The University of the State of New York

The State Education Department
State Review Officer
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No. 22-064

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 petitioners, by Sarah Khan, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the International Institute for the Brain (iBrain) for the 2021-22 school year. Respondent (the district) cross-appeals from the IHO's determination that equitable considerations favored the student's parent. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student in this matter has been the subject of prior impartial hearings, including administrative appeals, related to the 2017-18, 2018-19, 2019-20, and 2020-21 school years (see Application of a Student with a Disability, Appeal No. 21-079; Application of a Student with a Disability, Appeal No. 20-041; Application of a Student with a Disability, Appeal No. 20-038). The parties' familiarity with the student's educational history and the prior due process proceedings is presumed and will not be recited here.

At the time of the proceeding the student was 13 years old, non-verbal, non-ambulatory, and had a history of seizures, spastic quadriplegia, cerebral palsy, intractable epilepsy, microcephaly, asthma, nystagmus, cortical visual impairment, and traumatic brain injury (Parent Exs. C at p. 1; D at pp. 11-12, 14).[1] The student received all nutrition, medications, and hydration through gastric and jejunal tubes, and was fully dependent in all domains of mobility and activities of daily living (Parent Exs. C at p. 1; D at pp. 6, 13, 14; O at p. 3). The student attended iBrain during the 2020-21 school year (see Parent Ex. C).[2] He had undergone spine surgery in August 2020, and as a result, the student's physical therapy (PT) services were interrupted until November 2020 (Parent Exs. C at pp. 1, 7; D at pp. 11, 14). At the time of the March 2021 CSE meeting, the student received "all services via telehealth, with a paraprofessional and 1:1 nurse assisting in the home," and the parent reported that the student was currently "medically stable" (Parent Exs. C at p. 1; D at p. 14).

A CSE convened on March 23, 2021 for the student's annual review and to develop the student's proposed public school IEP with an implementation date of April 14, 2021 (Parent Ex. D at pp. 1, 35). The March 2021 CSE found the student eligible for special education and related services as a student with a traumatic brain injury (id. at p. 1). The March 2021 CSE recommended a 6:1+1 special class placement in a specialized school for 35 periods per week (id. at p. 30). In addition, the March 2021 CSE recommended the following related services: three 60-minute sessions per week of individual occupational therapy (OT), five 60-minute sessions per week of individual PT, five 60-minute sessions per week of individual speech-language therapy, and three 60-minute sessions per week of individual vison education services (id.). The CSE also recommended full-time individual school nurse services daily and the support of an individual health paraprofessional to assist with the student's feeding, ambulation, and safety (id.). In addition, the CSE recommended one 60-minute session per month of parent counseling and training in a group (id.). The CSE further recommended assistive technology described as "switch and mount management needs" and one 60-minute session of individual assistive technology services per week (id.). The March 2021 IEP also identified supports for school staff, including 2-person transfer training, seizure safety training, assistive technology training, vision education training, G/J tube training, and allergy safety and awareness training (id. at p. 31). Further, the CSE recommended 12-month services, noting that the student would receive the same special education program and services for July and August (id.).

On March 24, 2021 the district sent the parent a prior written notice, notifying the parent of the evaluative information relied on by the March 2021 CSE, the recommendations made by the March 2021 CSE, and other options considered (Parent Ex. E at pp. 1-3). On the same day, the district sent the parent a school location letter, notifying the parent of the district public school at which the student could receive the program and services recommended in the March 2021 IEP (id. at p. 5).

[1] The hearing record includes duplicate copies of the March 2021 IEP with different page formatting (Parent Ex. D; Dist. Ex. 1; see Tr. pp. 39-41). For clarity, citations will be made to the parent's exhibit (Parent Ex. D).

[2] The Commissioner of Education has not approved iBrain as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

On June 23, 2021, the parent sent a letter to the district notifying the district that the parent rejected the recommended program and placement for the 2021-22 school year and intended to unilaterally place the student at iBrain and seek public funding (Parent Ex. G). 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).

A. Due Process Complaint Notice

In a due process complaint notice dated July 6, 2021, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22 extended school year (Parent Ex. A at pp. 1, 3).[3] Initially, the parent requested that the student be allowed to remain at iBrain at district expense during the pendency of the proceeding, asserting that the administrative decisions from a prior proceeding relating to the 2020-21 school year set forth the student's placement for the purpose of pendency in this proceeding (id. at p. 2).

Turning to the substance of the complaint, the parent alleged that the district failed to create an appropriate IEP designed to meet the student's needs (Parent Ex. A at p. 3). More specifically, the parent asserted that the March 2021 CSE failed to incorporate the student's health management needs as recommended by iBrain staff and set forth in documentation sent to the district regarding the student's diagnoses and medical needs (id.).

The parent also asserted that the district did not recommend an appropriate school location (Parent Ex. A at pp. 3-4). According to the parent, a 6:1+1 special class in the district was inappropriate for the student because those classes were "primarily for students who have highly intensive behavioral needs related to their classification of autism" (id. at p. 3). The parent contended that the student would not have been appropriately grouped due to his extensive medical and personal needs (id.). Additionally, the parent argued that the student would not have had access to appropriate peer models (id.). The parent's position was that placing the student in a class with ambulatory students who may have had intensive behavioral and communication needs would have been a safety hazard for the student because of his visual impairment and inability to sense danger (id.). Furthermore, the parent asserted that the assigned school was only partially wheelchair accessible, making it inappropriate for the student as he required a wheelchair (id.).

The parent next asserted that the assigned public school could not implement the March 2021 IEP because an extended school day had not been recommended (Parent Ex. A. at p. 4). Specifically, the parent argued that because the student was mandated to receive 16 hours of related services per week on a push-in and pull-out basis in addition to 35 instructional periods per week, there were not enough hours in a regular school day to implement the program (id.). The parent argued that an extended school day was necessary because providing all of the student's services

[3] Subsequent to filing the due process complaint notice, on July 19, 2021, the parent executed a special transportation service agreement which was to be effective from July 1, 2021 to June 30, 2022 (Parent Ex. I at pp. 1, 5). Additionally, on August 4, 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. J at pp. 1, 7).

on a push-in basis would deprive the student of the opportunity to learn and practice new skills in an environment free from distractions (id.).

The parent argued that the student's placement at iBrain in a 6:1+1 classroom with a 1:1 paraprofessional, a 1:1 nurse, and related services provided on a push-in and pull-out basis was appropriate to address the student's academic, physical, social, and emotional needs and was reasonably calculated to confer an educational benefit to the student (Parent Ex. A at pp. 2-3, 4). The parent further asserted that there were no equitable considerations that would bar reimbursement because at all relevant times she attempted to cooperate with the CSE review and placement process (id. at p. 4).

For relief, the parent requested an order declaring that the district denied the student a FAPE for the 2021-22 school year and that iBrain was an appropriate placement for the student (Parent Ex. A at p. 4). Additionally, the parent sought an order directing the district to directly fund the cost of the student's tuition at iBrain for the 2021-22 extended school year including related services, a 1:1 paraprofessional, and a 1:1 nurse (id.). The parent further requested that the district provide the student with assistive technology and augmentative and alternative communication (AAC) devices and supports (id. at p. 4). The parent also requested reimbursement and/or prospective funding of special education transportation with limited time travel, a transportation paraprofessional, nurse, or porter services as required (id. at p. 5). Lastly, the parent requested that a CSE convene to address any needed changes to the student's IEP, if necessary (id. at p. 5).

B. Impartial Hearing Officer Decision

On November 22, 2021, the parties convened for a hearing to discuss the student's placement during the pendency of the proceeding (Tr. pp. 1-11). During the hearing, the district consented to a proposed order on pendency (Tr. p. 4). On the same day, November 22, 2021, the IHO signed an interim order on pendency directing that the student's placement at iBrain as set forth in the final decision in the prior proceeding constituted the student's placement for the pendency of this proceeding (November 22, 2021 Interim Order; see Application of a Student with a Disability, Appeal No. 21-079). The parties next convened for a conference on January 24, 2022, during which the parties discussed the district's request for subpoenas (Tr. pp. 12-25).

An impartial hearing on the merits commenced and concluded on March 15, 2022 (Tr. pp. 26-134). In a final decision dated April 23, 2022, the IHO found that the district offered the student a FAPE for the 2021-22 school year and denied the parent's request for funding of the student's program at iBrain for the 2021-22 school year (IHO Decision at pp. 15-20). Initially, the IHO determined that the parent's sole challenge to the March 2021 IEP was that it did not include the health management needs recommended by iBrain (id. at p. 15).[4] In addressing this allegation, the IHO noted that while the CSE was required to consider privately-provided information in developing the student's IEP, it did not have to "wholesale" incorporate that information into the student's IEP (id. at p. 16). Further, the IHO determined that the hearing record supported finding

[4] With regard to the parent's contention that the student needed to receive instruction remotely, in a footnote, the IHO found that the student's medical issues which necessitated remote instruction only arose after the March 2021 CSE meeting and accordingly, the IHO did not further address this issue (IHO Decision at p. 16 n. iii).

that the March 2021 CSE was aware of the student's health management needs and included recommendations to address those needs, indicating that the IEP listed the student's significant health management needs, recommended a 1:1 paraprofessional and a 1:1 nurse to address the student's health, ambulation, feeding, and safety needs, included staff training related to the student's seizures, G/J tubes, and safety awareness, and included recommendations for specialized transportation (id. at pp. 16-17). However, the IHO found that the CSE "should reconvene . . . to explicitly memorialize any additional health precautions addressed at the hearing but not expressly presented to the CSE at the time of its most recent review" (id.).

The IHO then turned to the parent's remaining allegations, which the IHO found were challenges to the district public school assigned to implement the student's March 2021 IEP (IHO Decision at pp. 15, 17-18). Addressing the parent's assertion that the student would not be grouped appropriately at the assigned school, the IHO found that this assertion was too speculative to be considered (id.). The IHO also noted that testimony by the school's assistant principal showed that the school would have been able to address the student's needs (id.). With respect to the parent's allegation that the assigned school was not wheelchair accessible, the IHO determined that the parent's claim was directed at the public school assigned to the student for the remainder of the 2020-21 school year and that a different school was assigned to the student for the 2021-22 school year (id. at pp. 17-18). The IHO also noted that the district's website showed the school was wheelchair accessible and the assistant principal testified that the school could have implemented the student's IEP (id. at p. 18). Finally, the IHO rejected the parent's argument that the school could not implement all of the student's programming and related services without an extended school day (id.). The IHO determined that the district presented evidence, including testimony of the assistant principal, showing that the assigned school could have implemented the student's IEP (id.).

The IHO went on to determine that the program provided to the student by iBrain for the 2021-22 school year was appropriate and reasonably calculated to meet the student's needs (IHO Decision at p. 18). More specifically, the IHO found that the program provided by iBrain was substantively similar to the program that the student received during the 2020-21 school year, which had already been determined appropriate (id. at pp. 18-19). The IHO also found that although the student received remote instruction from iBrain during the 2021-22 school year due to his health concerns, the program provided remained appropriate (id. at p. 19). With regard to equitable considerations, the IHO found that the parent cooperated with the district and acted in good faith (id. at p. 20). In so finding, the IHO rejected the arguments made by the district relating to the cost of the private school program because of the student's complex needs, as well as the quality and level of support the unilateral placement provided (id.).

The IHO denied the parent's request for relief, except the IHO ordered the district to reconvene the CSE within 30 days of the decision to memorialize any additional health precautions addressed during the hearing, but not presented to the CSE at time of review, including specifically noting the student's allergies on his IEP (IHO Decision at p. 20).

IV. Appeal for State-Level Review

The parent appeals from the IHO's determination that the district offered the student a FAPE for the 2021-22 school year asserting that the recommended program and school did not

ensure the student's safety. According to the parent, the IHO erred in discounting the parent's claims related to the March 2021 IEP. The parent asserts that the due process complaint notice alleged that the March 2021 IEP did not account for the student's diagnoses and medical needs. Specifically, the parent argues that the district did not address the student's severe allergies, seizures, and need for remote services/homebased instruction. The parent also asserts that the March 2021 CSE failed to include "critical management needs," noting the student had life-threatening fish, egg, and latex allergies and seizures triggered by noise and light. The parent further asserts that the IHO erred in finding that the March 2021 CSE made extensive recommendations to ensure the student's safety, and also contends that the IHO mischaracterized the hearing record when he found that the student's health concerns were not expressly presented to the March 2021 CSE given that his health needs were included in the iBrain report that was relied on by the CSE. The parent also contends that because the student's allergies were not addressed in the March 2021 IEP, any evidence that the assigned school could have accommodated the student's allergies was prohibited as retrospective evidence.

The parent further asserts that the IHO erred in failing to find that the assigned public school denied the student a FAPE. The parent asserts that the IHO mischaracterized her claims regarding grouping of the student at the assigned school. The parent contends that her allegations are not speculative and that, rather, the hearing record supports finding that the student would have been placed with other students with significantly different needs, noting that the proposed class included students who were ambulatory, who were mostly classified as students with autism, and some of whom had behavior plans. The parent cites to the testimony of iBrain's director of special education, in that she testified that a district 6:1+1 special class would not be appropriate for the student. The parent argues that the proposed program could not be implemented without an extended school day. Additionally, the parent asserts the IHO erred in accepting the testimony of the assistant principal of the assigned school alleging that her testimony was speculative. The parent further contends that the IHO erred by ignoring the parent's argument that the student should have been placed in a school with a remote learning plan so that he could receive instruction remotely.

With respect to the parent's assertions regarding remote instruction, the parent contends that she properly raised this claim in the due process complaint notice and the IHO erred by mischaracterizing the student's need for remote instruction as something that developed after the March 2021 CSE meeting. The parent asserts that the due process complaint notice included the language "but not limited to" prior to describing the factors that the parent believed denied the student a FAPE and that inclusion of that phrase in the due process complaint notice provided the district with fair notice of the issue.

Finally, the parent submitted additional evidence along with her request for review identified as an audio file of the March 2021 CSE meeting and a copy of the student's June 9, 2020 IEP.

The district submits an answer and cross-appeal generally denying the allegations set forth in the request for review, asserting that the IHO properly found that the district offered the student a FAPE for the 2021-22 school year, and cross-appealing from the IHO's determination that equitable considerations favored the parent. In addition, the district objects to inclusion of the parent's additional evidence, asserting that the audio file was not accessible and was not

authenticated by the parent and that both the audio file and the June 2020 IEP were available at the time of the hearing.

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]).[5]

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).

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

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

VI. Discussion

A. Preliminary Matters

1. Scope of Impartial Hearing

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

The parent asserts that the IHO erred by not addressing her claim that the student required remote instruction. The IHO found that this issue arose after the March 2021 CSE meeting and that the parent did not advise the district of the circumstances underlying her belief that the student needed to receive instruction remotely until the hearing was underway; accordingly, the IHO found that this issue was not properly raised (IHO Decision n. iii). Review of the parent's post-hearing brief shows that the parent argued that the student had been receiving remote services since the start of the COVID-19 pandemic and that he required remote services (Parent Post Hr'g Br. at p. 14). In support of this contention the parent asserted that the student "nearly died and had to be resuscitated several times" over the course of the 2021-22 school year (id. at pp. 14-15; see Tr. pp. 91-96). Review of the hearing record shows that the parent and the director of special education at iBrain testified by affidavit that the student had attended iBrain since 2018 (Parent Exs. N at p. 1; O at p. 3). They also testified that the student had previously attended a 6:1+1 class but was currently receiving services remotely during the 2021-22 school year as a result of doctor's orders due to infections in his lungs, his current treatment, and ongoing concerns regarding COVID (Tr. pp. 50, 86-87, 104-05; Parent Exs. L; N at p. 3; O at p. 4). The student spent several weeks in the hospital in May and June 2021 due to lung infections and was hospitalized with COVID in December 2021 (Tr. pp. 91-92; Parent Ex. L). The hearing record included a December 2021 letter from the student's pediatric nurse practitioner indicating that because the student was medically fragile, he needed to be "homeschooled" "until medically stable" and a January 2022 letter from the student's attending pediatric neurologist indicating that the student was "neurologically cleared to resume therapies at home" (Parent Exs. L; M). Considering that the above cited information

concerning the student's medical condition and need for homeschooling is related to events that took place during the 2021-22 school year—after the March 2021 CSE meeting took place and, with the exception of the student's hospitalization in May and June 2021, also occurred subsequent to the July 2021 due process complaint notice, the IHO's finding that the asserted need for remote instruction was not a claim raised in the due process complaint notice is fully supported by the record.

The parent asserts that the IHO also erred because the student had been receiving remote services since the start of the pandemic and that the March 2021 IEP indicated that the student was receiving services remotely (Parent Mem. of Law at pp. 11-12; see Tr. pp. 50, 100; Parent Ex. D at pp. 3-14). While it is true that the student was receiving services remotely, merely recounting that the student was receiving services remotely is not an indication that the student could not receive instruction in person. Additionally, the parent does not assert that the due process complaint notice included a specific allegation regarding a need for remote instruction, rather, the parent asserts that the allegation concerning remote services "is connected to [the district's] failure to accommodate all of [the student's] health management needs" (Parent Mem. of Law at p. 20). According to the due process complaint notice, "[the district] was provided with ample documentation regarding [the student's] diagnoses and resulting medical needs; however, the CSE failed to incorporate iBRAIN's recommendations for health management needs on the March [2021] IEP" (Parent Ex. A at p. 3). Review of the management needs identified in the March 2021 iBrain IEP shows that this allegation did not relate to remote instruction as receiving instruction remotely is not identified as a management need in the iBrain IEP (see Parent Ex. C). Additionally, the iBrain management needs repeatedly refer to in-person activities (Parent E. C at pp. 14-17). For example, the management needs identified in the iBrain IEP indicate a need for hand-over-hand physical prompting, 2-person transfers to and from the student's wheelchair, use of sensory items, monitoring the student "in the classroom and during school activities," having medication available in school, and working on school safety, such as "evacuat[ing] the building in a safe and efficient manner" (id.). Additionally, the iBrain IEP recommends that the student be placed in a 6:1+1 special education class, specifically noting that the parent and iBrain staff considered a district 12:1+4 special class for the student but rejected it, in part, because it "represent[ed] the most restrictive setting other than home instruction" (id. at pp. 32, 33). Accordingly, the parent's due process complaint notice did not raise the issue of the student requiring a home-based or remote program.

Without an allegation in the due process complaint notice asserting that the student required remote instruction or some indication that the district opened the door to this issue in some way other than generally describing how the student was receiving services, there is no basis to overturn the IHO's finding that the issue of the student needing to receive instruction remotely was not properly raised in this proceeding and it will not be addressed further.[6]

[6] Additionally, neither party has appealed from the IHO's determination that iBrain was an appropriate unilateral placement for the student during the 2021-22 school year (see IHO Decision at pp. 18-19). As such, that finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

2. Additional Evidence

The parent submits two exhibits as additional evidence with her request for review; an audio recording of the March 2021 CSE meeting and a copy of the student's June 9, 2020 IEP (Req. for Rev. Exs. A; B). From the request for review, it appears the exhibits are submitted in support of the parent's assertion that the district was aware of the student's management needs, particularly related to the student's seizures and allergies, and that the CSE did not replicate all of the student's management needs from the student's iBrain IEP in the district's March 2021 IEP (see Req. for Rev. ¶¶ 7-12). The district specifically objects to the introduction of the parent's additional evidence, asserting that it was unable to access the audio recording and that the June 2020 IEP concerns a school year that is not at issue and is not relevant to this proceeding.

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

Review of the parent's additional evidence indicates that it either was available or should have been available at the time of the hearing (Req. for Rev. Exs. A; B). Additionally, considering the reasons set forth in the request for review for the introduction of the additional evidence, it is not necessary in order to render a decision in this matter (see Req. for Rev. ¶¶ 7-12). Finally, the district was not able to access the parent's audio file, accordingly it would be unfair to the district to accept it into evidence without the district having the opportunity to review it. For all of the above reasons, the parent's additional evidence will not be further considered.

B. March 2021 IEP

1. Health and Safety and Management Needs

The parent asserts that the IHO erred in finding that the March 2021 CSE made extensive recommendations to ensure the student's safety. In particular, the parent contends that the March 2021 failed to include "critical management needs" noting the student had life-threatening fish, egg, and latex allergies and seizures triggered by noise and light. The parent further contends that the IHO mischaracterized the hearing record when he found that the student's health concerns were not expressly presented to the March 2021 CSE as they were included in the iBrain report that was relied on by the CSE.

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]).

In this instance, most, if not all, of the information about the student contained in the March 2021 IEP, including the student's present levels of performance, was carried over from the March 2021 iBrain IEP (compare Parent Ex. C with Parent Ex. D). The school psychologist who participated in the student's March 2021 CSE meeting as both the school psychologist and the district representative confirmed that all of the information the district had about the student was obtained from iBrain (Tr. p. 48; Dist. Ex. 8 ¶¶ 2, 5). She stated that the district attempted to conduct a classroom observation and a social history but were unsuccessful due to technical difficulties and because they were unable to contact the parent (Tr. p. 48). The school psychologist's written testimony indicated that the information obtained during the CSE meeting revealed that the student was completely dependent on others for all activities of daily living and as a result, the March 2021 CSE developed an IEP that included individual, full time school nurse services, an individual health paraprofessional for ambulation, feeding and safety, as well as staff training in two person transfers, seizure safety, assistive technology, vision education, G/J tube, and allergy safety and awareness (Dist. Ex. 8 ¶ 17).

Many of the management needs reflected in the March 2021 iBrain IEP were adopted and incorporated into the March 2021 IEP (compare Parent Exs. C at pp. 1, 14-16, with Parent Ex. D at p. 15). These included a one-to-one paraprofessional in order to benefit from participation in an educational setting, aided language stimulation, repetition of verbal clues with physical clues to increase comprehension, one-on-one instruction using a direct instructional model, a highly structured classroom without visual and auditory distractions, direct instruction, multisensory supports, sensory breaks, repeated directions, tablet based communications tool, access to AAC, having the student's interests incorporated into his school day to maximize his interest, access to an instructional laptop with resources/software for literacy and math, repetitive additional processing time, support of verbal, visual and tactile cues, a quiet and non-distracting environment, access to a variety of switches, partner assisted scanning to provide choices for activities and communication, 1:1 adult support and repetition of directions, use of games and age appropriate activities incorporated into PT sessions, 1:1 adult support for hand over hand and physical prompting, repositioning throughout the day in his wheelchair to avoid skin breakdown and contractures, two person transfers to and from his wheelchair, a quiet environment with reduced lighting and noise in order to focus on physical tasks and reduce risk of startle and seizure, time to sleep after seizure medication is administered, recommendation that the student not be woken up suddenly as that could elicit a seizure, orthotics to be worn during the day to prevent deformity and contracture, daily standing program in the supine stander with bilateral orthotics and knee immobilizers, bilateral hand and elbow splints, a custom wheelchair, and access to sensory items (tactile balls, light-up objects) (id.).

The March 2021 iBrain IEP also included a section described as a health management plan (Parent Ex. C at pp. 16-18). This section was comprised of information regarding the student's assessment and diagnoses, goals, nursing interventions, and expected outcomes for the student's numerous health concerns (id.). Specifically, the student had received a diagnosis of asthma, for which he required medication and asthma care "devices and supplies" to be accessible at school id. at p. 16). Further, the student had been diagnosed with acquired brain injury resulting in cerebral palsy, intractable epilepsy, and cortical vision impairment; requiring development of an emergency evacuation plan, a 1:1 nurse, a 1:1 paraprofessional, observation of fall precautions and a seizure action plan, and medication monitoring (id. at pp. 16-17). In addition, the March 2021 iBrain IEP noted that the student required a gastric and jejunal tube for nutrition, hydration, and

medication administration (id. at p. 17). It also indicated that the student had a "[r]isk for aspiration related to physical disability and seizure activity" (id.). In addition, the iBrain IEP noted that the student had airborne food and latex allergies requiring an allergy/anaphylaxis and emergency care plan, as well as in-service training for school staff regarding allergic reactions, anaphylaxis, and using the EpiPen (id. at pp. 17-18).

Some of the health concerns identified in the March 2021 iBrain IEP were noted in detail on the March 2021 IEP (compare Parent Ex. C at pp. 16-18, with Parent Ex. D at pp. 1-14). For example, the March 2021 IEP noted in multiple locations that the student had a complex medical history, that the student had a brain injury due to loss of oxygen at birth and had a history of spastic quadriplegia, cerebral palsy, intractable epilepsy, microcephaly, asthma, nystagmus, and cortical visual impairment (Parent Ex. D at pp. 11-12, 14, 16). The March 2021 IEP noted that the student was non-verbal and non-ambulatory, he received all nutrition and hydration through gastric and jejunal tubes, and he was fully dependent in all domains of mobility and activities of daily living (id. at pp. 2, 6, 14). The March 2021 IEP further noted that the student would "become overstimulated in loud environments," which had been reported to sometimes result in seizures, and included an environmental management need identifying that the student needed "a quiet and non-distracting environment . . . with reduced lighting and noise in order to focus on physical tasks and reduce risk of startle and seizure" (id. at pp. 11, 15).

The March 2021 CSE recommended programming specifically to address the student's health related needs including daily full-time 1:1 school nurse services and a daily full-time 1:1 health paraprofessional for ambulation, feeding, and safety (Parent Ex. D at p. 30). In addition, the March 2021 IEP included supports for school personnel on behalf of the student consisting of two-person transfer training, seizure safety training, G/J tube training, and allergy safety and awareness training (id. at p. 31).

Additionally, although the March 2021 IEP did not include present levels of performance or management needs directed specifically at asthma monitoring, the IEP did include a goal for the recommended 1:1 paraprofessional to consult with the recommended 1:1 nurse "regarding close monitoring of [the student's] medical needs" (Parent Ex. D at pp. 1-15, 27-28). The goal also included objectives that indicated the paraprofessional and nurse would "observe aspiration precaution at all times" and "maintain an upright position as appropriate" (id. at p. 28). Another objective indicated that in addition to monitoring seizure precautions, the paraprofessional would demonstrate an awareness of medications and monitor administration by the nurse of anticonvulsive medications including their side effects (id.).

Despite the CSE's incorporation of the above-described health information gleaned from iBrain's IEP into the March 2021 IEP it developed for the student, the district IEP did not include some of the health management interventions included in the iBrain IEP such as an emergency evacuation plan, details regarding medication management, an allergy/anaphylaxis plan, or an emergency care plan (Parent Ex. C at pp. 16-18; see Parent Ex. D). Of particular concern to the parent, the March 2021 IEP did not identify the student's allergies. However, it is not clear that these health concerns, as identified in the March 2021 iBrain IEP, are required to be described in detail in a district IEP.

A child who is medically fragile and needs school health services[7] or school nurse services[8] to receive a FAPE must be provided such services as indicated in the student's IEP (see School Health Services and School Nurse Services, 71 Fed. Reg. 46,574 [Aug. 14, 2006]; see also 34 CFR 300.34[a], [c][13]; 8 NYCRR 200.1[qq], [ss]; Cedar Rapids Community Sch. Dist. v. Garret, 526 U.S. 66, 79 [1999] [school districts must fund related services such as continuous one-on-one nursing services during the school day "in order to help guarantee that students . . . are integrated into the public schools"]). With regard to skilled nursing services on a student's IEP, 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).

In this instance as noted above, the March 2021 IEP recommended a 1:1 full-time health paraprofessional and a 1:1 full-time nurse to address the student's health related concerns (Parent Ex. D at p. 30). Also, as discussed above, the IEP indicated that the paraprofessional and nurse would consult and monitor the student's medical needs (id. at pp. 27-28). Additionally, a review of the hearing record shows that it includes a March 16, 2021 district nursing referral, which indicated the student was recommended for 1:1 skilled nursing services due to the student's "uncontrolled seizures" and "significant airborne allergies requiring 24/7 care" (Dist. Ex. 7). The referral form also included a description of the nursing services the student required, identifying the student's daily medications through his G-tube, continuous G/J tube feedings via pump, nebulizer treatments, oxygen administration, an EpiPen for allergies and anaphylaxis, and medications for seizures over 10 minutes, pain, fever, and constipation (id.).

With specific regard to the health or safety of a student with a disability, a school district denies the student the benefits guaranteed by the IDEA if it proposes a placement that threatens a student's health in a manner that undermines his or her ability to learn (A.S. v. Trumbull Bd. of Educ., 414 F. Supp. 2d 152, 178 [D. Conn. 2006]; citing Lillbask v. Conn. Dep't of Educ., 397

[7] "School health services means health services provided by either a qualified school nurse or other qualified person that are designed to enable a student with a disability to receive a free appropriate public education as described in the individualized education program of the student" (8 NYCRR 200.1[ss][1]).

[8] "School nurse services means services provided by a qualified school nurse pursuant to section 902(2)(b) of the Education Law that are designed to enable a student with a disability to receive a free appropriate public education as described in the individualized education program of the student" (8 NYCRR 200.1[ss][2]).

F.3d 77, 93 [2d Cir. 2005] [noting that Congress did not intend to exclude from consideration any subject matter, including safety concerns, that could interfere with a disabled student's right to receive a FAPE]; L.K. v. Dep't of Educ. of the City of New York, 2011 WL 127063, at *9 [E.D.N.Y. Jan. 13, 2011] [finding failure to identify a serious allergy to citrus fruits on a student's IEP did not constitute a denial of a FAPE]). Based on the above, the hearing record shows that the district sufficiently addressed the student's management needs, including all of the health concerns identified in the March 2021 iBrain IEP. Accordingly, although the IHO erred in finding that the student's allergies were not presented to the March 2021 CSE at the time of review (see IHO Decision at pp. 16-17, 20), the IHO correctly found that the March 2021 CSE was aware of the student's health management needs and included recommendations to address those needs, indicating that the IEP listed the student's significant health management needs, recommended a 1:1 paraprofessional and a 1:1 nurse to address the student's health, ambulation, feeding, and safety needs, included staff training related to the student's seizures, G/J tubes, and safety awareness, and included recommendations for specialized transportation (id. at pp. 16-17). Further, based on the March 2021 nursing referral, it is clear that the district was aware of the student's airborne allergies and would have addressed them through the 1:1 skilled nursing services (Dist. Ex. 7).

2. Extended School Day

The parent asserts that the assigned school could not implement the March 2021 IEP because the school did not have an extended school day. The parent bases this argument on the March 2021 IEP recommending 17 hours per week of related services and a 6:1+1 special class placement for 35 periods per week.

Initially, upon review while the parent asserts this argument as a failure to implement an extended school day, the March 2021 IEP did not recommend an extended school day for the student (see Parent Ex. D). Accordingly, the parent's assertion is really a "substantive attack[] on [the] IEP . . . couched as [a] challenge[] to the adequacy" of the assigned public school site's capacity to implement the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 245 [2d Cir 2015]).

Addressing the parent's allegation as a substantive attack on the March 2021 CSE's decision not to recommend an extended school day of the student, the March 2021 CSE recommended that the student receive three 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, and three 60-minute sessions per week of individual vision education services, along with one 60-minute session per week of individual assistive technology services (Parent Ex. D at p. 30). The March 2021 CSE also recommended that the student be placed in a 6:1+1 special class for 35 periods per week (id.). Finally, with respect to the student's related services, the IEP noted that they could be provided in a separate location, the student's special education classroom, or the provider's office (id.). The IEP also explicitly noted that "the majority of the related service sessions should be push-in so that [the student] c[ould] also work towards his academic goals" (id. at p. 7). Although there were only eight periods in the school day—40 periods per week, including lunch (see Tr. p. 71), the hearing record does not provide any basis for finding that the student's related services could not have been provided within the student's classroom or during lunch. Accordingly, the hearing record does not support finding that the student required an extended

school day to receive the recommended services and, instead, supports finding that the student would have been able to receive the full complement of recommended services.

Further addressing the parent's assertion as an implementation claim, the assistant principal of the assigned school testified that the school could have implemented the March 2021 IEP; she further testified that they "would work it out in their schedule, so that they -- to accommodate as best as they could for him" (Tr. p. 72). Additionally, the student never attended the assigned school. Accordingly, any conclusion that the district would not have implemented the student's IEP or that the assigned public school site could not meet the student's needs would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's programming under the IEP or to refute the parents' claims (R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]; F.L., 553 Fed. App'x at 9; K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 187 & n.3]).

C. Assigned Public School Site and Grouping

As a final issue, the parent raises various challenges to the district's capacity to implement the program recommended in the March 2021 IEP at the assigned public school site. Most of these challenges relate to allegations that the student would not have been appropriately grouped at the assigned public school, asserting that the proposed class would not have been a safe environment for the student because the other students in the class were ambulatory, most had an autism classification, and several had behavioral plans. In addition, the parent asserts that the assigned school could not have accommodated the student's allergies or needs related to the student's seizures and that based on a lack of staffing would not have been able to provide all of the student's recommended services.[9]

Regarding the claims related to the functional grouping of the proposed class at the assigned school, neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's

[9] The request for review includes an allegation that the IHO "erroneously mischaracterized the testimony, assuming [the assistant principal] also referred to wheelchair accessibility when she said that [the assigned public school] could implement the IEP" (Req. for Rev. ¶19). There is no question that the student required use of a wheelchair, as well as an attendant, in order to navigate the school environment (Parent Ex. D at pp. 2, 13, 15). Review of the assistant principal's testimony shows that although she did not specifically reference the student's use of a wheelchair, she reviewed the student's March 2021 IEP and testified that the assigned school "could have fully implemented [the student's] March 23, 2021 IEP" (Dist. Ex. 9 ¶¶ 6, 7, 9). The parent had the opportunity to cross-examine the district's witness in order to clarify if this testimony included the school being able to accommodate the student's use of a wheelchair; however, counsel for the parent declined to make any such inquiry (see Tr. pp. 56-77). Accordingly, the hearing record does not provide any basis to depart from the IHO's determination that the assistant principal's testimony that the assigned school could have "'fully implemented'" the March 2021 IEP included the student's use of a wheelchair (IHO Decision at p. 18). Additionally, the IHO determined that the website for the assigned school identified that the school was fully wheelchair accessible (id.). Neither party has appealed from that determination and, accordingly, it has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3]; [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).[10] State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). The social and physical levels of development of the individual students must be considered to ensure beneficial growth for each student, although neither may be a sole basis for determining placement (8 NYCRR 200.6[a][3][ii], [iii]). Further, the management needs of students may vary, so long as the modifications, adaptations, and other resources provided to students do not "consistently detract from the opportunities of other students" in the class to benefit from instruction (8 NYCRR 200.6[a][3][iv]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

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

Although the student was not placed at the assigned public school site due to the parent's unilateral placement at iBrain and I find that the parent's argument regarding functional grouping

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

is impermissibly speculative, I will review the evidence in the hearing record regarding functional grouping for the sake of thoroughness.

The assistant principal for the assigned school testified that based on the student's age, the student would have been placed in a middle school class (Tr. pp. 65-66; Dist. Ex. 9 ¶ 1). As noted by the parent, the assistant principal then testified that all of the students in that class were ambulatory, most of the students had classifications of autism, and several students had behavior plans (Tr. pp. 66-67). She also testified that some of the students were nonverbal and required assistive technology for communication, the students had a range of functional levels from infancy through third or fourth grade, and some of the students had health paraprofessionals assigned to them (Tr. pp. 66-68).

Turning to the testimony of the director of special education at iBrain, she opined that it would have been "inappropriate and unsafe" to group the student with students with autism (Tr. pp. 119-23). With regard to the student's safety, according to the director, students with autism, who are appropriate for placement in 6:1+1 special classes, "don't have social awareness. They don't understand what things are going to hurt other people, and they have a lot of impulsive behaviors. And the combination of that and -- and [the student] is a disastrous one" (Tr. pp. 120-21). With regard to academics, the director testified that students with autism, who are appropriate for placement in 6:1+1 special classes, "typically [have] a lot of echolalia, which is noncommunicative, repetitive speech"; the director opined that the presence of students exhibiting this speech pattern would "create[] a really noisy environment for [the student], which -- and then that will probably cause him to really shut down" (Tr. pp. 121-22).

Review of the iBrain director's testimony shows that it was based on her experience teaching in a district 6:1+1 special class for approximately one year, ten years prior to the school year at issue (Tr. pp. 116-18). There is no indication in the hearing record that the iBrain director visited the assigned school or observed any classes in the assigned school (Tr. pp. 97-130). Nor was there any testimony by the assistant principal of the assigned school that the school would have been unable to implement the student's March 2021 IEP based on safety concerns or instructional needs (Tr. pp. 56-77).

While the parents are free to choose private schooling like iBrain in which all of the children in the classroom are very similar, overall this is not a case in which the evidence shows that the public school site is "factually incapable" of implementing the IEP. The evidence does not support finding that the assigned school was not an appropriate placement or that it would not have been able to implement the March 2021 IEP. The parent's objections to the classification of other students with autism or the fact that the other students were ambulatory or had behavioral plans are subjective and speculative and do not support a conclusion that the school lacked the capacity to implement the student's IEP, and therefore constitute an impermissible attempt to enact a parental veto over the district's assignment of the student to a public school site. Additionally, the testimony of the iBrain director as to the appropriateness of grouping the student in a class with students with autism was entirely speculative as the director had no specific information regarding the students in the proposed class. Review of the director's testimony shows that it contained generalizations and unsupported hypotheticals about the types of students that might have been in the proposed class, including characterizations of students with certain disability classifications that amounted to stereotypes, as opposed to actual knowledge of the functional levels of the

students who would be assigned to attend the same classroom as the student (Tr. pp. 119-23). Accordingly, based on the above, the district presented sufficient evidence to show that the assigned school could have implemented the March 2021 IEP.

Turning to the parent's concerns regarding the school's ability to accommodate the student's allergies and the student's need for an environment with reduced lighting and noise, the assistant principal at the assigned school explained how the school could meet the student's needs (Tr. pp. 59-64, 76). Regarding the student's allergies, the assistant principal testified as to how the school could accommodate the student, in that the student would be provided with the recommended nursing services and all of the staff that working with him would be provided with training on any allergies that he had (Tr. p. 59). Additionally, with respect to the student's airborne seafood allergy, the assistant principal testified that the school did not serve seafood, the school would ensure that seafood would not be brought into the building near the student, and that all of the staff that worked with the student would be informed of the student's allergy (Tr. pp. 59-61). When asked how the school would address loud environments that could trigger the student's seizures, the assistant principal explained that the student would have the support of the recommended health paraprofessional and the 1:1 skilled nursing services and that staff would be informed and trained, noting that supervision was "constant" (Tr. pp. 63-64). With respect to the student's seizure activity and lighting, the assistant principal testified that the school could dim the lights in the classroom, but the lights in the hallway could not be changed (Tr. p. 76). However, the hearing record does not indicate that the student can never be exposed to bright lights. For example, the parent testified that when the student went outside he avoided bright lights by wearing sunglasses (Tr. pp. 89-90). Accordingly, based on the above, there was nothing in the assistant principal's testimony that indicated the assigned school would have been incapable of implementing the March 2021 IEP.

Finally, to the extent that the parent asserts that the assigned public school would not have been able to implement the recommendations contained in the March 2021 IEP due to a perceived lack of staffing, any such assertion is entirely speculative. During cross-examination counsel for the parent asked the assistant principal of the assigned school how many 1:1 paraprofessionals and 1:1 nurses the school had on-site, to which the assistant principal responded she was not sure how many 1:1 paraprofessionals were on-site and that she did not have any 1:1 nurses for students at that site (Tr. p. 69). However, this type of 1:1 staffing is personal to the student and since the student never attended the assigned school, it would follow that the district had not gone through the process of ensuring that the school would have the 1:1 staffing recommended in the student's March 2021 IEP available to implement the student's programming. Any assumption that the school would not have been able to provide such 1:1 staffing if the student had actually attended the district school is entirely speculative.

VII. Conclusion

Based on the foregoing, I find that the hearing record supports the IHO's finding that the March 2021 IEP was reasonably calculated to enable the student to receive educational benefit in light of his unique circumstances and that the parent's allegations regarding the assigned school's capacity to implement the March 2021 IEP were speculative (Endrew F., 137 S. Ct. at 1001; Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]). Having found that the district offered the student a FAPE, I need not reach the issues of whether the private educational services obtained by the parents were appropriate for the student or whether

equitable considerations supported 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 find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 1, 2022

CAROL H. HAUGE
STATE REVIEW OFFICER