The University of the State of New York

The State Education Department
State Review Officer
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No. 22-071

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, Ltd., attorneys for petitioner, by John Henry Olthoff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student in this matter has been the subject of prior impartial hearings, as well as a prior State-level administrative review involving the student's 2018-19 and 2019-20 school years (see Application of a Student with a Disability, Appeal No. 20-138). The student has attended iBrain since the 2018-19 school year (Parent Ex. A at p. 3).[1]

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

The hearing record reflects that the student was hospitalized from November 15, 2020 through December 10, 2020 (Parent Exs. D at p. 14; N at p. 1; Dist. Ex. 2 at p. 1). By letter dated December 21, 2020, the district notified the parent of a CSE meeting scheduled for February 1, 2021 (Dist. Ex. 3 at pp. 1-3).

According to the private school IEP developed by iBrain for the 2020-21 school year dated January 22, 2021, the student was a friendly 10-year-old boy who was nonverbal and non-ambulatory (Parent Ex. C at p. 1). The IEP indicated that the student had received diagnoses of cystic encephalomalacia, global central nervous system injury, seizure disorder, hypoxic-ischemic encephalopathy, cerebral palsy, optic atrophy, cortical visual impairment, exotropia, developmental delay, feeding problems, gastroesophageal reflux disease, constipation, asthma, adenoid hypertrophy, scoliosis, and congenital subluxation of the hip (unilateral), and shoulder dystocia (id.). The student communicated using facial expressions, head turning, touching desired objects and pressing switches with minimal support (id.). The student did not eat by mouth and received all means of hydration and nutrition via percutaneous endoscopic gastronomy (PEG) tube (id. at p. 7). The iBrain IEP further described the student as fully dependent on others for all activities of daily living (id. at p. 25).

The January 2021 iBrain proposed IEP included recommendations that the student receive a 12-month program in a nonpublic school and instruction in a 6:1+1 classroom with a full time 1:1 paraprofessional (Parent Ex. C at p. 47). iBrain indicated that due to the student's physical and cognitive needs, he required a classroom with minimal external visual and auditory stimuli that emphasized direct instruction in individual and small groups (id. at p. 1). The iBrain proposed IEP further indicated that the student required highly individualized attention and adult supervision via a 1:1 paraprofessional throughout the school day (id. at p. 2). It was further noted that, while the student demonstrated intellectual and cognitive potential to learn and excel, the student's rate of progress was dictated by his physical health and well-being (id.). The iBrain proposed IEP also included recommendations for assistive technology services and assistive technology devices such as switches, software, and adaptive seating, among other recommendations (id. at pp. 50-51). 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, three 60-minute sessions per week of vision education services, one 60-minute session per month of individual parent counseling and training, and one 60-minute individual assistive technology service session per week (id. at pp. 32, 34, 37, 38, 40, 42, 43, 49-50).

The January 2021 iBrain proposed IEP indicated in the student's present levels of educational performance that the student had received one 60-minute session per week of individual music therapy services beginning in September 2020 (Parent Ex. C at p. 14). The iBrain IEP further indicated that due to the student's extended hospital stay and low arousal during "session time," the student had only received six sessions as of the time of the IEP writing (id.). The January 2021 iBrain proposed IEP included a recommendation for two 60-minute sessions per week of individual music therapy in the annual goals section, however, the summary of recommended special education program and services section of the iBrain IEP did not include a recommendation for music therapy (compare Parent Ex. C at pp. 42-43, with Parent Ex. C at p. 49).

On February 1, 2021, a CSE convened for the student's annual review and to develop a public school IEP for the student with projected implementation dates of February 16, 2021 and March 2, 2021 (Parent Ex. D at pp. 1, 28-29, 33).[2] The February 2021 CSE found the student eligible for special education and related services as a student with a traumatic brain injury (TBI) and recommended a 12-month program in a 6:1+1 special class in a specialized school (id. at pp. 1, 28-29, 33-34).[3] The CSE also recommended that the student be provided with an assistive technology device, one 60-minute session per week of individual assistive technology services, five 60-minute sessions per week of OT, five 60-minute sessions per week of PT, one 60-minute session per month of group parent counseling and training, five 60-minute sessions per week of speech-language therapy, three 60-minute sessions per week of vision education services, a full time 1:1 health, safety, feeding and ambulation paraprofessional, and supports for school personnel on behalf of the student (id. at pp. 28-29). The CSE also found that the student needed specialized transportation which included a 1:1 paraprofessional, lift bus, air conditioning, and limited travel time (id. at p. 32).

In a prior written notice and school location letter, both dated February 19, 2021, the district 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. E at pp. 1-6). In a prior written notice and school location letter, both dated June 16, 2021, the district again provided the parent with notice of the student's continued eligibility for special education services and the CSE's recommended 12-month program, however the school location letter identified a different assigned school site (Parent Ex. F at pp. 1-6; compare Parent Ex. E at p. 5, with Parent Ex. F at p. 5).

In a letter dated June 23, 2021 the parent notified the district that she was rejecting the February 2021 IEP and public school placement, intended to unilaterally place the student at iBrain for the 12-month 2021-22 school year, and would seek public funding for that placement (Parent Ex. G 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). On June 25, 2021, the parent signed an enrollment contract for the student's attendance at iBrain for the period from July 7, 2021 to June 24, 2022 (Parent Ex. H at pp. 1, 7).

A. Due Process Complaint Notice

By due process complaint notice dated July 6, 2021, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 12-month, 2021-22

[2] The hearing record contains duplicative exhibits (compare Parent Exs. D, and F with Dist. Exs. 5, and 7). Although the district's copy of the February 2021 IEP contains more legible page breaks than the parent's copy, the district failed to correct the duplicate page numbering, which was identified during the impartial hearing (Tr. p. 31; see Dist. Ex. 5 at pp. 14-15). For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[3] The student's eligibility for special education services and classification as a student with a TBI is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

school year because it failed to provide a program and placement uniquely tailored to meet the student's needs (Parent Ex. A at pp. 1, 3). Specifically, the parent asserted that the CSE failed to appropriately address the student's management needs because it did not adopt the recommendations for health management needs set forth in the iBrain proposed IEP; failed to recommend appropriate related services because it failed to recommend music therapy; failed to recommend an individual, 1:1 nurse during school hours and transport; failed to recommend extended school day services for the student and therefore could not implement its IEP without reducing or modifying the mandated related services; and failed to recommend an appropriate school location (id. at pp. 3, 4). The parent further alleged that the district's recommendation for a 6:1+1 special class in a specialized school was not appropriate because the student would be grouped with students with behavioral management needs, the student would not have access to appropriate peer models, and the student would be exposed to health and safety risks (id. at p. 4). The parent next argued that the district failed to recommend a school location that could implement the IEP because the assigned school site did not offer extended school day services and related services could not be offered on a push-in/pull out basis (id. at p. 5).[4]

The parent argued that iBrain was an appropriate unilateral placement and that equitable considerations favored tuition reimbursement (Parent Ex. A at p. 5). As relief, the parent requested an order declaring that the student was denied a FAPE for the 2021-22 school year, a determination that iBrain was an appropriate placement for the student, and an order directing the district to fund the cost of full tuition at iBrain for the 2021-22 school year, including 12-month services, related services, a 1:1 paraprofessional and a 1:1 nurse (id.). In addition, the parent requested that the district be ordered to provide all assistive technology and augmentative and alternative communication (AAC) devices and supports; to reimburse or directly fund the cost of special transportation with limited travel time, a transportation paraprofessional, nurse or porter services; and, lastly, be directed to reconvene the CSE to address changes, if necessary (id. at p. 6).

B. Events Post-Dating the Due Process Complaint Notice

According to an iBrain service delivery log, the student was hospitalized again on May 14, 2021, and remained hospitalized through August 2021 (Parent Exs. N at p. 6; X at pp. 1-3). Thereafter, the student did not attend school either in person or remotely from August 5, 2021 through mid-January 2022 due to being "uncleared medically" (Parent Exs. O; X at pp. 4-13; see Parent Ex. N at p. 7).[5]

On October 6, 2021, the parent executed a special transportation service agreement which was to be effective from July, 1, 2021 to June 30, 2022 (Parent Ex. K at pp. 1, 5). According to the hearing record, the student did not receive any instruction or related services for the 12-month,

[4] In an apparent typographical error, this section of the July 6, 2021 due process complaint notice references a different student (Parent Ex. A at p. 5).

[5] Although the parents asserted claims related to the February 2021 CSE meeting and IEP developed as a result there were subsequent events that the February 2021 CSE would not have been in a position to consider at that time. The parent testified that the student was hospitalized from May 2021 through August 2021 and did not receive any home-based services until 2022 (Tr. pp. 129, 134, 135). On January 14, 2022, the student's physician cleared him to resume his school program (Parent Ex. Q at p. 3).

2021-22 school year until he was medically cleared to receive home-based services on January 14, 2022 (Parent Exs. N at pp. 6-7; Q at pp. 2-3; see Tr. pp. 162, 163).

C. Impartial Hearing Officer Decision

A hearing date was held on August 24, 2021 to identify the student's stay-put placement during the pendency of the proceedings (Tr. pp. 1-20). The parties agreed that the basis for pendency was an unappealed March 13, 2021 IHO decision (Tr. pp. 6, 7, 8, 11; see Parent Ex. B). In an interim decision on pendency dated August 24, 2021, the IHO ordered the district to directly fund the cost of the student's attendance at iBrain, including the cost of related services and a 1:1 paraprofessional for the 12-month, 2021-22 school year (Interim IHO Decision at p. 3).[6] The IHO further ordered the district to reimburse the cost of the student's special transportation for the 2021-22 school year up to a maximum amount per trip upon receipt of an affidavit and invoice detailing the use of the transportation (id.).

The impartial hearing continued on October 6, 2021, and concluded on April 18, 2022, after five nonconsecutive days of proceedings (Tr. pp. 21-223). In a decision dated May 5, 2022, the IHO determined that the district offered the student a FAPE for the 2021-22 school year (IHO Decision at pp. 10, 11, 14).[7] The IHO found that the district was not obligated to provide music therapy as that the proposed music therapy "[g]oals could be met through management needs, occupational, physical and speech and language services as well as with assistive technology" (id. at pp. 8-9). The IHO also found that the CSE "considered the benefits of music therapy and included them in the goals and as part of the curriculum" (id. at p. 9). In addition, the IHO found that the district was not required to provide the student an extended school day (id.).

The IHO next determined that the district's February 2021 IEP sufficiently addressed the student's medical needs (IHO Decision at p. 9). The IHO further determined that the district was not obligated to provide the assistive technology recommended in the February 2021 IEP because the student did not attend the public school placement (id. at p. 10).

With regard to the parent's claims related to the assigned public school, the IHO found that the parent's assertions that the student would be placed in a classroom with students with autism and behavioral challenges, and that such a classroom posed safety and health risks to the student, were "purely speculative" as the student never attended the proposed classroom (IHO Decision at p. 10). The IHO next indicated that the parent's due process complaint notice included several claims related to the assigned school site but did not include any claims related to wheelchair accessibility and found the parent first attempted to raise this claim as part of her closing (id.).

[6] The IHO incorrectly listed the date of the unappealed IHO decision as July 6, 2021, which was the date of the due process complaint notice (compare Interim IHO Decision at p. 3, with Parent Ex. B at p. 7).

[7] The IHO decision is not paginated; for the purposes of this decision, the pages will be cited consecutively with the cover page of the decision as page one (see IHO Decision at pp. 1-22).

Although not required, the IHO made findings related to the appropriateness of the parent's unilateral placement and equitable considerations (IHO Decision at pp. 10, 11-14). The IHO found that iBrain was an appropriate unilateral placement (id. at p. 12).

The IHO further found that the parent "never had any intention to place [the s]tudent at any" district specialized school and also found that the parent cooperated with the district (id. IHO Decision at pp. 10, 12). In addition, the IHO determined that, even if the district had failed to offer the student a FAPE, "there [we]re other issues that would warrant a reduction in any award of tuition" (id. at p. 13). The IHO noted that the student did not begin attending iBrain until the middle of January 2022 and found that, although the student was enrolled for the 12-month, 2021-22 school year, the district was "not responsible to fund the portion of any contract during months where [the s]tudent did not attend" (id.). The IHO further stated that "[i]t [wa]s between the school and the [p]arent and their outside contractors to figure out who [wa]s responsible for payment" and that the district "[wa]s certainly not responsible to fund either [the s]tudent's attendance at school, services, or transportation for a prolonged period of time where [the s]tudent was unable to attend or receive any services" (id.). The IHO also found that, had the parent prevailed at the impartial hearing, the district would have been responsible to fund the home-based services the student had received (id.). Having determined that the student was offered a FAPE for the 2021-22 school year, the IHO denied the parent's request for funding of the cost of the student's attendance at iBrain (id. at p. 14).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred by finding that the district's recommended placement was appropriate. The parent alleges that the assigned school site could not implement the student's February 2021 IEP because the school was not accessible to the student. The parent further asserts that the IHO improperly excluded evidence of the inaccessibility of the assigned school site and improperly failed to consider the parent's argument that it was not possible for the assigned school site to implement the February 2021 IEP because the student could not access the classroom.[8] The parent further alleges that the district failed to present a witness to testify to the assigned school site's ability to implement the student's February 2021 IEP and as a result failed to sustain its burden of proving that it offered the student a FAPE. The parent also argues that the IHO assumed facts not in evidence and "fill[ed] in the missing pieces" of the district's case (Req. for Rev. ¶ 25). The parent also contends that the IHO made erroneous findings by citing the district's "witnesses," when in actuality the district only presented one witness. The parent further asserts that the district's one witness did not address the assigned school site or the parent's claim of a lack of accessibility for the student. The parent next requests that an adverse inference be made against the district for failing to present a witness to rebut the parent's assigned school site claims.

The parent argues that the IHO erred by finding that the district offered the student a FAPE. The parent further alleges that the district failed to rebut the claim that the district could not implement the student's recommended 60-minute related services sessions without extended

[8] The parent concedes that the inaccessibility of the assigned school site was not raised in the due process complaint notice (Req. for Rev. ¶ 38).

school day services. The parent contends that the IHO erred by finding that the district was not required to provide an extended school day and argues that the district did not present any evidence that the student did not require extended school day services. In addition, the parent asserts that the district failed to demonstrate that the student did not need music therapy to receive a FAPE. The parent also alleges that the IHO's finding that the district considered the benefits of music therapy and included them in the goals and as part of the curriculum was unsupported by the hearing record. The parent further argues that the district's witness' testimony that the goals for music therapy could be met in other ways was not credible.

The parent also alleges that the recommended 6:1+1 special class was not appropriate and the IHO erred by finding the parent's claim speculative. The parent also asserted that the recommended classroom was dangerous for the student and that the district failed to rebut the claim.

The parent contends that the IHO erred by finding that the district was not required to fund the student's cost of attendance at iBrain and fund the student's transportation cost when the student was hospitalized for a period of time during the 2021-22 school year.

As relief, the parent requests a finding that the student was denied a FAPE for the 2021-22 school year, and an order directing the district to fully fund the student's tuition, related services and special transportation during the 2021-22 school year or alternatively that the matter be remanded to the IHO to complete the hearing record. In addition, the parent requests that the IHO's findings related to the appropriateness of iBrain and to equitable considerations favoring the parent be affirmed.

In an answer, the district responds with denials and requests that the parent's appeal be dismissed with prejudice. The district asserts that the IHO correctly determined that the student was offered a FAPE for the 2021-22 school year. In addition, the district contends that the parent has appealed the IHO's findings that the recommended placement was appropriate, that music therapy was not required for the student to receive a FAPE, and the IHO's alternative finding that the parent would have only been entitled to funding for iBrain for the time that the student actually attended the school. The district argues that the parent has not appealed the IHO's findings related to health management needs, 1:1 nursing, and provision of assistive technology and therefore those findings are final and binding.

Next the district alleges that the IHO correctly determined that the parent's claims related to the assigned school site were speculative, and as a result, the district was not required to present testimony related to the assigned school site's capacity to implement the IEP. The district further argues that the IHO correctly found that the parent's extended school day claim was without merit. The district contends that an extended school day was not necessary to implement the student's IEP because the district's witness testified that 35 periods represented a full school day rather than certain subjects and the IEP indicated that the majority of related services sessions should be delivered on a push-in basis. The district further argues that the evidence showed that the February 2021 IEP was created to be delivered within a regular school day and thus could be implemented in the assigned school site. The district also asserts that the parent's functional grouping claims were not a permissible prospective challenge to the district's capacity to implement the IEP and the IHO correctly determined they were speculative claims and without merit. The district further

contends that the student never attended the recommended assigned school site, and the testimony by the iBrain director of special education that the recommended classroom would be physically unsafe and inappropriate for the student was wholly speculative.

With regard to the parent's claim related to wheelchair accessibility, the district alleges that the IHO correctly determined that the claim was outside the scope of the impartial hearing and that the parent conceded as much in her request for review.

Concerning music therapy, the district argues that the IHO correctly found that the student did not require music therapy to receive a FAPE and that the student's needs were appropriately addressed by the February 2021 IEP. The district further asserts that the music therapy goals included in the proposed iBrain IEP related to needs that the district's February 2021 IEP addressed with other related services. In addition, the district argues that the student's interest in music was incorporated into the student's management needs and that music was offered as part of the curriculum at the assigned school site.

For all of these reasons, the district asserts that the IHO's determination that the district offered the student a FAPE for the 2021-22 school year should be affirmed; and that it is unnecessary to consider the parent's appeal related to the IHO's alternative finding that a reduction in an award of tuition was warranted based on the student's lack of attendance at iBrain until mid-January 2022.[9]

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

[9] The parent prepared, served, and filed a reply to the district's answer in this case. However, State regulation limits the scope of the parent's reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent triggering the parent's right to compose a reply. As such, the parent's reply fails to comply with the practice regulations and, thus, the reply will not be considered.

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]).[10]

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

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

VI. Discussion

A. Preliminary Matters

1. Scope of the Impartial Hearing

The parent argues that the IHO erred by finding that the parent failed to raise the issue of whether the assigned public school location was wheelchair accessible in the due process complaint notice. In her request for review, the parent concedes that the inaccessibility of the assigned school site was not raised in the due process complaint notice. The district alleges that the IHO correctly determined that the claim was outside the scope of the impartial hearing and notes that the parent conceded that the due process complaint notice did not include this claim in her request for review. The district also argues that the parent did not amend the due process complaint notice to include this allegation.

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

[10] 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).

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]).

Here, review of the due process complaint notice supports the IHO's finding that the parent did not raise the issue of the accessibility of the assigned public school location in the due process complaint notice. The parent made no specific allegations regarding the wheelchair accessibility of the assigned public school location, and the district correctly argues that the due process complaint notice cannot be reasonably read to include such a claim. In her request for review, the parent concedes that the due process complaint notice did not include this claim and it does not appear that she thereafter sought the district's agreement to expand the scope of issues or the IHO's permission to amend the due process complaint notice.

The next inquiry focuses on whether the district through the questioning of its witnesses "open[ed] the door" under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 59 [2d Cir. June 18, 2014]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

The district asserts that it did not open the door by eliciting testimony on the issue in order to defend its proposed programming and that it was the parent's attorney who belatedly and without IHO approval attempted to raise the issue of wheelchair accessibility at the assigned school site during cross-examination and in his closing statement. The district further argues that the IHO did not improperly exclude evidence that the placement was inaccessible and that the parent's attorney withdrew his question after the district objected. The district also contends that the parent's assertion that the district conceded the issue of wheelchair accessibility because it did not present a witness to testify about the assigned school site is without merit. The district argues that the IHO correctly determined that the issue was not properly raised by the parent and was outside the scope of the impartial hearing.

The hearing record supports the district's position. The district's attorney objected to the parent's attorney's question during cross-examination and the parent's attorney withdrew the question (Tr. pp. 50-52). The parent's attorney again attempted to raise the issue during his closing statement, the district's attorney objected and the IHO indicated that she would not give any weight to the claim if it was not properly raised (Tr. pp. 205-06).

As such, the hearing record does not support that the IHO incorrectly determined the scope of the impartial hearing by finding that the parent did not raise the issue of wheelchair accessibility at the assigned public school location. This accessibility issue was not among the issues in the due

process complaint notice and was outside the scope of the impartial hearing and, therefore, cannot be raised in this appeal.

2. Scope of Review

State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]).

The district correctly asserts that the parent has not appealed the IHO's findings related to health management needs, 1:1 nursing, and the provision of assistive technology that were adverse to the parent's position. As such, those determinations by the IHO have become final and binding on both parties and they 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]).

Accordingly, the issues remaining to be addressed on appeal are whether the IHO correctly determined that music therapy was not required for the student to receive a FAPE, that the student's IEP was appropriate without a specific recommendation for extended school day services, and that the parent's assigned public school site claims were speculative.

B. February 2021 IEP

1. Music Therapy as a Related Service

The parent appeals the IHO's finding that the district offered the student a FAPE despite not including music therapy as a related service in the student's February 2021 IEP. The parent asserts that the music therapy component in the student's iBrain program "bypass[es] damaged areas of the brain and support[s] the development of skills that are targeted throughout [the student]'s educational program" and an IEP without music therapy is not appropriate (Req. for Rev. ¶ 34). The district asserts that the IHO's determination regarding music therapy should be sustained because the student's needs that were addressed by music therapy at iBrain were otherwise appropriately addressed by the February 2021 IEP (Answer ¶¶ 8, 9).

According to the January 2021 proposed iBrain IEP, the student's skill level on a measure of his ability to consistently engage in conversational exchange was described as "[s]eldom effective sender and receiver with familiar partners" (Parent Ex. C at pp. 3, 4). It was noted that the student did not initiate contact or communicate intentionally with others, however, based on clinical observation, the student's interests that motivated him to communicate included music, vibrating toys and familiar communication partners (id.). Receptively, the student was also reportedly beginning to follow simple one-step commands to locate and activate his switch, such as, "turn your head to hit your switch if you want to play more music" (id. at p. 5). Expressively, it was indicated that the student was able to activate his switch to request an action or recurrence, for example, "turn the toy on, more music" (id.). The proposed iBrain IEP further indicated that when presented with highly motivating items, such as vibrating toys, scented candles or preferred

music, the student would intentionally hit his switch with the left side of his head to receive the desired item, "though performance for switch activation still remain[ed] inconsistent" (id.). The student's performance to reject or turn off an item using switch activation also remained inconsistent (id.).

The January 2021 proposed iBrain IEP reflected that the student enjoyed music and would engage in music while in OT, vision education services, for completing academic tasks, for class participation, for social/emotional development, and in assistive technology (Parent Ex. C at pp. 7, 12, 14, 15, 18, 20). According to the proposed iBrain IEP, the student was recommended to receive one 60-minute session per week of music therapy during the 2020-21 school year, however due to an extended hospitalization and low arousal during session time, the student received a total of six sessions for the school year (id. at p. 14). According to the student's iBrain IEP, the student benefited from a familiar, modified environment with limited environmental distractions, because external and background noise easily distracted the student (id.). The student reportedly required 60-minute individual sessions to allow adequate time for transitioning to appropriate therapy space, transfers, preparatory activities, equipment set up, rest breaks, demonstrations, repetition, and processing/response time (id.). The student's sessions began with "a hello song" to help the student transition to music therapy, improvisational music was used to support the student's expression and relatedness, exploration of various instruments was used to introduce the student to various sounds, timbre and textures, and "a goodbye song" was used to help transition the student out of music therapy (id.). The proposed iBrain IEP further indicated that throughout the music therapy session, the student was "presented with and introduced to various sounds and instruments such as guitar, voice, shakers, quakers, drums and xylophone" (id.). The proposed iBrain IEP also noted that the student's responses to the various sounds and instruments, tempos and dynamics would be assessed by observing the student's musical attention, musical affect, adaptation to musical-play, musical engagement, and musical interrelatedness (id.).

The January 2021 iBrain proposed IEP included three annual goals for music therapy (Parent Ex. C at pp. 42-43). The first goal stated that the student would increase active participation in improvisational music by extending his upper extremities to play an instrument (id. at p. 42). The second goal stated that the student would increase active participation in interpersonal interactions within the context of music therapy (id.). The third goal indicated that the student would increase his expression and communication skills within the context of music therapy (id.). The iBrain proposed IEP recommended that the student receive two 60-minute sessions per week of individual music therapy for the 2021-22 school year on a push-in/pull-out basis (id. at p. 43). The rationale for the recommendation was that the student had shown responsiveness to the presence of music therapy and its techniques, and music therapy was appropriate for the student to ensure repetition of skills and comprehensive work to promote carry-over and generalization of skills outside of the therapy setting (id.).

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]).

Despite the parent's assertion that the student required music therapy in order to receive a FAPE, review of the district's February 2021 IEP showed that the areas and skills targeted during music therapy were addressed by related services, annual goals and management needs (see Parent Ex. D). Specifically, the February 2021 CSE recommended the student attend a 12-month program in a 6:1+1 special class in a specialized school along with the related services of one 60-minute session of individual assistive technology services per week, five 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, one 60-minute session per month of group parent counseling and training, five 60-minute sessions per week of individual speech-language therapy, three 60-minute sessions per week of vision education services, and a full time 1:1 health, safety, feeding and ambulation paraprofessional (id. at pp. 1, 28-29, 33-34).

Nearly all of the information reported in the iBrain proposed IEP was incorporated into the district's February 2021 IEP (compare Parent Ex. C at pp. 1-14, 18, 22-24, 30-41, 43-46, 49-51, with Parent D at pp. 4-18, 20-29). The February 2021 IEP included the description of the student's performance in music therapy sessions, as found in the January 2021 iBrain IEP, along with information provided by the student's therapist at the CSE meeting (Parent Ex. D at p. 9). Within the present levels of performance the IEP indicated that the student "enjoy[ed] participating in music,"" respond[ed] well to music," and that "preferred music" served as a highly motivating item for the student (Parent Ex. D at p. 7). Although the February 2021 IEP did not include a recommendation for music therapy goals or services specifically, the annual goals and the resources identified to address the student's management needs targeted the motor (extension of upper extremities), social (active participation in interpersonal interactions/localization of sound), and communication (expression and communication/switch activation) skills underlying iBrain's recommendation for music therapy (Parent Ex. C at p. 42). With respect to motor development and extension of upper extremities, the February 2021 IEP included a short-term objective that targeted the student's ability to demonstrate improved shoulder and elbow range of motion by reaching forward and a second short-term objective that targeted the student's ability to demonstrate active reaching and participation in handwashing by extending his arms (Parent Ex. D at pp. 21, 23). With respect to social development and participation in interpersonal interactions, the February 2021 IEP included goals that targeted the student's participation in academic and classroom activities as well as social activities (id. at pp. 20-21). The corresponding short-term objectives targeted the student's ability to participate in morning meeting by accessing a switch to play pre-recorded phrases, such as "good morning," and activating a switch to make single-step requests during leisure activities (id.). In addition, the IEP included a goal that targeted the student's ability to increase his awareness and attention to different stimuli and short-term objectives that addressed the student's ability to localize toward sounds (id. at p. 25). The IEP also included goals and objectives that targeted the student's ability to use a switch to stop an undesired activity (using a prerecorded "stop" message), increase his expressive language skills using multimodal means of communication in order to request or comment, and develop consistency in his switch activation to increase ability to participate in a variety of classroom and therapeutic activities (id. at pp. 24-25, 26, 27). To assist the student with meeting these goals, the February 2021 CSE also recommended that the student have access to the use of a single voice output device to communicate and participate in academic activities and the support of a paraprofessional to assist with switch use (id. at pp. 16-17).

The district school psychologist testified that music was part of the general education curriculum and that the CSE reviewed the iBrain music therapy goals and "felt that the goals would

be able to be met through the other service[s] and through the program [the CSE was] creating with the management needs" (Tr. pp. 27, 40). The district school psychologist further testified that the objectives of the iBrain music therapy goals were "to have him actively participate and to have him increase his communication and increase his interpersonal skills" (Tr. p. 41). The district school psychologist noted that those goals were met by the recommended management needs, the student's goals in OT, PT and speech-language therapy, and assistive technology services (id.). The district school psychologist also testified that "one of the proposed goals for the music therapy was to increase his expression and communication" and that the recommended speech-language goals "that we did incorporate [we]re to help develop his expressive language and to help increase his communication" (id.).

Although it is undisputed that iBrain recommended that the student receive music therapy during the 2021-22 school year (Parent Ex. C at pp. 42-43), comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE; rather it must be determined whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint notice, and whether the IEP developed by its CSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (Rowley, 458 U.S. at 189, 206-07; R.E, 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "'the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent'"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at *8 [S.D. Cal. Feb. 14, 2013] [noting that "'[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits'"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at *5 [S.D. Cal. Mar. 14, 2011]).

As such, review of the district's February 2021 IEP reveals that it provided related services—albeit in a different way than those the parent preferred—and supports to address the student's needs that iBrain addressed through music therapy (see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 592-93 [S.D.N.Y. 2013] [finding that, although the evidence may have supported that music therapy was beneficial for the student, it did not support the conclusion that the student could not receive a FAPE without it]). There was no denial of a FAPE to the student in this case merely because the district did not opt to use music therapy as a related service in the same manner as iBrain.

2. Extended School Day Services

The parent appeals the IHO's finding that the CSE was not required to recommend an extended school day to the student and argues that the district failed to rebut the claim that the district could not implement the student's recommended 60-minute related services sessions without extended school day services. The parent asserts that the student was denied a FAPE because it was mathematically impossible to provide the student with all required academic instruction and related services in a regular school day.

The February 2021 CSE recommended the student receive the related services of one 60-minute session of individual assistive technology services per week, five 60-minute sessions per week of OT, five 60-minute sessions per week of PT, five 60-minute sessions per week of speech-language therapy, and three 60-minute sessions of vision education services (Parent Ex. D at pp. 28-29).

The February 2021 IEP included information from the student's related services providers from iBrain who participated in the February 2021 CSE meeting (Parent Ex. D at pp. 9-10). With regard to the student's academic, developmental and functional needs including needs that were of concern to the parent, the February 2021 IEP reflects that the parent did not have any comments about academics, speech-language therapy, assistive technology or music therapy (id. at p. 10). The IEP then noted that "[t]he CSE Team recognize[d] that the majority of the related services should be push-in so that [the student] c[ould] work towards his academic goals. However, when new skills [we]re introduced or if a session mandate[d] a separate location, pull-out services [we]re recommended" (id.).

The iBrain director of special education (director) testified that related services were provided at iBrain approximately on "a 50-50 split of push-in and pull-out services" (Tr. pp. 86, 116). The iBrain director further testified that push-in services were provided in collaboration between the therapists and offered an example of the music therapist pushing into academic instruction to support the student's "understanding and his ability to participate . . . not presenting any conflicting information or information demands on him. They're really just facilitating his participation and understanding of the material" (Tr. pp. 117-18).

Notwithstanding evidence that the student's school day schedule at iBrain may have been extended, the hearing record does not support the parent's view that it was mathematically impossible for the student to receive the recommended related services without extended school day services. The hearing record also indicates that the parent was in agreement with the district's recommendations with the exception of the recommended public school placement at a district specialized school (Parent Ex. F at p. 2).

Additionally, the parent argues that the recommended placement was unable to implement the recommendations contained in the February 2021 IEP during the regular school day as one of her reasons for rejecting the assigned public school site (Parent Ex. G at p. 2). Her view was not borne out by the evidence, as the student never attended the assigned public school site pursuant to the February 2021 IEP. As discussed further below, 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. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 187 & n.3]). Further, any claim that the assigned school would not offer an extended school day 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 244, 245 [2d Cir. 2015]). In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the February 2021 IEP.

C. Assigned School Site Claims

The parent argues that the IHO erred by finding the parent's claims related to the "inappropriateness of a 6:1:1 class in a District [specialized] public school" as speculative and asserts that the parent "presented extensive testimony that such a classroom would not only be inappropriate but would also be dangerous" for the student (Req. for Rev. ¶ 37).

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 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., 589 Fed. App'x at 576). 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., 793 F.3d at 244; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York

City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Turning first to the parent's claims related to the functional grouping of the proposed class at the assigned public school, neither the IDEA nor federal regulations require students who attend a special class setting to be grouped in any particular manner. The United States Department of Education has opined that a student must be assigned to a class based upon his or her "educational needs as described in his or her IEP" and not on "a categorical placement," such as one based on the student's disability category (Letter to Fascell, 18 IDELR 218 [OSEP 1991]). While unaddressed by federal law and regulations, State regulations set forth some requirements that school districts must follow for grouping students with disabilities. In particular, State regulations provide that in many instances the age range of students in a special education class in a public school who are less than 16 years old shall not exceed 36 months (8 NYCRR 200.6[h][5]). State regulations also require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii]; 200.6[a][3], [h][3]; see Walczak, 142 F.3d at 133 [approving an IEP that placed a student in a classroom with students of different intellectual, social, and behavioral needs, where sufficient similarities existed]).[11] State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the students according to levels of academic or educational achievement and learning characteristics, levels of social development, levels of physical development, and the management needs of the students in the classroom (see 8 NYCRR 200.6[h][2]; see also 8 NYCRR 200.1[ww][3][i][a]-[d]). SROs have often referred to grouping in the areas of academic or educational achievement, social development, physical development, and management needs collectively as "functional grouping" to distinguish that set of requirements from grouping in accordance with age ranges (see, e.g., Application of a Student with a Disability, Appeal No. 17-026).

It is undisputed that the February 2021 CSE recommended that the student receive instruction in a 6:1+1 special class in a specialized school (Parent Ex. D at pp. 28, 33, 34). However, the student never actually attended the recommended 6:1+1 special class, as he was unilaterally placed at iBrain (Parent Exs. G at pp. 1-2; H at pp. 1-7). As noted by the IHO, because the student never attended the recommended placement, any claim related to a particular class or the students who may have been in a particular class was purely speculative (IHO Decision at p. 10). 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. , 643 Fed. App'x at 33 [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

[11] 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.

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., 2016 WL 5107039, at *15 [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). Therefore, the IHO correctly found that all questions presented by the parent which related to other students in the classroom at the public school were speculative (IHO Decision at p. 10).

The evidence in the hearing record further underlines the speculative nature of the parents' concerns that the student would be inappropriately grouped. The hearing record indicates that the parent did not disagree with the district's recommended class size, rather the parent objected to the student being placed in a district specialized school (Dist. Ex. 5 at p. 49). The parent testified that she disagreed with the recommendation for the district specialized school "[b]ecause they don't provide what [the student] needs right now" (Tr. p. 133; see Tr. pp. 139-40). The parent further testified that she called the assigned school site but could not recall who spoke with or when she called (Tr. p. 139). The parent further testified that she agreed with a 6:1+1 special class because the student was very fragile and needed more attention (Tr. p. 140).

The iBrain director of special education testified, based upon her own experience having worked in 6:1+1 classes in district specialized schools and "from parent reports and conversations . . . from a range of parents who have reported back . . . after having visited recommended placements," 6:1+1 special classes in district specialized schools "[we]re very consistently for student who are on the autism spectrum" (Tr. pp. 87, 95). The iBrain director further testified that "students that are on the autism spectrum . . . who would warrant a 6:1:1 placement would be a really inappropriate peer group for [the student]" and "would be physically unsafe for [the student] to be in a room with these students, because they lack safety awareness, and they lack an awareness of their peers" (Tr. p. 96). The iBrain director next described the student's medical fragility and noted the student's reliance on a ventilator and feeding tube (id.).

The iBrain director further opined that

> [t]o put him in a room with students that wouldn't have the ability to really understand the implications of this and who . . . are often impulsive, they wouldn't understand . . . the implication of knocking into [the student], or they might like the texture of his G-Tube and end up touching it or pulling it in an unsafe way, not to mention, you know, something with his ventilator. Something with that could easily be a huge risk in that student population. Also, some students with autism do present with behavioral challenges, which again would pose a huge threat to [the student], because not only is he unable to defend himself and is literally a sitting target who, because of his visual and physical challenges, would literally just not be able to understand what was going on around him. That's number 1, it's the safety. Number 2 is in terms of the learning environment. So many students with a 6:1:1 class ratio recommendation, they are on

> the autism spectrum at the level where they often require devices to communicate, or very often, display echolalia, where they will repeat a lot of phrases, really without communicative intent, and they are -- that would be really confusing for [the student]. And 1, he has difficulty in understanding, you know, what things are directions for him. It would present a lot of confusing auditory information that he would need to, kind of parse away so that he could understand and focus during the day, and it would provide a lot of inappropriate models for the way that language is used. So he's trying to learn to use his device and what different phrases mean, and to have phrases repeated often without meaning and purpose would just present a lot of confusion for [the student] that I think would be extremely detrimental to his academic learning

(Tr. pp. 96-98).

However, the director later testified that her personal knowledge of a district specialized school was from the 2010-11 school year and that she had did not have any actual knowledge of the proposed classroom or school site in this case (Tr. pp. 112-13). Thus, the testimony of the iBrain director noted above was unsupported by the hearing record. Without basis in fact, her statements were based upon her own generalizations about other classrooms and stereotypes of students with different disability classifications.

While the parents are free to choose private schooling like iBrain in which they feel all of the children in the classroom fit their preferred characteristics and disability categories, overall, this is not a case in which the evidence shows that the public school site is "factually incapable" of implementing the IEP. The information discussed in detail above does not support disturbing the IHO's finding that the district presented sufficient evidence to show that it would have been able to implement the February 2021 IEP or that the IEP was procedurally and substantively appropriate. The parent's objections to the classification of students with autism or the fact that the other students are ambulatory at the assigned school do not amount to an inability to implement the student's IEP, and therefore fall too closely to an attempt to exercise an impermissible parental veto over the district's assignment of the student to a public school site.

In sum, the IHO correctly determined that the parent's arguments relating to the grouping of the student were entirely speculative as no specific information was presented regarding the particular class to which the student would have been assigned had he attended the specialized public school (IHO Decision at p. 10). Accordingly, based on the above, I decline to find that the district would have been incapable of implementing the February 2021 IEP.

VII. Conclusion

Based on the foregoing, I find that the hearing record supports the IHO's finding that the February 2021 IEP was reasonably calculated to enable the student to receive educational benefit in light of his unique circumstances (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]). Here, the parties do not dispute that iBrain was an appropriate unilateral placement for the student. Regardless, 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 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). Accordingly, there is no reason to reach the issues presented on appeal relating to a reduction in an award of the cost of the student's attendance at iBrain.

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.

Dated: **Albany, New York**
July 25, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER