The University of the State of New York

The State Education Department
State Review Officer
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No. 22-136

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for their daughter for the 2021-22 and 2022-23 school years was appropriate and denied their request to be reimbursed for their daughter's tuition costs at the International Institute for the Brain (iBrain) for the 2021-22 and 2022-23 school years. 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 has been the subject of prior State-level administrative appeals, Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248, which resulted in a remand of Appeal No. 21-248, which is currently pending before the IHO in this matter. The hearing record further reflects that the student is also the subject of multiple administrative hearings currently pending before the IHO in this matter (IHO Exs. I-II). Because the parents only seek relief from February 11, 2022 through the 2022-23 school year and because the parties are familiar with the facts and procedural history preceding this case, as well as the student's educational history, it is not necessary to repeat the student's educational history in detail.

The student began attending iBrain in February 2020 and received "remote services whenever she [wa]s unable to attend in person" (see Parent Exs. B at p. 1; V ¶¶ 8, 10; W ¶10).[1] According to the evidence in the hearing record, the student was engaging and energetic, and had an extensive history of seizures (see Parent Exs. B at pp. 1-3; C at p. 1; P at p. 1). The student was nonverbal, exhibited some academic readiness skills, and was ambulatory but required assistance due to poor safety awareness, impulsivity, and risk of seizures (see Parent Exs. B at pp. 1-3; C at pp. 1-3; P at pp. 1-3). During the 2020-21 school year the student continued to receive services from iBrain, which consisted of a 12-month program in a 6:1+1 class together with occupational therapy (OT), physical therapy (PT), speech-language therapy, parent counseling and training, 1:1 paraprofessional services, and assistive technology services and devices (Parent Exs. B at p. 24; D at pp. 27-28; see Parent Ex. V ¶¶ 9-11).

The student attended iBrain during the 2021-22 school year in a 12-month program consisting of a 6:1+1 class with OT, PT, speech-language therapy, 1:1 paraprofessional services, vision education services, music therapy, and assistive technology services (Parent Exs. D at pp. 27-28; L; W ¶12). As part of the district's reevaluation of the student, in January 2022 the district conducted a social history, a psychoeducational evaluation, and a level 1 vocational interview (Parent Exs. M; N; O).[2]

On February 11, 2022, a CSE convened for the student's annual review and to develop an IEP with a projected implementation date of February 21, 2022 (Parent Ex. X at p. 1). The February 2022 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 district specialized school (id. at pp. 1, 50-51).[3] The CSE also recommended that the student be provided with five 60-minute sessions per week of individual OT, four 45-minute sessions per week of individual PT, five 60-minute sessions per week of individual speech-language therapy, one 60-minute group session per month of parent counseling and training, full-time 1:1 paraprofessional services, school nurse services as needed, and an assistive technology device to be used daily throughout the day, at home and school (id. at pp. 50-51). The CSE further recommended that the student receive special transportation services which included a 1:1 paraprofessional, lift bus, air conditioning, and limited travel time (id. at pp. 55-56).

A. Due Process Complaint Notice

In a due process complaint notice dated March 16, 2022, the parents alleged that the student had been denied a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school

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

[2] There are duplicate exhibits in the hearing record (see Parent Exs. N; O; S; X; Dist. Exs. 2; 3; 4; 6). In the future, the parties are encouraged to confer beforehand and submit joint exhibits to the extent practicable (8 NYCRR 200.5[j][3][xii][b]). Additionally, the IHO is reminded of her obligation to exclude from the hearing record any evidence 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 as a student with a TBI is not in dispute in this appeal (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

years (Parent Ex. A at p. 1).[4] Broadly, the parents argued that the district failed to provide a program and placement uniquely tailored to meet the student's needs, that the district's recommended program was not reasonably calculated to provide educational benefits to the student and asserted that they would "challenge herein any and all IEPs offered to the [s]tudent" for the 12-month 2021-22 school year (id. at p. 3).

Specifically, the parents contended that the district's February 11, 2022 IEP included an implementation date of February 21, 2022, and, as of the date of the due process complaint notice, the district had not provided the parents with prior written notice and a school location letter indicating the school site to which the student had been assigned (Parent Ex. A at p. 3). The parents asserted that this failure constituted a "per se denial of FAPE" (id.). Additionally, the parents alleged that the failure to recommend a school location denied them "their right to obtain sufficient information about a proposed school location to determine whether the school c[ould] implement the February 11 IEP" (id.). Next, the parents argued that the district failed to recommend appropriate related services and supports by failing to recommend music therapy, hearing education services, and vision education services in the February 11, 2022 IEP (id. at pp. 3-4). The parents alleged that the district did not base its determination on the student's needs but on the district's inability to provide music therapy (id. at p. 3). The parents further contended that the district adopted goals for sign language but failed to recommend hearing education services (id.). The parents also asserted that the district recommended assistive technology devices but failed to provide the student with any recommended devices (id. at p. 4).

With regard to the assigned public school site, the parents argued that a district 6:1+1 special class in a specialized school was "primarily for students on the autism spectrum, who have vastly different educational and behavioral needs than [the student]," that the district failed to recommend a school location with peers who have similar needs and that by failing to recommend a school with students who were working on similar communication goals and who could act as appropriate peer models for the student the district denied the student a FAPE (Parent Ex. A at p. 4). The parents further alleged that the student would be endangered at a district specialized school due to her visual impairment, lack of safety awareness, and inability to protect herself (id.). Lastly, the parents contended that it was "mathematically impossible" for the district to provide the student with all of the recommended related services in a district placement, "as there [we]re simply not enough hours in the school week" (id.).

The parents also argued that iBrain was an appropriate unilateral placement for the student and that equitable considerations favored an award of full tuition, related services, and transportation costs (Parent Ex. A at p. 4). As relief, the parents requested direct payment to iBrain for the full cost of the student's tuition, related services, and for a 1:1 paraprofessional for the 12-month 2021-22 school year, as well as reimbursement and/or prospective funding of the cost of special education transportation with limited travel time and a transportation paraprofessional, nurse, or porter services for the 12-month 2021-22 school year (id. at p. 5). The parents further requested that the district be directed to reconvene the CSE "to address changes if necessary,"

[4] The parents requested that the March 16, 2022 due process complaint notice be consolidated with the remand of Application of a Student with a Disability, Appeal No. 21-248, which, as noted above, was pending before the IHO in this matter (Parent Ex. A at pp. 1-2). By order on consolidation dated April 20, 2022, the IHO denied the parents' request for consolidation (IHO Ex. II).

provide the student's recommended assistive technology services and devices, and reimburse the parents for all costs associated with the student's assistive technology device (id.). In addition, the parents requested that the district fund an "independent educational and transition evaluation" of the student (id. at p. 6). The parents further requested a finding that the student had been denied a FAPE for the 2021-22 and 2022-23 school years (id. at p. 5).

B. Facts Post-Dating the Due Process Complaint Notice

By prior written notice and school location letter dated March 30, 2022, the district summarized the recommendations of the February 2022 CSE and notified the parents of the public school site to which the student had been assigned for the remainder of the 2021-22 school year and for a portion of the 2022-23 school year (Parent Ex. S). The prior written notice included the parents' concerns about the specialized school setting and the lack of recommendations for music therapy, vision education services, and hearing education services (id. at p. 2). According to the prior written notice, the district requested updated medical information to support determinations for hearing, vision, and transportation accommodations, and reflected that the student's mother had indicated that she would "forward all relevant materials once available" (id.).

C. Impartial Hearing Officer Decision

A prehearing conference was held on May 24, 2022 (Tr. pp. 1-18). The parties proceeded to an impartial hearing on June 27, 2022, which concluded on July 6, 2022, after four days of proceedings (Tr. pp. 19-382).[5] During the June 28, 2022 hearing date, the parents' attorney indicated that the parents were challenging the February 11, 2022 IEP and were limiting their request for relief for the period beginning on February 11, 2022 and "from that day forward" (Tr. p. 183).

In a decision dated August 29, 2022, the IHO found that the district offered the student a FAPE from February 11, 2022, through the end of the 2022-23 school year (IHO Decision at pp. 14, 28).[6, 7] The IHO also noted that while the parents challenged the 2022-23 school year, the parents did not request any relief related to that school year (id. at p. 7).

In finding that the student was offered a FAPE, the IHO first determined that the district complied with the procedural requirements of the IDEA, and then found that the school location letter was not untimely; the February 11, 2022 IEP was reasonably calculated to enable the student to receive educational benefits; the student did not require music therapy, vision education services, and hearing education services to receive a FAPE; the district's recommended school

[5] The hearing dates listed on the cover of the IHO's decision are not consistent with the dates listed on the transcripts (compare IHO Decision at p. 1, with Tr. pp. 1, 19, 178, 336, 374).

[6] The IHO decision is not paginated; for the purposes of this decision, the pages will be cited consecutively with the cover sheet as page one (see IHO Decision at pp. 1-47).

[7] The IHO's decision indicated that the parents filed and withdrew an amended due process complaint notice via email correspondence dated June 14, 2022 (IHO Decision at pp. 2-3, 5). The hearing record reflects that by interim decision dated June 18, 2022, the IHO denied the district's partial motion to dismiss (IHO Ex. III at p. 4).

location was appropriate; and the district was not required to provide the student with recommended assistive technology services and devices (IHO Decision at pp. 14-28).

Although not required to do so, the IHO determined that iBrain was an appropriate unilateral placement for the student and "if the [district] had failed in their offer of a FAPE to [the] [s]tudent, [iBrain] was an appropriate placement for the [s]tudent for the school years at issue" (IHO Decision at pp. 28-32). The IHO next found that equitable considerations did not favor full reimbursement (id. at pp. 32-35). The IHO noted that the parent's testimony indicated that the student had left the district as of April 30, 2022, and was receiving remote instruction, however there was no additional evidence describing the remote services and what they included (id. at p. 33). The IHO further noted that the parents were seeking full reimbursement of the tuition and transportation contracts from February 11, 2022 through the end of the 2022-23 school year without evidence of whether or not the student received all of the services reflected in the contracts (id.). In addition, the IHO stated that the parent testified that she was unsure of her financial responsibility for any portion of the cost of the student's attendance at iBrain including travel, housing, tuition, related services, and transportation, and that she had not made any payments to iBrain (id. at p. 34). The IHO further noted that the parents had not offered a contract for the 12-month 2022-23 school year into evidence and failed to provide a ten-day notice letter to the district for the 12-month 2022-23 school year (id.). The IHO determined that based on all of the issues she outlined, a reduction in the total amount of a tuition award would be warranted had she found that the district failed to offer the student a FAPE (id. at pp. 34-35). Additionally, the IHO determined that had the district failed to offer the student a FAPE, the student would have been entitled to the provision of transportation (id. at p. 35).

Notwithstanding the IHO's determination that the district offered the student a FAPE, the IHO ordered the district to fund independent educational evaluations (IEE) with providers of the parents' choosing in hearing education services and vision education services (IHO Decision at p. 37). The IHO further ordered the district to reconvene a CSE meeting to consider the additional data which may be included in the IEEs (id.).

IV. Appeal for State-Level Review

The parents appeal and assert that the IHO erred in finding that the student was offered a FAPE from February 11, 2022 through the end of the 2022-23 school year, and in further finding that had the parents prevailed during the impartial hearing a reduction in the amount of tuition awarded would have been warranted based on equitable considerations.

Specifically, the parents argue that the IHO erred in finding that the district's recommendation of a school location was timely and allege that the district's prior written notice and school location letter were dated more than a month after the implementation date of the February 2022 IEP and two weeks after the parents' due process complaint notice. The parents assert that they were denied timely relevant information about the district's proposed placement. The parents also contend that the district waived any objection and accepted the student's residency by creating the February 11, 2022 IEP and "was obligated to provide [the student] with a school location by the IEP's Implementation Date of February 22, 2022" (Req. for Rev. ¶18).[8] Next the

[8] The implementation date listed on the February 11, 2022 IEP was actually February 21, 2022 (Parent Ex. X at

parents assert that because the student had been found to be a nonresident of the district prior to February 11, 2022, "the date of the IEP was effectively the beginning of the school year for [the student]" (Req. for Rev. ¶19). The parents also argue that the IHO incorrectly used the date of the parents' consent to evaluate to calculate the 60 school days the district had to implement the student's IEP.[9]

The parents further allege that the IHO erred in determining that the recommended related services were appropriate, and assert that the student required music therapy, hearing education services, and vision education services to receive a FAPE. The parents further assert that the IHO erred in finding that the assigned school site was appropriate and that the district failed to demonstrate that that it could implement the February 2022 IEP. The parents allege that the student would not be appropriately grouped with similar students and that there was insufficient staffing at the assigned school site to provide the student's recommended related services. The parents also contend that the IHO shifted the burden of proof on the issue of implementation to the parents.

The parents argue that the IHO erred in finding that the student was not entitled to transportation when the student was not present in the district and that equitable considerations entitled the parents to full reimbursement. Lastly, the parents assert that the IHO correctly determined that iBrain was an appropriate unilateral placement for the student and correctly awarded IEEs.

In an answer, the district responds with general denials and asserts that the IHO's decision should be upheld in its entirety. The district argues that the IHO correctly determined that the student was offered a FAPE for the 2021-22 and 2022-23 school years. The district asserts that the IHO correctly found that the district's school location letter was timely because it was sent to the parents within 60 school days of the district having obtained consent from the parents. The district further argues that it was not required to provide special education and related services to the student until 60 school days had elapsed since parental consent was obtained because the student previously had been determined to be a nonresident. Next the district argues that the parents' contention—that 60 school days should be calculated from the date the student was referred to the CSE—was not raised in the due process complaint notice and should not be considered. The district further asserts that the parents' proposed exhibits which were annexed to the memorandum of law should be rejected as procedurally infirm and otherwise excluded as the parents had requested that the scope of the impartial hearing be limited to the time period from February 11, 2022 through the 2022-23 school year.

The district also argues that the IHO correctly determined that its recommended placement was appropriate and capable of implementing the February 11, 2022 IEP. Additionally, the district alleges that the parents' arguments are speculative and that the claims related to air conditioning

p. 1).

[9] The request for review references a parents' proposed SRO Ex. XX, which was not submitted to the Office of State Review for consideration. In addition, no proposed exhibits were annexed to the request for review, nor have the parents requested that an SRO consider any additional evidence in their appeal. The parents annexed three exhibits to their memorandum of law consisting of email correspondence between November 2021 and January 2022 and a contract for the student's enrollment at iBrain for the 2022-23 school year signed in June 2022.

and appropriate areas for related services were not raised in the due process complaint notice. Lastly, the district contends that the IHO correctly found that equitable considerations did not favor full reimbursement.

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]).[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).

[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).

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

VI. Discussion

A. Scope of Review and Additional Evidence

It is first necessary to identify what issues are properly before me on appeal. 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]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Neither party has appealed the IHO's determination that iBrain was an appropriate unilateral placement from February 11, 2022 through the 2022-23 school year. Nor has either party appealed the IHO's award of IEEs in hearing education services and vision education services and her directive to reconvene the CSE to consider those evaluations upon completion. Therefore, those aspects of the IHO's decision have become final and binding 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]).

Turning to the exhibits annexed to the parents' memorandum of law, I note at the outset that the proposed exhibits and the parents' arguments are contained wholly within the parents' memorandum of law. The parents did not annex the exhibits to the request for review and did not request, in the request for review, that the proposed additional evidence be considered on appeal.

In its answer, the district argues that the parents' proposed exhibits should be rejected as procedurally infirm because they were annexed to the memorandum of law and further that the exhibits are outside the scope of the impartial hearing, which was specifically requested by the parents to be limited to the time period beginning February 11, 2022 through the end of the 2022-23 school year.

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO'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 a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

All of the exhibits annexed to the parents' memorandum of law were available at the time of the impartial hearing. Moreover, the proposed additional evidence and all of the parents' arguments related to the proposed evidence are included in the parents' memorandum of law and

are not set forth in the request for review. Accordingly, these arguments were not properly raised, as it has long been held that a memorandum of law is not a substitute for a pleading (8 NYCRR 279.4; 279.6; 279.8[c][3]; [d]; see Davis, 2021 WL 964820, at *11; see, e.g., Application of a Student with a Disability, Appeal No. 15-070).

In addition, the parents' sole argument for acceptance of the exhibits is that an SRO has authority to consider additional evidence and that the proposed additional evidence was not offered at the impartial hearing "because it was believed to be self-evident that [the district] could not disingenuously challenge the allegation that its [prior written notice] and [school location letter] were untimely" is contained entirely in the parents' memorandum of law. However, even if I were to accept the parents' somewhat inartful framing of why the evidence was not presented during the impartial hearing and agree that the proposed exhibits establish a set date for referral to the CSE, as discussed below, the hearing record would remain insufficient to establish the timeliness of the district's school location letter and would not change the outcome of this appeal. Additionally, it is unnecessary to review the contract for the student's enrollment at iBrain for the 2022-23 school year as it is not relevant to any determinations made within this decision. Therefore, the parents' exhibits are not necessary in order to render a decision and none of the parents' proposed exhibits will be considered in this appeal.

B. Scope of the Impartial Hearing

The district alleges that the parents' argument that the IHO incorrectly calculated 60 school days from the date of consent rather than the date of referral was "a meritless attempt to reframe a 'child find' claim" and was not raised in the due process complaint notice (Answer ¶13). Next the district asserts that the parents' claims related to air conditioning and appropriate areas for related services were also not raised in the due process complaint notice and should not be considered.

1. Timeliness of the School Location Letter

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

Moreover, it is essential that the IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ. of Evanston Tp. High Sch. Dist. 202, 502 F.3d 708, 713 [7th Cir. 2007]). Although an IHO has the authority

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

The parents' due process complaint notice does not include any allegations related to the State regulation which governs the timeline for the implementation of IEP services (see Parent Ex. A). The parents asserted—without citing to any authority—that the February 21, 2022 implementation date listed on the February 11, 2022 IEP was the controlling date by which the district was required to provide the student's recommended program (Parent Ex. A at p. 3). The parents further argued that the district's failure to issue a prior written notice and a school location letter by the implementation date of February 21, 2022 was a "per se denial of FAPE"; and that the district's prior written notice and school location letter dated March 30, 2022 were untimely (id. at p. 3). The due process complaint notice does not allege that the parents referred the student to the CSE on any particular date and does not allege that the parents provided consent to evaluate the student on any particular date; nor does the due process complaint notice include any calculation of school days associated with the timely provision of special education and related services. The parents argue in their memorandum of law that exhibits related to dates of referral and consent to evaluate "were not submitted during the impartial hearing because it was believed to be self-evident that [the district] could not disingenuously challenge the allegation that its [prior written notice] and [school location letter] were untimely" (Parent Mem. of Law at p. 13 n.5).

While both parties raise new arguments in the appeal that now align with the regulation cited by the IHO in her decision, after previously citing to no authority whatsoever, the parents' underlying claim that the district's March 30, 2022 school location letter was untimely is not a new claim and was raised in the due process complaint notice.

Nevertheless, the IHO erred in determining that the hearing record supported a finding that the district's school location letter was timely. The IHO found that the district's school location letter was timely by applying her interpretation of the State regulation which governs IEP implementation (IHO Decision at pp. 14-15; see 8 NYCRR 200.4[e][1]). The IHO relied on a note from the evaluator who conducted the January 18, 2022 social history update, which stated that the parent "consented to this evaluation process" (Dist. Ex. 6 at p. 1). The IHO then purported to calculate 60 school days—without any evidence in the hearing record documenting the district's school day calendar for the 2021-22 school year—and determined that the district had until April 28, 2022 to implement the February 11, 2022 IEP (IHO Decision at p. 15).[11]

Notably, the hearing record does not include any dates related to written consent to evaluate or a referral to the CSE, and neither party argued to the IHO which date should apply and why. In any event, even if there was a date from which the calculation would begin, there is no evidence in the hearing record with which to calculate school days. At the impartial hearing, the district

[11] A "school day" is defined as "any day, including a partial day, that students are in attendance at school for instructional purposes" (8 NYCRR 200.1[n][1]).

was the party that carried the burden of production and persuasion regarding whether it met the procedural requirements of the IDEA and whether the district timely arranged for the provision of appropriate special education programs and services (see Educ. Law § 4404[1][c]). With no evidence in the hearing record to support the IHO's determination, it must be found that the district failed to demonstrate that its school location letter was timely.

Nevertheless, having determined that the district did not provide a timely school location letter, such a violation is not a "per se" denial of FAPE as asserted by the parents. Where a district fails to adhere to the requisite regulatory timelines, relief for such a procedural violation of the IDEA is warranted only if the violation affected the student's right to a FAPE (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.H. v. New York City Dep't of Educ., 394 Fed. App'x 718, 720 [2d Cir. Aug. 16, 2010]; Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016], aff'd 700 Fed. App'x 25 [2d Cir. July 7, 2017]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 688 [E.D.N.Y. 2012], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]; Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 300 [S.D.N.Y. 2010]; M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 501 [S.D.N.Y. 2008]; Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261, 279 [D. Conn. 2002]). Having found that the district failed to demonstrate that it complied with the regulatory timeframe for implementing the February 11, 2022 IEP, relief is only warranted after a determination is made that the district's failure to do so deprived the student of a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or 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]).

In certain factually specific cases, it has been determined that a district's failure to provide a parent with prior written notice of the program recommended and notification identifying the public school building that would implement the program prior to the start of the relevant school year rose to the level of a denial of a FAPE. As discussed below, those specific circumstances are not present in this matter.

In general, the IDEA and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; Tarlowe, 2008 WL 2736027, at *6).[12] The IDEA and State regulations also provide parents with the opportunity to offer input in the development of a student's IEP, but they do not permit parents to direct through veto a district's efforts to implement each student's IEP (see T.Y. v. New York City Dep't of Educ., 584 F.3d at 420 [2d Cir. 2009], cert. denied, 560 U.S. 904 [2010]; see also Deer Val. Unified Sch. Dist. v L.P., 942 F. Supp. 2d 880, 889 [D. Ariz. 2013]). Once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). With regard to the implementation of a student's IEP, a denial of a FAPE occurs if the district deviates from substantial or significant provisions of the student's IEP in a material way (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205, 2010 WL 1049297 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep.

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

Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). Additionally, a district "must ensure that . . . [t]he child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation" (34 CFR 300.323[d][1]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *13 [S.D.N.Y. May 27, 2014]).

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

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

This analysis also fits with the competing notions that while a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]), there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City

Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

Review of the hearing record in this matter shows that while the district delayed in notifying the parents of the school that the student was assigned to attend to receive the educational programming recommended in the February 2022 IEP, the district's delay did not result in any harm that would rise to the level of denial of a FAPE.

Prior to reaching the implementation of the February 2022 IEP, a proper review of this issue requires a brief summary of the student's recommended placement for the whole of the 2021-22 school year. A CSE had convened in May 2021 to develop a program for the student with an implementation date of June 11, 2021 (Parent Ex. F at pp. 30-31, 36). The district then sent the parents a prior written notice and school location letter dated June 16, 2021, which notified them of the student's assigned school for the 2021-22 school year (Parent Ex. G at pp. 1, 5). The school location letter included contact information in order to arrange for a visit of the assigned school (id. at p. 5).

Had the parents enrolled the student in a public school for the 2021-22 school year, the May 2021 IEP would have been implemented at assigned school identified in the June 2021 school location letter, and that educational program would have been in effect at the time of the February 11, 2022 CSE meeting. Accordingly, this is not the situation where the parents were not aware of where the student was supposed to attend school for the 2021-22 school year; the parents were notified of the student's initial school placement and were provided with contact information to arrange for a visit of the school.

Notably, the March 30, 2022 prior written notice and school location letter assigned the student to the same school that she had initially been assigned to in June 2021 (Parent Ex. S at pp. 1, 5). As the district continued to recommend the same school, the parents' assertion that they did not have an opportunity to obtain information about the assigned school site is not supportable; the parents already had the opportunity to visit the assigned school and there is no indication that they made any attempt to do so.

As a further example of why any delay in implementation of the February 2022 IEP did not result in a denial of FAPE or impede the parents in any way, the parents' June 23, 2021 ten-day notice letter rejecting the May 7, 2021 IEP stated that "[n]one of the proposed Individualized Education Programs ("IEP") to be implemented during the 2021-2022 extended school year are designed to enable the Student to receive educational benefits or receive appropriate related services" (Parent Ex. H at p. 2). Additionally, the parents did not send a ten-day notice letter

rejecting the February 11, 2022 IEP and instead filed their due process complaint notice on March 16, 2022 (Parent Ex. A at p. 1). Although the due process complaint notice included specific allegations regarding the February 2022 IEP, it also repeated a similar allegation from the June 2021 ten-day notice, indicating that the parents "challenge herein any and all IEPs offered to the student for the 2021-2022 ESY" (id. at p. 3). Having reviewed these assertions, it does not appear that the parents were genuinely considering placement in a public school. Rather, the language of the parents' June 23, 2021 ten-day notice letter and March 16, 2022 due process complaint notice indicated that any consideration of a public school placement was pretextual on their part and, accordingly, the untimely school location letter at issue did not affect the parents' decision to reject the February 2022 IEP.

Based on the above, the hearing record shows that the district's failure to demonstrate that its prior written notice and school location letter was timely did not rise to the level of a denial of a FAPE under the circumstances presented.

2. Air Conditioning and Related Services in a Separate Location

I will next address the district's assertion that the parents' claims related to air conditioning and whether the assigned school site included appropriate areas for related services were not raised in the parents' due process complaint notice. A review of the parents' March 16, 2022 due process complaint notice shows that it did not include these claims (see Parent Ex. A).

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018], appeal dismissed [2d Cir. Aug. 16, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K., 961 F. Supp. 2d at 584-86; 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 hearing record reflects that the district did not elicit testimony related to air conditioning or the separate location for related services at the assigned school site. It was the parents' attorney who attempted to raise these issues while cross-examining the district's witnesses and on direct examination of the parent, over the objection of the district's attorney (Tr. pp. 119-22, 152-55, 160-64, 299-300). Therefore, the district did not open the door to those issues (see A.M., 964 F. Supp. 2d at 282-84; J.C.S., 2013 WL 3975942, at *9). Accordingly, allegations related to whether the assigned school site was air conditioned or included separate locations for the student's related services were not raised in the due process complaint notice and were outside the scope of the impartial hearing (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]").

Based on the forgoing, the issues that remain and will be discussed below are whether the February 11, 2022 IEP was appropriate absent recommendations for music therapy, hearing

education services and vision education services, and whether the assigned school site was capable of implementing the February 11, 2022 IEP.

C. FAPE-February 11, 2022 IEP-Related Services

The parents appeal the IHO's finding that the district offered the student a FAPE despite not including music therapy, hearing education services, and vision education services as related services in the student's February 2022 IEP (Req. for Rev. ¶¶ 22-25). In an answer, the district asserts that the IHO's determination regarding music therapy, hearing education services, and vision education services should be sustained because the student's needs that were addressed with those specific services at iBrain were targeted by appropriate annual goals, services, and supports included in the district's February 2022 IEP (Answer ¶¶ 7-10).

As discussed above, the student is nonverbal and has received diagnoses of cerebral palsy and a seizure disorder (Parent Ex. N at p. 1). According to the January 2022 district psychoeducational evaluation report, the student was "nonverbal and communicate[d] through gestures, vocalizations and a single button switch" and while ambulatory, the student "often use[d] a wheel chair for safety, due to Epilepsy" (Parent Ex. O at p 1). According to the February 2022 iBrain report and education plan (iBrain plan), the student "present[ed] with deficits in strength, functional endurance, balance, executive functioning, cognition, motor skills, activity tolerance, fine and gross motor skills and coordination, and sensory regulation" (Parent Ex. P at p. 12). Further, the iBrain plan indicated that the student occasionally required rest breaks as she presented with decreased arousal and required close supervision throughout the school day for safety and to meet sensory needs (id.).

The CSE convened on February 11, 2022, to conduct the student's annual review (Parent Ex. X at pp. 1, 56). According to the hearing record, the February 2022 CSE reviewed a January 2022 psychoeducational evaluation report, a January 2022 social history, the results of a 2022 administration of the Vineland Adaptive Behavior Scales-Parent Form, a January 2022 vocational assessment report, and a February 2022 iBrain report and educational plan for the student (Parent Exs. S at p. 2; X at pp. 1-27; see Parent Ex. P). The February 2022 CSE recommended a 12-month program in a 6:1+1 special class in a district specialized school together with five 60-minute sessions per week of individual OT, four 45-minute sessions per week of individual PT, five 60-minute sessions per week of individual speech-language therapy, one 60-minute session per month of group parent counseling and training, and fulltime 1:1 health paraprofessional services (Parent Ex. X at pp. 50-51). Additionally, the CSE recommended that the student be provided with school nurse services as needed, assistive technology "[s]witches" throughout the day at school and home, and special transportation which included a 1:1 paraprofessional, lift bus for student wheelchair, and transportation from the closest curb to school (id. at pp. 51, 55-56).

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]).

1. Music Therapy

The February 2022 iBrain plan indicated that music therapy helped the student to "regulate her emotions, promote independence, choice, and communication skills, and exercise to stimulate functional movement patterns" (Parent Ex. P at p. 31). The iBrain plan recommended that the student receive two 60-minute sessions of individual music therapy and one 60-minute session of music therapy in a group per week (Parent Ex. P at pp. 1, 50). According to the iBrain director of special education (director), iBrain recommended music therapy services for the student after she was "assessed for her responsiveness and receptiveness to specific techniques within music therapy" including how the student responded to it and if it increased "her performance in various areas" (Tr. p. 216; see Parent Exs. P at p. 31; W ¶ 1). The February 2022 iBrain plan explained that the student's music therapy was conducted by a board-certified music therapist and consisted of "live, interactive, and highly individualized music exercises to help students achieve goals faster and more efficiently" (Parent Ex. P at p. 31).

According to the iBrain plan, the student "appear[ed] to benefit from the presence of music and ha[d] a very evident physical response that c[ould] be seen by her rocking rhythmically back and forth," and also noted that the student benefited from taking a break to walk around the building "to break up" her music therapy session (Parent Ex. P at p. 31). The iBrain plan provided a description of a typical music therapy session for the student, that included engaging in a song to transition into the session and generalize greeting skills, engaging in a song or instrument choice activity by using her assistive technology device to communicate her wants, and playing "musical instruments to exercise and stimulate functional movement patterns" (id.). The iBrain plan also indicated that the student enjoyed using the drum, strumming the guitar, and grasping and flipping the rain stick, but that she became "dysregulated at times" as demonstrated by "spitting, yelling or throwing instruments" which necessitated movement breaks (id.) Review of the iBrain plan shows that it included three music therapy annual goals, designed to increase the student's ability to sustain appropriate use of an instrument, increase comprehension and her ability to follow directions, and increase purposeful vocalizations (id. at pp. 49-50).

Despite the parents' assertion that the student required music therapy in order to receive a FAPE, review of the district's February 2022 IEP shows that the CSE acknowledged the music therapy "update" provided in the iBrain plan and considered music therapy, but did not recommend it for the 2022-23 school year as the CSE discussed that "music c[ould] be used as an instructional tool to support with engagement throughout the school day" (Parent Ex. X at p. 12). Further, review of the district IEP shows that the student's needs addressed in part via music therapy were addressed by other supports and services that the February 2022 CSE recommended.

The February 2022 IEP acknowledged the use of music during the student's speech-language therapy sessions (Parent Ex. X at p. 9). Specifically, the IEP indicated that music was used to establish and build an understanding of the beginning/end of the therapy session and the student's ability to follow directions (id.). According to the IEP the student "enjoyed music activities" hit a drum with prompts and assistance, imitated hitting a drum after a model, and "looked at the speaker more often when involved in music activities and appeared increasingly calm" (id. at p. 13). Additionally, the IEP indicated that the student increased "her attention during preferred activities such as music and pulling an accordion tube" (id.). Further, the IEP stated that music activities would "continue to be utilized" throughout OT sessions to assist the student in

maintaining regulation and an aroused state so her participation in tasks was maximized (id. at p. 21).

Review of the February 2022 IEP shows that some of the annual goals included multimodal and sensory based approaches, which as described in the present levels of performance, included the use of music (see Parent Ex. X at pp. 9, 13, 21, 31, 32). For example, the IEP included annual goals for the student to maintain attention, indicate her preference of a classroom activity, and participate in turn-taking activities with peers, when "[g]iven a multimodal approach and sensory breaks" (id. at pp. 31, 32). To the extent the IEP referenced that at iBrain music was used to help the student transition to related services sessions and increase communication skills, the school psychologist testified that those skills were also addressed through the recommended special education program and potentially during speech-language therapy sessions (see Tr. pp. 82-83, 84-85, 87-88). Review of the annual goals and short-term objectives within the IEP reflects that some were designed to increase the student's expressive communication skills (see Parent Ex. X at p. 31, 36, 38-39). When asked how the IEP addressed that the student made decisions using her devices to communicate what she wanted during music therapy sessions, the school psychologist responded that the IEP provided speech-language therapy and implementation of assistive technology and augmentative communication (Tr. p. 83). Specifically, review of the IEP reflects annual goals to increase the student's ability to express requests by using a total communication approach that included the use of "switch activation" and "low or high tech" augmentative communication devices (Parent Ex. X at pp. 38-39, 51). Regarding how the IEP addressed the "tactile benefits to music therapy" the school psychologist stated that those skills would be addressed in OT sessions and the IEP included management needs including tactile exploration, sensory breaks, multisensory supports, and access to modified tactile materials (Tr. p. 84; Parent Ex. X at pp. 27, 28). Management needs in the IEP targeting skills addressed by music therapy at iBrain, such as increasing communication skills and attention, included aided language stimulation, repeated directions, access to augmentative communication, interests incorporated into her school day, sensory stimulation, verbal cuing, and "constant redirection" (see Tr. pp. 85-86; Parent Ex. X at pp. 27-28). iBrain's use of music therapy as a "form of exercise" and to "stimulate functional movement patterns" was addressed in the IEP through OT and PT services and annual goals targeting improving the student's movement and self-care abilities (see Tr. pp. 88, 137-38; Parent Ex. X at pp. 41-44).

Here, the evidence in the hearing record shows that music therapy at iBrain offered a different approach for addressing the student's skill needs that were also identified and addressed by the February 2022 IEP related services, annual goals, and management needs, and as such, that the CSE did not recommend music therapy specifically did not result in a denial of a FAPE in this instance. Therefore, I find no reason to disturb the IHO's finding that the student did not require music therapy to receive a FAPE (see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 592-93 [S.D.N.Y. 2013] [finding that, although the evidence may have supported that music therapy was beneficial for the student, it did not support the conclusion that the student could not receive a FAPE without it]).

2. Hearing Education Services

The parents assert that the IHO erred in finding that the student did not require hearing education services to receive a FAPE. The parents argue that hearing education services enabled

the student to improve her communication using sign language. The district contends that the student's hearing was within normal limits and that the IHO correctly determined that the district offered the student a FAPE.

According to the February 2022 iBrain plan present levels of performance in hearing, on December 13, 2021 the "hearing specialist" informally assessed the student for the need of sign language support (Parent Ex. P at p. 24). The assessment included observation of the student "first without sign language intervention, and then her response to sign language intervention" (id.; see Tr. p. 217). According to the iBrain plan, the student was observed during a speech session and prior to sign language intervention being introduced, she was observed to have difficulty attending, following directions, and staying on task (Parent Ex. P at p. 24). The iBrain plan indicated that once sign language was incorporated into the assessment, the student "showed immediate improvement" in that she "was very interested and looked and attended to the hearing provider as the provider signed," which occurred "throughout the rest of the assessment" (id.).

The February 2022 iBrain plan included two annual hearing goals for the student: that she would increase her auditory comprehension skills by expanding her working vocabulary of frequently used words/educational concepts and expand her working vocabulary of frequently used words/educational concepts (Parent Ex. P at pp. 40-41). To assist in achieving these goals, the student would be provided with sign language paired with auditory input and visual supports, and she would demonstrate progress towards the goals by making choices and responding to familiar questions using signing "and/or reaching for items, photographs or picture symbols" (id.).

The director testified that the student "showed increased attention, ability to sustain her attention, and attention to what was being asked of her, as well as increased comprehension and ability to follow directions when information was presented to her not only orally, but also visually with the use of sign" (Tr. pp. 217-18; see Parent Ex. P at p. 1). Based on the reported improvement in performance, the iBrain plan present level of performance in hearing included a recommendation that the student receive four 60-minute hearing education sessions per week to "[increase] her understanding and use of language to communicate, process information, and to complete tasks" (Parent Ex. P at p. 24). Notwithstanding this recommendation reflected within the present level of performance, the annual goals section of the iBrain plan reflected a recommendation for three 60-minute individual hearing education sessions per week, and the summary of recommended special education program/services did not recommend any hearing educational services (compare Parent Ex. P at p. 41, with Parent Ex. P at pp. 56-57).

Review of the February 2022 IEP indicated that hearing education services were "requested and recommended" in the iBrain plan and discussed in the IEP present levels of performance but "were not initiated on this IEP" (Parent Ex. X at p. 27). The IEP stated that iBrain was "using [hearing education services] as part of a total communication program to teach sign language as a method of communication," and that the district recommends hearing education services "for students with hearing loss who require intervention related to the documented hearing loss" (id.).[13] The January 2022 social history reflected the parent's report that the student's hearing was "within

[13] State regulations do not contain a definition for hearing education services and the parties do not define it; however, the district defines hearing education services under related services as helping "students who are deaf or hard of hearing improve their communication skills" (https://www.schools.nyc.gov/learning/special-education/supports-and-services/related-services).

normal limits," and the school psychologist stated that she did not believe that any information was presented at the CSE meeting "to suggest that the student was hard of hearing" (Tr. p. 92; Parent Ex. N at p. 1). According to the school psychologist, the district did not recommend hearing education services for the student because anyone seeking hearing education services for a student needed to submit medical information to the district in the form of an updated audiological assessment that documented the levels of hearing loss for an audiologist to review to determine if there was an educational benefit for hearing education services (Tr. p. 91). In the March 30, 2022 prior written notice the district requested updated medical information to support the request for hearing services, and reflected that the student's mother "indicated she [would] forward all relevant materials once available" (Parent Ex. S at p. 2). At the time of the hearing, the school psychologist testified that she did not believe the district had received the required medical information to recommend hearing education services for the student (Tr. pp. 91-92).

The school psychologist described "sign language support" in the context of the student as "using basic signs such as more . . . to give another method towards total communication aspects" which would be continued in the district's program (Tr. p. 89). She indicated that the district would want to continue using "[a]ny method of communication that [wa]s seen as helpful or instructionally appropriate," including sign language, to "stimulate communication and academic development" (id.). According to the school psychologist, it was not the district's expectation that the student would become fluent in American Sign Language or another form of sign language, rather, "providers would focus on simple signs" such as "give me" and "hello" (Tr. pp. 89-90). She continued that providers did not need to be fluent in American Sign Language to provide this instruction, as "many special educators and related service providers have a base understanding of those type of functional signs" (Tr. p. 90). Review of the February 2022 IEP shows that it incorporated the use of sign language in the annual goals and short-term objectives, including that the student would demonstrate her understanding of academic concepts and increased responsiveness and expressive communication with "sign language support" (Parent Ex. X at pp. 35-37).

Review of the February 2022 iBrain plan and the district's IEP shows that to improve the student's attention and communication skills, both documents recommended the use of instructional supports such as verbal, physical, tactile and visual cues, sensory stimulation, redirection to task, a multimodal approach, and sensory breaks; as such the use of sign language was not the only method of addressing those needs (compare Parent Ex. P at pp. 35-38, 40-44, with Parent Ex. X at pp. 28, 31-33, 35-37). To the extent that in this instance the hearing record shows that the student benefitted from sign language as another method to improve her attention and communication skills, it does not support a finding that the student required hearing education services per se to provide such support.

3. Vision Education Services

Next, turning to the claim regarding vision education services, the parents assert that the IHO erred in finding that the district offered the student a FAPE when it failed to recommend vision education services on the February 2022 IEP, after the CSE "was presented with clear evaluative data regarding [the student's] vision needs." The district asserts that the IHO was correct in rejecting the claim that the student required vision education services as the parents reported that the student's vision was normal, the CSE did not have the student's vision diagnostic

information, and the February 2022 IEP addressed her "vision-related deficiencies that iBrain claimed [vision education services] addressed."

Review of the student's February 19, 2020 and the March 16, 2021 iBrain IEPs shows that iBrain did not recommend that the student receive vision education services (see Parent Exs. B at pp. 1, 24; D at pp. 1, 27-28). According to the February 2022 iBrain plan, students who have a diagnosis of cerebral palsy, such as the student in this matter, were "commonly diagnosed with strabismus, refractive errors, and visual acuity concerns" such as near and farsightedness (Parent Ex. P at p. 16). In addition, the iBrain plan indicated that students with cerebral palsy "may experience visual field loss, oculomotor challenges, and [c]ortical [v]isual [i]mpairment" (id.). On January 13 and 14, 2022, iBrain observed and assessed the student using a Functional Vision Skills assessment checklist, observed her during a PT session, and observed her "in a dimly lit, quiet, separate treatment room using Cortical Visual Impairment accommodated visual materials" to determine "how she used her vision to complete tasks, navigate her environment, and access visual information" (id. at p. 14). Results of the iBrain assessment indicated that the student showed a central field preference; her lower field of vision and peripheral fields were impaired; she benefited from materials being placed in her upper and central visual field; the best viewing of material occurred within 7 inches of her face; and she was able to localize objects farther away and up to an approximate distance of three feet from her eyes when materials were illuminated and presented in a dark space (id. at pp. 14-15). When assessed using cortical visual impairment accommodated materials, the iBrain plan indicated that the student "had responded positively to the activities," showed color and movement preferences, and attended to certain objects (id. at p. 15).

Additionally, the February 2022 iBrain plan indicated that the student demonstrated an inconsistent ability to track, had "limited use of her vision and demonstrate[d] decreased acuity, non-purposeful gazing, and light gazing behaviors," had "a difficult time viewing complex images and images with patterns," and when she was "observed navigating her environment, she relie[d] heavily on muscle memory and planned regular routes rather than her vision" (Parent Ex. P at pp. 15, 16).[14] Further, the iBrain plan stated that the student localized to familiar sounds before using her vision, did not make eye-to-object connections when reaching for an object, and required extended wait time to focus and begin to engage with an object (id. at p. 16).

The iBrain plan present levels of performance in the area of vision reflected that the student was then-currently receiving one 60-minute session per week of vision education services (Parent Ex. P at p. 16). When presented with cortical visual impairment accommodated viewing materials during vision sessions at iBrain, the student reportedly demonstrated increased ability to make eye-to-object visual connections and sustain her gaze when looking at objects with movement and light (id. at pp. 16-17). The use of high contrast materials with "decreased visual clutter," "spotlighting," and objects with movement, sound, metallic or shimmering qualities reportedly improved the student's access to her functional vision (id. at p. 17). As such, the iBrain plan recommended that the student receive two 60-minute sessions per week of vision education services in a light and

[14] I note that the February 2022 iBrain plan indicated that the student demonstrated an unsteady gait pattern but could "ambulate safely in a familiar environment with close supervision, navigate an obstacle course with minimal assistance and negotiate stairs with one hand rail and close supervision" (Parent Ex. P at p. 13). The iBrain plan also indicated that the student was "highly distracted" by external visual and auditory stimuli within the environment" (id. at p. 25).

sound-controlled room in order to help the student learn how to use her vision with purpose and to address the following annual vision goals: that the student sustain her visual gaze towards illuminated materials with increasing durations of visual attention, and reach to touch a visually accommodated object, picture or toy using a visually guided reach (id. at pp. 39-40). The iBrain director stated that iBrain recommended vision education services for the student as the vision specialist indicated that she had characteristics of cortical vision impairment, such that she was not accurately processing the visual information around her and was unable to "navigate her environment well" (Tr. p. 214). Further, the student had shown progress in that area and was responsive to the vision education services at iBrain (Tr. pp. 214-15).

The January 18, 2022 social history update and the February 2022 IEP reflected the parent's report that the student's "vision [was] within normal limits" (Parent Exs. N at p. 3; X at p. 14). Review of the February 2022 IEP shows that it included information about the student's present levels of performance in vision from the February 2022 iBrain plan (compare Parent Ex. P at pp. 14-16, with Parent Ex. X at pp. 23-25). The IEP reflected that vision education services were requested and recommended in the iBrain plan and information about the service was discussed; the CSE did not recommend that the student receive vision education services as those services were "recommended for students with specific visual acuity/diagnostic information; however, updated ophthalmological information was not available" at the time of the CSE meeting (Parent Ex. X at p. 27).[15] The iBrain members of the February 2022 CSE indicated that the student's "diagnostic information of [c]erebral [p]alsy is often comorbid with visual diagnoses"; however, the IEP indicated that "no vision diagnostic information was presented" at the CSE meeting (id.). The March 30, 2022 prior written notice requested additional medical information to support the request for vision services, but the school psychologist testified that she believed the district had not received the required information, which included "an updated eye report that document[ed] the levels of visual acuity with corrective and non-corrective lenses" (Tr. pp. 93-96; Parent Ex. S at p. 2).

The school psychologist testified that the concerns raised during the February 2022 CSE meeting about the student's vision needs were described in the IEP present levels of performance, "so that the providers know what to work on," and the annual goals and management needs provided information to related service providers and classroom teachers about what would be targeted during instruction (Tr. pp. 99-100). Although the February 2022 CSE did not recommend vision education services to address the vision needs of the student, the February 2022 IEP incorporated the same two vision annual goals and short-term objectives from the iBrain plan (compare Parent Ex. P at p. 39, with Parent Ex. X at pp. 33-35). Additionally, the IEP provided management strategies such as visual and tactile exploration, sensory breaks to encourage visual attention, a highly structured classroom with less stimulus from visual distractions, visual aids and large pictures, visual cues when using assistive technology to communicate, and set up of communication device within the student's eyesight and reach (id. at pp. 27-28).

[15] State regulations do not include a definition for vision education services and the parties do not define it; however, the district defines vision education services under related services as helping "students who are blind or have visual impairments to use braille" (https://www.schools.nyc.gov/learning/special-education/supports-and-services/related-services).

Although it is undisputed that the iBrain plan included recommendations that the student receive music therapy, sign language support described as hearing education services, and vision education services during the 2021-22 school year (Parent Ex. P at pp. 39-42, 49-50),[16] 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 2022 IEP reveals that it provided supports to address the student's needs that iBrain addressed through other related services (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, hearing education services and vision education services as related services in the same manner as iBrain.

D. Assigned Public School Site

The parents argue on appeal that the IHO erred by shifting the burden from the district to the parents to show that the district could not implement the February 2022 IEP at the assigned public school. The parents contend that the district did not prove that the assigned school could have provided the student the OT and PT recommendations contained in the February 2022 IEP. This challenge appears to relate back to the parent's allegation in the due process complaint notice that it was "mathematically impossible for [the district] to provide [the student] with all of her

[16] The summary of recommended special education program/services section of the iBrain plan does not include music therapy or hearing education services (Parent Ex. P at pp. 56-58).

related services in a typical school week in a [specialized] school, as there [we]re simply not enough hours in the school week to provide [the student] with all of her mandated instructional time and related services" (Parent Ex. A at p. 4). The student, however, never attended the public school site and, accordingly, any implementation claims regarding the assigned school that the parents continue to pursue on appeal are impermissibly speculative.

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]).

At the outset, the parents' claims regarding the provision of related services to the student was not borne out by the evidence, as the student never attended the assigned public school site pursuant to the February 2022 IEP. 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 recommended educational program would not have been able to be implemented without a recommendation for 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 related services recommended in the February 2022 IEP.

The parents remaining challenge to the assigned public school was that it would not have provided the student with appropriate peer models. In a section of the due process complaint notice asserting that the district "failed to recommend an appropriate school location," the parents alleged that the district's recommendation of a specialized school was inappropriate for the student as those schools were "primarily for students on the autism spectrum, who have vastly different educational and behavioral needs" than the student (Parent Ex. A at p. 4). The parents also argued that the district's recommended specialized school would not have placed the student "with peers who have similar needs" and would have subjected the student to danger due to her visual impairment, lack of safety awareness, and inability to protect herself (id.). The parents further argued that "[d]epriving [the student] of access to peers who [we]re working on similar communication goals and who c[ould] act as appropriate peer models constitute[d] [a] denial of FAPE" (id.). Although set forth in their due process complaint notice as separate claims, these claims distill to a single functional grouping claim.

With respect 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]).[17] State regulations further provide that determinations regarding the size and composition of a special class shall be based on the similarity of the individual needs of the

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

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 2022 CSE recommended that the student receive instruction in a 6:1+1 special class in a specialized school (Parent Ex. X at pp. 50, 56). However, the student never actually attended the recommended 6:1+1 special class, as she was unilaterally placed at iBrain (Parent Ex. A at pp. 3, 4-5). 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. 25). 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 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 parents which related to other students in the classroom at the public school were speculative (IHO Decision at pp. 25-27).

The evidence in the hearing record further underlines the speculative nature of the parents' concerns that the student would have been 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 (Tr. pp. 273, 274; Parent Ex. X at p. 58).

The parent testified that she disagreed with the recommendation for the district specialized school because the student was "a unique person and she's complex" and that the student had "a lot of needs, a whole lot of needs" (Tr. p. 273). The parent further testified that the student needed individual attention and small settings and that the student could have "seizures at any time" (Tr. p. 274). The parent stated that the student could "be standing in one spot and just fall, you know, if that -- nobody's paying attention to her. I don't think the school could accommodate [the student]'s needs, right? Not [the specialized school] because of this seizure disorder" (id.). The parent further testified that the special classes at the assigned school were not appropriate and that "[a]ll the students there had different needs" (Tr. p. 284). The parent also testified that she worried about the student's safety among the other students at the assigned school site (id.).

The iBrain director, based on her own experience of having taught in a 6:1+1 class in a district specialized school "[a]bout 11 years ago" and for a "[l]ittle over a year" opined that a specialized school was not appropriate to meet the student's needs (Tr. pp. 222, 223, 224).

The iBrain director further testified that

> [s]o on the basis of the class that I taught, as well as the other classes that I observed within our building, the students in the 6:1:1 class -- classrooms were on the more severe end of the autism spectrum. Very --- students who [were]very withdrawn, who were very often aggressive or self-injurious. And I mean, this is also in line with, you know, written characterizations of the 6:1:1 groupings that I think are still published so I don't know that it's necessarily that out-of-date. And so on the basis if that is the student profile, I don't feel that would be appropriate for [the student]. [The student] is not an aggressive student. She does not -- would not have the ability to process information if somebody was being aggressive toward her, and to keep herself safe. She is not withdrawn. As I mentioned, she's actually very interested in social engagement. So to have peers who were very withdrawn, I think, would be potentially very damaging to her because she would not -- she wouldn't get the positive feedback

(Tr. pp. 225-26).

However, the director later testified that she had reviewed two IEPs for students who attended a 6:1+1 special class in a specialized school over the last 11 years (Tr. pp. 240-41). Thus, the testimony of the iBrain director noted above was unsupported by the hearing record. Without basis in fact, her statements were based on her own generalizations about classrooms she has not observed within any recent or relevant time period 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 2022 IEP or that the IEP was procedurally and substantively appropriate. The parents' objections to the classification of students with autism or the fact that the other students at the assigned school had different mobility needs 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 parents' 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 she attended the specialized public school (IHO Decision at pp. 25-27). Accordingly, based on the above, I decline to find that the district would have been incapable of implementing the February 2022 IEP.

VII. Conclusion

Based on the foregoing, I find that the hearing record supports the IHO's finding that the February 2022 IEP was reasonably calculated to enable the student to receive educational benefit in light of her 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**
December 1, 2022

CAROL H. HAUGE
STATE REVIEW OFFICER