it challenging for him to understand what was going on around him; and that the more people in the classroom, the more "unpredictable" it would become (Tr. pp. 214-

¹⁰ To the extent the parent argues that the recommended 12:1+(3:1) special class was not the student's LRE as compared to a 6:1+1 special class, I note that class size and the level of adult support are, generally speaking, unrelated to the IDEA's LRE requirement (34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; R.B. v. New York Dep't of Educ., 603 Fed App'x 36, 40 [2d Cir. Mar. 19, 2015] [stating that "[t]he requirement that students be educated in the [LRE] applies to the type of classroom setting, not the level of additional support a student receives within a placement"]; see T.C. v. New York City Dep't of Educ., 2016 WL 1261137 at *13 [S.D.N.Y. Mar. 30, 2016] [stating that "[a] less restrictive environment refers to the ratio of special education to general education students in the same classroom, not the ratio of special education students to teachers"]). As neither party disputes that the student should not attend a general education class setting or otherwise participate in school programs with nondisabled students, there is no basis for a finding that the June 2021 CSE's recommendations ran afoul of LRE requirements.

¹¹ In her affidavit, the parent states that she did not agree with the recommended 12:1+(3:1) class size because the student was distractible and needed a small distraction-free environment to focus as well as that he used to be in this type of class setting and had not made progress at all in that kind of environment (Parent Ex. X at p. 2). The student's distractibility is discussed above, and there is no further information in the hearing record regarding when the student attended a 12:1+(3:1) or his performance there, and if it did occur, it does not appear to be temporally relevant to the school years in dispute in this case.

15). Further, she opined that in a 12:1+(3:1) special class there was more noise, more movement, and less individual time with the teacher, and that the student needed 1:1 direct instruction with the teacher on a daily basis so that he could work on materials that were specific to him and to target his skills without the interruption and confusion caused by other students (Tr. p. 215). The parent also claimed that the student's highly intensive management needs required a high degree of individualized attention and intervention that would only be addressed in a 6:1+1 setting and that the student required a smaller class ratio to remain focused to ensure all of his intensive management needs were met throughout the day.

It is no mistake that the adult-to-student ratio required in a 6:1+1 special class and a 12:1+(3:1) special class is similar; however, the 12:1+(3:1) special class ratio provides for variety in the type of school personnel working with the student and is reflective of the type of service providers this student needs and which may not be found in other special classes on the continuum designed to address the needs of a student with intensive management needs. Generally, while the student may exhibit highly intensive management needs and require a high or significant degree of individualized attention and intervention (see 8 NYCRR 200.6[h][4][ii][a]-[b]), the parent's strict adherence to the language in State regulation guiding 6:1+1 special class placements to the exclusion of other appropriate placement options is reductive and overlooks the evidence in the hearing record: that the student's highly intensive needs are due to his severe multiple disabilities, and that a program meeting the definition a 12:1+4 consisting of habilitation and treatment was also appropriate to meet the student's needs (see 8 NYCRR 200.6[h][4][iii]). The school psychologist noted that based on the evaluative material, the June 2021 CSE recommended that the student be placed in a 12:1+(3:1) special class in a specialized school, with related services, as discussed in more detail below, a full-time 1:1 nurse; a full time 1:1 paraprofessional; 1:1 assistive technology support; an "SGD" device with assistive technology support, and special training for two person transfers and seizure training for any staff working with the student (Dist. Ex. 14 at p. 4). In her direct testimony by affidavit, the school psychologist stated that in her professional opinion, the recommendation was appropriate because after a year in the 6:1+1 special class, the student was still functioning at a pre-kindergarten level (id.). The district school psychologist testified that if a student had not made growth in a placement that was on an IEP, that would absolutely be a reason to reconsider the placement or programming (Tr. p. 118). According to the school psychologist, the student's skills on the gross function measure declined as indicated by a reduction in the measure for laying and rolling (Dist. Ex. 14 at p. 4). This indicated that he regressed in his gross motor skills, and that there was no progress in his academic skills and performance; therefore, it was determined that a more restrictive, individualized setting would better address his then current needs as identified in the present levels of performance, as there is a more intense student to adult ratio in the 12:1+(3:1) classroom (id.). During cross-examination, the school psychologist repeated similar testimony that although the June 2021 IEP included information from a "school report" that stated the student required "specialized settings with no more than 6 students with a 1:1 paraprofessional," the CSE ultimately determined that based on the fact that the student was still functioning at a pre-kindergarten level and some regression was noted in his gross motor skills, a 12:1+(3:1) classroom with more intensified individualized instruction would be more appropriate for him at that time (Tr. p. 123). She also clarified that the recommendation was made "because of the fact there was almost a year where he had lost," which, in contrast to the testimony that the student had not made progress after a year in the 6:1+1 special class, seemingly acknowledges the student did not in fact attend school for most of the 2020-21 school year (Tr. p. 123; see Parent Exs. D at p. 1; X at p. 2; Dist. Ex. 14 at p. 4). The school

psychologist testified that the CSE wanted to put the student in a setting that afforded more individualized and more specialized instruction with a higher student to teacher ratio (Tr. p. 123). The assistant principal stated that in the case of students recommended for placement in 12:1+(3:1) classrooms, it was determined that they required that additional level of support in terms of additional staff being present and to help them meet their goals during the day (Tr. pp. 183-84).

The parent also asserts that the 12:1+(3:1) special class placement is a rehabilitative program and not academically based, and that the student had shown the ability to make academic gains in a 6:1+1 special class and did not require only treatment and habilitation (Req. for Rev. ¶ 15). While State regulations indicate that a 12:1+(3:1) program "primarily" consists of habilitation and treatment, it does not dismiss academics as part of the program and the student's June 2021 IEP, while primarily containing treatment and habilitation goals, also contained academic goals to be addressed in the 12:1+(3:1) setting (see Parent Ex. D at pp. 21, 23-24).¹² Based on the foregoing, including the student's needs for increased adult support for the 2021-22 school year and the student's absence from the private school and lack of progress over the previous school year, the June 2021 CSE's recommendation for placement in a 12:1+(3:1) special class was appropriate to address the student's unique educational needs.

In light of the above, I decline to disturb the IHO's finding that the special class placement recommendations contained in the student's May 2020 and June 2021 IEPs offered the student a FAPE.

5. Music Therapy as a Related Service

The parent appeals from the IHO's finding that the student's May 2020 and June 2021 IEPs offered the student a FAPE despite not including music therapy as a related service and asserts that the student greatly benefitted from the music therapy provided at iBrain (Req. for Rev. ¶¶ 26; Reply and Answer ¶ 8). The district asserts that the student's needs that were addressed by music therapy at iBrain were targeted by appropriate goals, services, and supports included in the May 2020 and June 2021 IEPs (Answer and Cross Appeal ¶ 14).

An IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" and includes psychological services as well as "recreation, including therapeutic recreation" (20 U.S.C. § 1401[26][A] [emphasis added]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]).

Although it is undisputed that iBrain recommended that the student receive music therapy during the 2021-22 school year, the evidence also shows that iBrain did not previously recommend music therapy as a related service on the student's 2020-21 iBrain IEP (Parent Ex. D at pp. 10-11,

¹² The parent argues that the a "12:1:4 is a rehabilitative program, not an academic-based one," but the parent draws this categorical conclusion that habilitation and treatment programs described in State regulation are essentially designed to exclude students with disabilities from academics—a false assumption. Instead, the academic and preacademic skills that the student should work on are described in the student's individualized IEPs.

34-36, 43; see Parent Ex. N). In any event, a school district is not required to mirror the same services in an otherwise appropriate 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]).

Neither iBrain nor the district recommended that the student receive music therapy as a related service during the 2020-21 school year (see Parent Exs. N at p. 38; Q at p. 31). However, the June 2021 iBrain IEP recommended that the student receive two 60-minute sessions per week of individual music therapy (Parent Ex. C at p. 35). The June 2021 IEP created by the district included information gleaned from iBrain regarding the student's potential response to music therapy and his music therapy strengths but did not find it necessary to include music therapy as a related service (Parent Ex. D at pp. 8-10, 32). According to the iBrain director of special education, iBrain recommended music therapy services for the student after its music therapist conducted an evaluation of the student and determined that he was "highly responsive to the techniques that are used in music therapy" (Tr. p. 220; see Parent Exs. C at pp. 11, 36; U at p. 11). She explained that the student worked on social and physical goals during therapy, as well as communicating his preferences and choices (Tr. p. 220). She further explained that the student had been working on coordinating his gross and fine motor movements in order to reach and grasp different instruments and also working on building his vocabulary for different music-related vocabulary words (Tr. pp. 221). The director reported that different music therapy techniques were employed due to music being processed differently in the brain than language (Tr. p. 221). She stated, "the idea is that it's . . . able to reinforce and build skills through different channels that might be . . . really significantly impaired in other ways" (Tr. p. 221). The director testified that music therapy differed from the other related services the student was receiving in that the techniques being used were music based and geared toward exact skills (Tr. p. 222). For example, she explained that a music therapist might change the pitch or rate of music in strategic ways to promote reaching and grasping (Tr. p. 222). She concluded by stating that music therapists used different mechanisms to support similar outcomes (Tr. p. 222). The district school psychologist noted that although the CSE did not recommend music therapy as a related service, per the report, the goals that were proposed by the music therapist were to develop the student's gross and fine motor skills, to increase his active participation with peers and familiar adults, and to improve his interpersonal skills by developing his expressive and receptive language (Dist. Ex. 14 at p. 4; see Parent Ex. C at pp. 34-35). She stated that these goals were addressed through his recommended speech-language therapy, OT, and PT goals and services as recommended in the June 2021 IEP, as well as his assistive technology goals (Parent Ex. D at pp. 22, 26-28; Dist. Ex. 14 at p. 4).

Here, the hearing record shows that music therapy at iBrain offered a different approach for addressing the same skills that were also being targeted by other related services providers and did not address a need that was otherwise neglected by the district's IEP. Based on the foregoing, I find no reason to disturb the IHO's finding that there was insufficient information to hold that music therapy was required to provide the student a FAPE (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]).

6. Individual and Group Parent Counseling and Training.

The parent argues that the IHO ignored that the district failed to recommend parent counseling and training in both group and individual settings and this resulted in a denial of a FAPE. According to the parent's due process complaint notice, "[t]o understand how to address [the student's] specific needs properly at home, [p]arent require[d] a combination of individual and group training, as opposed to solely group sessions" (Parent Ex. A at p. 6).

State regulations require that an IEP indicate the extent to which parent counseling and training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). Parent counseling and training is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's [IEP]" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]).

In this instance, the May 2020 and June 2021 IEPs included recommendations for one 60-minute group session per month of parent counseling and training (Parent Exs. D at p. 32; Q at p. 31). While it is understandable that the parent would prefer individual sessions due to the student's complex needs or that it would be beneficial for her to have more parent counseling and training, there is no explicit requirement that parent counseling and training be provided on a 1:1 basis.¹³

Additionally, considering that the May 2020 and June 2021 CSEs both recommended a group session of parent counseling and training each month and that the Second Circuit has consistently held that the failure to include parent counseling and training on an IEP does not usually constitute a denial of a FAPE (see L.O., 822 F.3d at 122-23; M.W., 725 F.3d 131, 141-42; R.E., 694 F.3d at 191; see also A.M., 845 F.3d at 538; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 32 [2d Cir. Mar. 16, 2016]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 39 [2d Cir. Mar. 19, 2015]; but see C.F., 746 F.3d at 80-82), there is insufficient basis to find that a lack of a recommendation for 1:1 parent counseling and training may have contributed to a denial of FAPE.

7. Special Transportation

The parent claims that the special transportation recommended in the May 2020 and June 2021 IEPs was inadequate because the student required oxygen and a ventilator as accommodations to address medical needs with respect to an asthma diagnosis (Req. for Rev. ¶28; see Parent Ex. Q at p. 11).

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education,

¹³ I suggest that in the context of group session the parent could find it beneficial to hear how other parents face and address concerns with their own children.

in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]).

Specialized forms of transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891, 894 [1984]; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The requested transportation must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

According to a guidance document, the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and that the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate" ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at <http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf>). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]).

Here, the special transportation and accommodations recommended by both the May 2020 and the June 2021 CSEs included transportation from the closest safe curb location to school; adult supervision – 1:1 nursing services; vehicle and/or equipment needs – lift bus; vehicle and/or equipment needs – air conditioning; other accommodations – limited travel time (Parent Exs. D at p. 37; Q at p. 35). Similarly, the student's June 2021 iBrain IEP recommended transportation to include a nurse, air conditioning, a lift bus or wheelchair ramp, and limited travel time (Parent Ex. C). In her pleadings on appeal, the parent only cites to the district May 2020 IEP and the private June 2021 iBrain IEP in support of her assertion that the student required oxygen and a ventilator during transportation (Req. for Rev. ¶28; Parent Mem. of Law at p. 25).

With respect to the student's physical development the June 2021 IEP notes that the student "has asthma and takes medication as needed" and "also uses oxygen when needed" (Parent Ex. Q at p. 11). However, there is no evidence in the hearing record indicating that the student required access to a ventilator to address his asthma and insufficient evidence to find that the student

required "oxygen" as a special transportation accommodation.¹⁴ Given the other transportation accommodations recommended in the student's IEPs, most specifically the 1:1 nursing support for the student, I find that the IEPs adequately provided for the student's medical needs with respect to asthma in the special transportation recommendations, and I decline to find that the IHO erred in failing to find otherwise.

C. 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 IEPs.

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 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

¹⁴ The student's need for oxygen can be accommodated within the terms of the district's IEPs in this case, and it is not within the preview of the CSE to determine when the student would or would not use oxygen. The use of oxygen would be addressed through medical orders issued by the student's physician. State guidance provides that "[d]ue to the frequency of changes to orders for nursing treatment and/or medications, the specific nursing service and/or medication to be provided should not be detailed in the IEP" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4, Office of Special Educ. Mem. [Jan. 2019], available at <http://www.p12.nysed.gov/specialed/publications/documents/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf>). Instead, the guidance document provides that "[t]he nursing treatment and/or medication orders [should be] documented on an Individualized Health Plan (IHP), which is a nursing care plan developed by an RN [and] maintained in the student's cumulative health record . . . and . . . updated as necessary" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4). However, in another State guidance document, it is acknowledged that an IHP is not required by law but "is strongly recommended for all students with special health needs-particularly those with nurse services as a related service on their individualized education plan (IEP)" ("Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs," at p. 9, Office of Student Support Servs. [Jan. 2019], available at <http://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf>). While it may be appropriate to mention a student's use of oxygen on a student's IEP, the parent and school district are encouraged to address concerns over the documentation of the student's need for oxygen use through an individualized health plan as is not appropriate for a CSE to attempt to specify the extent of oxygen use through an IEP.

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]).

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 and Extended School Day

The IHO based his finding of a denial of FAPE on a determination that the district's recommended school location could not implement the IEPs because the school did not offer an extended school day, a determination that was based on an assessment that the legally required amount of academic instruction and the amount of related services recommended for the student in the IEPs made it "mathematically impossible" for the entirety of the IEP services to be implemented (IHO Decision at p. 13). The parent contends that the IHO was correct in making this finding. The district, in its cross-appeal, asserts that the IHO recognized that many of the parent's claims concerning the assigned school were speculative and contends that the IHO should have found the argument that an extended school day would have been needed to implement all the services in the IEPs to be speculative as well. Alternatively, the district contends that the IHO's finding that it was "mathematically impossible" to fit all of the services into a standard school day was made in error. According to the district, the hearing record shows that the staff at the assigned school could have implemented the IEPs without an extended school day because teachers and providers could have made individualized schedules for students and the student's related services could have been provided within the classroom during instruction.

Overall, the parent's claims that the assigned school could not implement the student's IEPs as written were speculative and therefore could not form "an appropriate basis for unilateral placement." However, as, to some extent, the parent's assertions go to the assigned school's

"capacity" to implement the specific elements of the IEPs at issue, I will address those assertions in detail.

Initially, I note that the IHO cited "N.Y. Educ. Law § 175.5" as "mandating that a school which receives state aid must comply with a requisite for instructional time provided to students" (IHO Decision at p. 13). I presume the IHO was referring to State regulations titled "Minimum instructional hours and use of superintendents' conference days for State aid purposes" (see 8 NYCRR § 175.5). That State regulation is intended to provide districts with "flexibility in meeting the 180-day requirement in order to receive State aid pursuant to Education Law sections 1704(2) and 3604(7) for actual instructional time provided to students" (8 NYCRR § 175.5[a]). That State regulation sets forth that in order to receive State aid a district must "be in session for at least 180 school days;" provide a specific minimum number of "instructional hours" per year for students within a particular grade range and for the purposes of reducing State aid, it defines the minimum length of a school day for students within a particular grade range (8 NYCRR § 175.5[c]; [j]). The State regulation defines "instructional hours" as follows:

. . . an hour or a fraction of an hour, during which students are receiving instruction from a certified teacher pursuant to Part 80 of this Title in an academic subject and/or periods of time during which students are engaged in supervised study activities, including completing homework and/or the review of homework. Instructional hours shall not include periods of time where instruction and/or supervised study time is not provided to students, such as lunch or recess.

(8 NYCRR § 175.5[b]).

Thus, the purpose of this State regulation is to set a minimum number of days in a school year and length of a school day, excluding time when a student is not being instructed such as at lunch or recess, in order to receive State aid. The regulation is silent on the question of whether a special education student receiving a related service pursuant to a validly developed IEP in a location outside the classroom is no longer engaged in an "instructional hour". To the extent the IHO relied on 8 NYCRR § 175.5 in finding that it was "mathematically impossible" to implement the services in the May 2020 and June 2021 IEPs, I find such reliance to be in error.

Nevertheless, both IEP's included a special class recommendation noting a frequency and duration of 35 periods per week (Parent Ex. D at p. 32; Q at p. 31). Additionally, as discussed above, both the May 2020 and the June 2021 IEPs included extensive recommendations for related services, with the May 2020 IEP recommending 19 hours of related services and the June 2021 recommending 18 hours of related services (including assistive technology support) (Parent Ex. D at pp. 32-33; Q at pp. 31-32). However, each of the related services recommendations indicated that they were to be provided in a "Separate Location Special education classroom/provider's office" (id.).

Turning to the assistant principal's description of the assigned public school and how it could have implemented the student's IEPs, the assistant principal testified that the school building was wheelchair accessible with ramps, an elevator serving three floors, and appropriate emergency exits (Tr. p. 144). The assistant principal testified that the assigned school provided a range of related service to student's based on their IEP needs and had a staff consisting of speech providers,

occupational therapists, physical therapists, and counselors and could provide paraprofessional, hearing, vision, and nursing services as needed (Tr. pp. 145-47). She further testified that assistive technology and audio technical services were provided by the district (Tr. p. 146).

The assistant principal of the assigned school testified that at the start of the 2020-21 school year the assigned school was conducting classes both remotely and in person and that the school had several 6:1+1 classes with a seat available for the student in a suitable age grouping (Tr. pp. 149-51). The assistant principal stated that all of teachers at the assigned school were certified special education teachers responsible for planning individualized instruction for all of the students to meet the needs of each student, address IEP goals, and to ensure that IEP mandates were met (Tr. p. 153). She testified that she had reviewed the student's May 2020 IEP and asserted that the assigned school could have implemented the IEP exactly as written for the student (id.).

Likewise concerning the 2021-22 school year, the district assistant principal at the assigned school testified that at the start of the 2021-22 school year the assigned school had a "12:1+3+1" class with a seat available for the student in a suitable age grouping consisting of students with similar functional and academic needs (Tr. pp. 153-58). She testified that she had reviewed the student's June 2021 IEP and asserted that the assigned school could have implemented the IEP exactly as written for the student (Tr. p. 158). The IHO found that the June 2021 IEP provided the student a FAPE, but also found that "the record painted a picture of a classroom" during the 2021-2022 school year with 12 students, 11 adults and a myriad of push-in related service providers "all falling all over each other," and that this "potential bedlam" would have made educational benefit for this student virtually impossible and rendered the push-in related services "virtually useless" (IHO Decision at pp. 13, 15). I disagree with the IHO's assessment.

Turning to the specific question of whether the 60-minute related service sessions could have been implemented at the assigned school, according to affidavit and hearing testimony of a district school psychologist who was a CSE member for both the student's May 2020 and June 2021 CSE meetings, the CSE decided to use 60-minute sessions for the related services in the student's IEPs in part to account for the additional time it would take to transition the student from one activity to another due to his medical needs (Tr. pp. 102-03; Dist. Ex. 14 at pp. 1-4). The assistant principal of the assigned school testified that the school day lasted from 8:00 a.m. to 2:50 p.m. during the normal school year and was 10 minutes shorter during the summer (Tr. pp. 141, 174). She testified that there were nine periods during the school day, eight of which were 45-minutes, one of which was for lunch, and the last period of the day was 30 minutes with some time for transition between periods (Tr. p. 174). The assistant principal noted that the IEPs called for related services to be provided either in a separate location, the provider's office or within the special education classroom (Tr. p. 175). When asked how the 60-minute related service sessions could be implemented during the assigned school's typical school day, the assistant principal replied as follows:

So they're typically in their classroom for four or five of those periods during the day, and then they would go to the cafeteria for lunch, they would go to separate locations for a cluster class, such as gym or art, but the majority of the time would be spent in their classroom. So if services are able to be provided push in into the classroom, that's something that the providers could collaborate with the teacher to determine best time for that to occur, and the services could be provided while the

student is in the classroom so that they're not pulled out of class and missing that time.

(Tr. p. 175).

The assistant principal of the assigned school further clarified that any specific related service could be conducted in the classroom during whatever "courses" were being taught in the classroom at the time and, if necessary, a related service session could overlap from one course to another in the classroom (Tr. p. 191). When asked if all of the related services could be implemented through "push-in" services in the classroom given that there are "seven 45-minute instructional periods [per day] and then 18 hours of related services per week, meaning three to four hours per day for related services," she responded that a majority of the related services could be implemented through push-in services at the provider's discretion and after considering the "best course of action" for the student (Tr. p. 176). She further clarified that the IEPs state that related services can be provided within the special education classroom and the providers had the discretion to deliver all of the related services in the classroom if necessary (Tr. pp 176-77). She also stated that pull-out sessions of OT and PT could be conducted in a shared room outside the classroom on the third floor of the building (Tr. pp 179-80). With respect to a typical daily schedule of classes at the assigned school, the assistant principal testified that students are in the classroom with the classroom teacher for the "core content" subjects of "ELA, math, science, social studies" but are in other parts of the school for lunch, adaptive physical education and "cluster classes" such as art and library (Tr. p. 179).

Acknowledging that the June 2021 IEP program recommendation consisted of up to 18 hours of related services per week—including five hours per week of OT, five hours per week of PT, five hours per week of speech-language, two hours of vision education services, and one hour of assistive technology services—the hearing record supports the district's position that the IHO erred in finding that the assigned school was "mathematically" incapable of implementing all of the services in the student's IEPs without an extended school day because a majority of the student's recommended related services could have been accommodated by pushing into the student's classroom in the manner described by the assistant principal for fitting 60-minute related service sessions into the "four or five" 45-minute classroom periods (at least three hours per day for five days per week). The remaining related services could have been accommodated within the remaining time spent in "cluster classes," during lunch, or during other school activities. I find therefore that the IHO erred in determining that it would be mathematically impossible to so implement the student's entire program. The proposed IEPs align with the district assistant principal's statements that the related services providers could have worked with the student while he was attending his special education classes (Parent Exs. D at pp. 31-33; Q at pp. 30-32), and I decline to find that the student was denied a FAPE on this basis.

In light of the above, the IHO's determination that the district failed to offer the student a FAPE during the 2020-21 and 2021-22 school years because the assigned school was incapable of implementing the student's IEPs must be reversed.

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 during the 2020-21 and 2021-22 school years, the necessary inquiry is at an end. Having found that the district offered the student a FAPE for the school years at issue, I need not reach the issue of whether iBrain was an appropriate placement for the student or whether equitable considerations support the parent's request for relief and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated March 27, 2022, is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2020-21 and 2021-22 school years, and ordered funding for the unilateral placement at iBrain and assistive technology devices for those school years; and

IT IS FURTHER ORDERED that the IHO's decision, dated March 27, 2022, is modified by reversing those portions which ordered the district to provide special education transportation for the student, with appropriate accommodations in order for the student to be transported safely to and from iBrain;¹⁶ and

IT IS FURTHER ORDERED that the IHO's amended decision, dated April 4, 2022 is vacated.

Dated: **Albany, New York**
 July 5, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER

¹⁶ 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.