The University of the State of New York

The State Education Department
State Review Officer
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No. 23-005

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 State 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 Abigail Hoglund-Shen, 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 the decision of an impartial hearing officer (IHO) which dismissed their request to be reimbursed by the respondent (the district) for their daughter's tuition costs and transportation costs at the International Academy for the Brain (iBrain) for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student began attending iBrain during the 2018-19 school year (Parent Ex. 4 at p. 2).[1] The student has been the subject of five prior State-level administrative appeals (see Application of the Dep't of Educ., Appeal No. 21-236; Application of a Student with a Disability, Appeal No. 21-056; Application of the Dep't of Educ., Appeal No. 20-039; Application of a Student with a Disability, Appeal No. 19-089; Application of a Student with a Disability, Appeal No. 18-123). Accordingly, the parties' familiarity with the facts preceding this matter is presumed and, as such,

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

the student's educational history will not be repeated herein unless relevant to the disposition of this appeal.

On December 14, 2021, the student was "evaluated as part of [the] mandated three year reevaluation process" (Dist. Ex. 4 at p. 1). The CSE met on March 4, 2022 to review the results of the student's reevaluation and developed an IEP for the student with a projected implementation date of March 14, 2022 (Dist. Exs. 1 at pp. 1-2; 2 at p. 1). According to the March 2022 IEP, in addition to a March 2022 iBrain plan, the CSE had available for its review a December 2021 social history update, a February 2022 classroom observation, and a February 2022 psychoeducational evaluation (Dist. Ex. 2 at p. 2; see Parent Ex. K; Dist. Exs. 4; 5; 6).

The February 2022 psychoeducational evaluation report stated that the student was non-verbal and communicated through her speech generating device (SGD) and by using facial expressions, body language, gestures, and reaching for desired items (Dist. Ex. 6 at p. 5).[2] According to the evaluator, the student's cognitive and academic achievement levels were not assessable using standardized tools and no formal scores were calculated due to the student's inability to participate in subtests or attend to the testing materials; however, the evaluator stated that informal assessment and observations revealed that the student was "able to make preferred choices on her device," respond "yes" or "no," and use hand over hand to build words, but she was not able to identify letters or numbers or write by herself (id.). Administration of the Vineland Adaptive Behavior Scales, Third Edition (Vineland -3), with the parents serving as respondents, yielded an adaptive behavior composite score in the "[l]ow range, which was below the first percentile (id. at pp. 4-5; see Dist. Ex. 4 at pp. 2-3).

The district staff person who conducted the classroom observation of the student indicated that she could "reportedly" make single word utterances and word approximations such as "go," "all," "fine," "yes," and "no"; was working on correctly distinguishing between icons on her device to indicate "yes," "no," "good," "bad," "want," and "more"; and could sustain attention on academic activities, liked listening to books, and could use her SGD device to answer "wh" questions (Dist. Ex. 5 at p. 1).

According to the evaluative information, the student had previously received diagnoses of West syndrome, multiple disabilities, and traumatic brain injury due to seizures and the parents shared that, at the time, the student had daily seizures which were "very short," lasting 2-6 seconds (Dist. Exs. 4 at pp. 1-2; 6 at p. 5). The parents also reported that the increase in the student's seizure medication could make her drowsy or tired, and that they had not noticed "so much progress" at school and felt this was due to the frequency of seizures at that time (Dist. Ex. 4 at pp. 2-3).

Information considered by the CSE indicated that the student had an Epi-pen and Diastat for emergencies as needed, used a wheelchair, ambulated with adult support, wore a protective helmet while walking, and was working on using the wall to support and stabilize her ability to ascend and descend stairs and on increasing safety awareness to avoid obstacles as she navigated her environment (Dist. Exs. 4 at p. 2; 5 at p. 1).

[2] The student's SGD is referred to as her "AAC device" in the January 2022 psychoeducational report (see Dist. Ex. 5).

At the time of the March 2022 CSE meeting, the student attended iBrain as part of an "8:1:1 class" with a 1:1 paraprofessional and was receiving speech-language therapy, occupational therapy (OT), physical therapy (PT), and music therapy (Dist. Exs. 4 at p. 1; 6 at p. 1). In addition, the March 2022 iBrain plan reflected a new recommendation for hearing education services based on an assessment that revealed that the student's performance in task completion, following directions, and participating improved with "sign support" (Parent Ex. K at pp. 2, 62).

Finding the student eligible for special education as a student with a traumatic brain injury, the March 2022 CSE recommended the student attend an 8:1+1 special class in a district specialized school, and receive related services of one 30-minute session of group counseling per week, five 60-minute sessions of individual OT per week, five 60-minute sessions of individual PT per week, four 60-minute sessions of individual speech-language therapy per week, one 60-minute session of group speech-language therapy per week, and individual school nursing services as needed (Dist. Ex. 2 at pp. 46-47).[3, 4] In addition, the CSE recommended that the student be provided with a full-time, individual paraprofessional (id. at p. 47). The CSE also recommended that the parents receive one 60-minute session of group parent counseling and training per month (id. at p. 46). The March 2022 CSE noted the parents' concerns that "the lack of initiation of hearing services and music therapy would have a negative impact on [the student's] functioning and the parents were not in agreement to not provide these services" (id. at p. 53).

In an April 12, 2022 school location letter, the district identified the public school site that it assigned the student to attend (Parent Ex. G at pp. 5-6). On May 24, 2022, the parents visited the assigned public school and determined after their tour that the "public school recommendations c[ould]not be implemented, as proposed in the IEPs, during the regular school day" and rejected the assigned school location via a letter dated June 17, 2022 (id. at p. 2). In their June 2022 letter, the parents stated their intent to enroll the student at iBrain for the 2022-23 school year and seek reimbursement from the district for the costs thereof (id. at p. 2). In a prior written notice dated June 21, 2022, along with a second school location letter dated June 21, 2022, the district informed the parents that it was assigning the student to attend an 8:1+1 special class in the same public school as identified in the April 12, 2022 school location letter (compare Parent Ex. G at pp. 1-3, 5, with Dist. Ex. 3 at pp. 1-3, 5).

A. Due Process Complaint Notice

In a due process complaint notice dated July 6, 2022, the parents alleged that the district denied the student a FAPE for the 2022-23 extended school year (see Parent Ex. A). The parents requested "an interim order of pendency" and asserted that iBrain should be deemed the student's pendency placement pursuant to an IHO decision arising from a prior matter involving the 2021-22 school year (id. at pp. 1-2). Regarding the district's offer of a FAPE, the parents alleged that the district failed to assign the student to an appropriate school and failed to "mandate sufficient

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

[4] District Exhibit 2 and Parent Exhibit L are both copies of the March 2022 IEP. As Parent Exhibit L was condensed into a smaller format, for purposes of this decision, District Exhibit 2 will be cited to reference the March 2022 IEP.

related services" and that the CSE had "predetermined the outcome of the March 22 IEP meeting" (id. at p. 5). Specifically, the parents alleged that the assigned public school could not implement the IEP because it only provided related service sessions for 30-minute periods and the IEP recommended 60-minute sessions (id.). The parents argued that there were not enough hours in the week to provide the student with all of the IEP's recommended related services (id.). The due process complaint alleged that the CSE inappropriately failed to recommend music therapy and hearing services in the IEP (id.). For relief, the parents requested direct payment of the student's tuition at iBrain, including the costs of transportation, the costs of related services, the costs of a 1:1 paraprofessional and an order directing the district to fund an independent functional visual assessment (id. at 6).

B. Impartial Hearing Officer Decision

The parties convened for a prehearing conference on July 26, 2022; a hearing on pendency took place on September 8, 2022, and hearing dates devoted to the merits of the parents' claims proceeded on October 20, 2023 and November 7, 2022 (Tr. pp. 1-148). In an interim decision dated September 18, 2022, the IHO determined that the student's pendency was based on an unappealed IHO decision dated June 14, 2022 and noted that the district did not object to pendency during the hearing; therefore, the IHO found that the district would be required to "continue to fund the student's unilateral placement at iBrain, related services and transportation from the filing of the D[ue]P[rocess]C[omplaint] for the 2022-2023 school year until a final determination is made" (Interim IHO Decision at pp. 3, 5).

In a December 21, 2022 final decision, the IHO found that the district offered the student a FAPE for the 2022-23 school year and denied the parents' request for tuition reimbursement for iBrain and transportation costs (IHO Decision at p. 8).

The IHO noted that the district relied on its exhibits to prove that the March2022 "IEP was reasonably calculated to enable the student to make progress" (IHO Decision at p. 5). The IHO found that the IEP included recommendations for "an extensive array of related services" and addressed the student's need for 1:1 support with individual related services and noted that the iBrain director of special education (iBrain director) "admitted on cross examination that the student was in a[n] 8:1+1 class at iBrain with the same related services that were recommended on the student's IEP" except that the IEP included a recommendation for counseling instead of music therapy (id. at p. 6). The IHO found that the evidence did not support a finding that the student required music therapy in order to receive a FAPE (id. at p. 7).

The IHO determined that the parents' assertion that the assigned public school site would not be able to provide the student with the services recommended in the IEP was not supported by the evidence (IHO Decision at p. 6). The IHO noted the parents' concerns that the one elevator and one nurse in the school would be insufficient to serve all of the students; however, the IHO found that the parents' concerns were not dispositive (id.). The IHO also found that the parents' allegation that the assigned public school site only offered related services in 30-minute sessions and, therefore, could not implement the IEP, which recommended 60-minute sessions, was "unfounded" (id. at p. 7).

The IHO found that the district met its burden to prove that it offered the student a FAPE for the 2022-23 school year (IHO Decision at p. 8). The IHO stated, because he found that the student was not denied a FAPE, there was no need to issue rulings on whether iBrain was an appropriate unilateral placement or whether equitable considerations weighed in favor of an order of tuition funding (id.). The IHO denied the parents' request for district funding of iBrain tuition and transportation costs for the 2022-23 school year (id.).

IV. Appeal for State-Level Review

The parents appeal and allege that the IHO erred by finding that the district offered the student a FAPE for the 2022-23 school year. Additionally, the parents argue that the IHO erred in denying the parents' request for "tuition reimbursement and transportation costs" and erred by failing to rule on the appropriateness of iBrain and equitable considerations.

The parents argue that, at the hearing, the district "did not call any witnesses, and did not put on a . . . case to defend its IEP, effectively conceding that it failed to offer [the student] a FAPE" for the 2022-23 school year." The parents allege that the IHO "improperly shifted the burden to [the p]arents to show that [the district] could not implement the March 2022 IEP" at the assigned public school site. The parents further allege that the IHO "showed bias" by issuing his findings of facts and decision "almost a week prior to the scheduled receipt of the parties' closing briefs" and by "concocting all of [the district's] arguments for it."

The parents note that the March 2022 IEP recommended counseling services in lieu of music therapy and did not recommend hearing education services for the student. The parents argue that the IHO "manufactured all of [the district's] arguments, [and] failed to show how 'counseling,' nowhere indicated for [the student], could replace music therapy provided by a Board-Certified Music Therapist." The parents state that the hearing record reflects that the student was progressing in her education by using sign language and that the March 2022 IEP was flawed because it did not provide sign language for the student.

The parents allege that the IHO improperly shifted the burden of proof to the parents to demonstrate that the assigned public school's nurse would be unable to meet the student's needs. The parents argue that the district "is required to recommend a placement capable of implementing the IEP, and failure to do so is a clear and unequivocal denial of [a] FAPE." The parents allege that the assigned public school site was "unable to implement the March 2022 IEP as written because [it] only provide[d] related services in 30-minute sessions." In addition, the parents argue that the district carried the burden of proof to prove that the nurse at the recommended school would be able to meet the needs of all of the students, including the student in the present matter, who suffers from seizures.

In an answer, the district responds with general denials to the parents' material allegations and asserts that the IHO's decision should be upheld in its entirety.

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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

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

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).

[5] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

VI. Discussion

A. Preliminary Matters

1. IHO Decision—Burden of Proof

The parents argue that the IHO improperly shifted the burden to the parents to prove that the district's recommended program was not appropriate, whereas it was the district that bore the burden to prove that its recommendations were appropriate. In particular, the parents argue that the IHO "improperly shifted the burden to [p]arents to show that [the district] could not implement the March 2022 IEP at [the recommended school]" (Req. for Rev. at p. 5). In support of their contention, the parents cite to the IHO's determination that the"[p]arents did not present any evidence to establish that having only one nurse in the recommended school building [wa]s a detriment to the student or that it [wa]s a denial of FAPE" as evidence of the burden of proof being improperly shifted from the district to the parents (Req. for Rev. at p. 7, quoting IHO Decision at p. 6).

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

While some of the statements made by the IHO may appear to place the burden on the parents to prove certain claims contained in their due process complaint notice, to the extent claims at issue related to the assigned school's capacity to implement the March 2022 IEP, the parents first had the obligation to assert nonspeculative challenges (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]). While the IHO framed his statements in terms of the lack of evidence in the hearing record, it was the parents' allegations that were lacking, as discussed further below.

As to the parents' claims pertaining to the appropriateness of the IEP, the IHO identified the evidence presented by the district that he relied on in making his FAPE determination and correctly stated the legal standard with respect to burden of proof (see IHO Decision at p. 5). Specifically, the IHO found that the district "relied on its exhibits that were entered into evidence in support of its Prong I burden pursuant to the Burlington/Carter cases to establish that it provided [a] FAPE to the student" and noted that the district "contends that it[]s IEP was reasonably calculated to enable the student to make progress" (id.). The IHO also determined that "[t]he IEP recommended an extensive array of related services for the student" (id. at pp. 6, 7). Further, the IHO correctly stated that the parents had the burden of proof with respect to the appropriateness of the unilateral placement for the student (id. at p. 5).

Thus, the available evidence in the hearing record proffered by the district led the IHO to find that the IEP adequately addressed the student's needs and that there was no contrary evidence

that would rebut that conclusion; accordingly, the actual analysis of the relevant evidence by the IHO did not represent a shift of the burden of persuasion to the parent to demonstrate the IEP's substantive deficiency (see E.E. v. New York City Dep't of Educ., 2018 WL 4636984, at *11 n.13 [S.D.N.Y. Sept. 26, 2018]; Application of a Student with a Disability, Appeal No. 18-058; see also C.F., 746 F.3d at 76 [noting that "the Department bears the burden of establishing the validity of the IEP"]). Further, the decision when read in its entirety reveals that the IHO made his decision based on an assessment of the relative strengths and weaknesses of the evidence presented by both the district and the parent rather than by solely allocating the burden of persuasion to one party or the other (see generally IHO Decision). Thus, even assuming the IHO misallocated the burden of proof to the parent, the error would not require reversal in this case insofar as the hearing record does not support a finding that this was one of those "very few cases" in which the evidence was in equipoise (Schaffer, 546 U.S. at 58; M.H., 685 F.3d at 225 n.3).

2. IHO Bias and Conduct of Hearing

The parents also claim that the IHO was biased against them. Specifically, the parents contend that, by issuing his finding of fact and decision before giving the parties the opportunity to submit their post-hearing briefs, the IHO engaged in "an act indicative of extreme bias" (Req. for Rev. at p. 10). The parents also argue that the IHO created the district's arguments for it thereby displaying bias (id. at pp. 4, 6, 10).

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an IHO is required to exclude evidence and may limit the testimony of witnesses that he or she "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]-[e]), it is also an IHO's responsibility to ensure that there is an adequate and complete hearing record (see 8 NYCRR 200.5[j][3][vii]). Further, State regulation provides that nothing shall impair or limit the IHO in his or her ability to ask questions of counsel or witnesses for the purpose of clarifying or completing the hearing record (8 NYCRR 200.5[j][3][vii]). Moreover, it was well within the IHO's discretion to attempt to control the hearing by excluding evidence or testimony that the IHO finds to be irrelevant, immaterial, or unduly repetitious and by limiting the witnesses who testify to avoid unduly repetitious testimony (see 8 NYCRR 200.5[j][3][xii][c]-[e]).

As pertinent to the issue raised by the parents, State regulation provides that an IHO "may receive" memoranda of law from the parties (8 NYCRR 200.5[j][3][xii][g]).

The hearing record reflects that, at the November 7, 2022 hearing date, the IHO granted the parties' requests to submit post-hearing briefs (Tr. pp. 146-47). It appears that the transcript was not received by the parents until December 12, 2022 (SRO Ex. A at pp. 1-2).[6] The parents' attorney immediately informed the IHO that they received the transcript on December 12, 2022, and that they would submit their post-hearing brief within two weeks of December 12, 2022, specifically by December 27, 2022 (see id. at p. 2). However, the IHO issued his decision on December 21, 2022 before the parties submitted briefs (see IHO Decision at p. 8).

During the November 7, 2022 hearing, the IHO appeared to be concerned that the submission of post-hearing briefs could place the case "out of compliance" (Tr. p. 147), and, while the parties may have believed that their statements on the record and the parents' counsel's subsequent communication with respect to receipt of the transcript were sufficient to request an extension of time, it may be that the IHO's issuance of the decision prior to receipt of post-hearing briefs may have been motivated by concern over adherence to the compliance date.[7] In any event, the IHO's issuance of the decision is not indicative of bias against the parents given that the IHO rendered his decision before either party submitted post-hearing briefs, so neither party was afforded an advantage over the other. While State regulation allows IHOs to accept post-hearing brief, it does not require IHOs to do so (8 NYCRR 200.5[j][3][xii][g]). Accordingly, although it was not ideal that the IHO issued his decision before the parties submitted their post-hearing briefs, his action does not rise to the level of demonstrating bias as claimed by the parents.

Finally, review of the IHO's decision demonstrates that he weighed the evidence in the hearing record and does not support the parents' allegation that he "manufactured all of the [district's] arguments" (Req. for Rev. at p. 6). The IHO determined that the district "relied on its exhibits that were entered into evidence in support of its . . . burden" to prove that it offered the student a FAPE, and, as discussed in detail below, based upon my independent review of the hearing record, I concur with the IHO's determination that the district offered the student a FAPE (IHO Decision at p. 5; see Dist. Exs. 1-8). Moreover, the hearing record does not show that the IHO prevented the parents from putting on a case to support their claims or that he denied the parents' due process rights. The parents' disagreement with the conclusions reached by the IHO does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial

[6] As additional evidence with their request for review, the parents offer email correspondence with the IHO, marked as "SRO Ex. A," which for purposes of this decision, will be cited as marked.

[7] The hearing record reflects that, when the IHO granted the parties' requests to submit post-hearing briefs, he noted that "[s]o by that time, you will be out of compliance" (Tr. pp. 146-47). The parents' attorney stated the parents "w[ould] request an extension of compliance to allow for receipt of transcript and for the matter to be briefed and the decision issued" (Tr. p. 147). The district affirmed the parents' attorney's statement that a request for an extension of compliance would be made (id.). The IHO did not rule on the requests at that time (id.). Moreover, the hearing record does include copies of the IHO's orders grating or denying extensions of time as required by State regulation (8 NYCRR 200.5[j][5][vi][c]). Thus, it is unclear from the hearing record whether the IHO treated the statements on the record as requests for an extension or as statements of future intent to do so and there is no indication that either party thereafter formally requested an extension of the compliance date.

bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994]; Application of a Student with a Disability, Appeal No. 13-083). Accordingly, the evidence in the hearing record does not support the conclusion that the IHO exhibited bias against the parents.

B. March 2022 IEP

1. Music Therapy

The parents argue that the IHO erred in finding that the district's failure to recommend music therapy did not deny the student a FAPE. In particular, the parents assert that the IHO erred in his rationale that "counseling" could replace music therapy and be used to target the student's areas of need which had been addressed by her receipt of music therapy at iBrain, including the student's need for increased "independence, choice, and communication skills" and increased ability to create functional movement patterns (Req. for Rev. at pp. 6-7).

Under the heading "Rationale" for the music therapy services recommendation, the March 2022 iBrain plan stated that the student appeared to benefit from music therapy but indicated that two individual sessions per week were sufficient for the student's program because she did not need music to maintain arousal levels and orientation (Parent Ex. K at p. 57). The March 2022 iBrain plan explained that music therapy sessions at the school were conducted by a board-certified music therapist and consisted of live, interactive, and highly individualized music exercises to help the students achieve goals faster and more efficiently (id. at p. 31). At the time the iBrain plan was developed, the student was receiving three 60-minute individual music therapy sessions per week and one 60-minute session per week in a group (id.). The iBrain plan stated that, in a typical music therapy session, the student first engaged in a "hello song" to encourage smooth transitions into music therapy and to generalize skills within the realm of greetings and communication and then was encouraged to "make a choice of an instrument or a song" using total communication, which promoted independence, choice, and communication skills (id. at p. 32). In addition, the plan indicated that the student engaged in playing musical instruments "in order to exercise and stimulate functional movement patterns" and noted that, while the student was able to attend, grasp, and play instruments when she was interested and regulated, she could easily become dysregulated and at times would throw instruments (id.).

The March 2022 iBrain plan included music therapy annual goals that targeted the student's ability to engage in expressive communication with decreased response time, play musical instruments in order to exercise and stimulate functional movement patterns, and increase maintenance of a regulated state (Parent Ex. K at pp. 56-57). The goals were consistent with the iBrain plan recommendation that the student participate in music therapy interventions aimed at increasing communication skills, intentional/purposeful instrument use, self-regulation (id. at pp. 32, 57).

Turning to the district's recommendation, 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]).

Review of the district's March 2022 IEP shows that the CSE acknowledged iBrain's "update and recommendation for continuation of school based music therapy" and considered music therapy but did not recommend it as the CSE discussed that "music c[ould] be used as an instructional tool to support [the student] with engagement throughout the school day" (Dist. Ex. 2 at pp. 14-15). 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 recommended by the March 2022 CSE. The IEP's present levels of performance also acknowledged the use of music as a support and/or approach to help the student maintain attention and to "enhance her learning" (Dist. Ex. 2 at pp. 3, 5, 8, 10, 16, 21, 23, 26).

The iBrain director testified that music therapy supported goals in a range of domains and stated that the March 2022 CSE discussed how the district was unable to offer music therapy services but that they felt that some of the needs that would be addressed by music therapy would be addressed within "their continuum through counseling services" (Tr. pp. 123, 133-34).

The March 2022 IEP included related services and annual goals that addressed the areas of need targeted by music therapy provided by iBrain such as independence, choice, communication skills, self-regulation, exercising and stimulating functional movement patterns, and increasing intentional/purposeful instrument use (see Dist. Ex. 2 at pp. 32-47). More specifically, to foster student independence and choice, the IEP contained annual goals and objectives in the areas of assistive technology, speech, and OT that targeted the student's the use of her SGD to communicate wants and needs, participate in daily routines with minimal cues, request objects/actions and request or reject for recurrence, and to choose between activities and indicate preferences (id. at pp. 35, 37, 42). The IEP also included an OT goal that targeted the student's participation in self-care skills (id. at p. 42). To improve the student's self-regulation, the IEP included annual goals and objectives in the areas of social skills and speech that addressed turn-taking and attending to non-preferred structured tasks (id. at pp. 34, 37). To address the student's communication needs, the IEP included annual goals and objectives in the areas of social skills and speech that targeted the student's ability to engage in turn taking, demonstrate joint attention with a peer, respond to a greeting, and increase expressive language skills (id. at pp. 34-37). The IEP also contained annual goals and objectives in the areas of PT and OT that targeted the development of the student's functional movement skills, including his ability to walk 100-200 feet with minimal assistance, perform a forward step up and step down activity, negotiate five gross motor obstacles, complete a three-step craft activity, access her SGD with finger isolation, and perform self-care skills such as toothbrushing and hair grooming (id. at pp. 39-40, 42-43). And while the IEP did not mention the use of musical instruments, it did include annual goals and objectives involving intentional/purposeful instrument use such as inserting papers into a shredder with appropriate hand placement, tracing letters using a functional grasp, using a damp towel to clean her table, toothbrushing, and hair brushing (id. at pp. 41-43).

In its answer, the district also contends that the February 2022 psychoeducational evaluation, "the sole evaluation in the record," did not indicate that the student required music therapy in order to receive educational benefit (Answer at pp. 5-6; see Dist. Ex. 6). Although the

parents note in their reply that multiple times throughout the evaluation report the examiner states how music was important for the student, such as "[i]t was reported that [the student] enjoys music and often chooses to listen to her favorite songs during breaks" and "[s]he enjoys music and likes to attend school," as detailed earlier, the March 2022 IEP noted the student's preference for music-based tasks and stated that incorporating music into academic routines and tasks was a "a great way to maintain [the student's] attention and enhance her learning of the skills in questions" (Dist. Ex. 2 at pp. 3, 5, 8, 9, 10).

Although it is undisputed that iBrain recommended that the student receive music therapy during the 2022-23 school year (Parent Ex. K), 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]).

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 March 2022 IEP through related services and annual goals, and as such, that the CSE did not recommend music therapy specifically did not result in a denial of a FAPE in this instance. The district was not required to replicate the exact same services that the parent preferred for the student in the private school. Therefore, there is 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

Next, the parents argue that the IHO erred by failing to address their allegation that the lack of a recommendation for hearing education services in the IEP denied the student a FAPE. The parents argue that the evidence in the hearing record demonstrated that learning to communicate using sign language had increased the student's focus, attention, expressive and receptive language, and other skills. The district argues that the IHO correctly found that hearing education services were unnecessary for the student because she did not have documented hearing loss.

The March 2022 iBrain education plan indicated that, in consulting with the student's team, it was determined that the student had "difficulty attending, processing and retaining information, following directions, and completing tasks" and thus a "hearing specialist" conducted an "informal assessment" with the student on November 29, 2021, which consisted of an observation of the student first without signed language intervention and then her response to the sign language support (Parent Ex. K at p. 26). According to the iBrain plan, the assessment showed that, with the sign language support, the student demonstrated increased attention and information retention and improved performance in task completion, following directions, and participating and, as a result, hearing education services were recommended twice weekly for 60-minute sessions (id. at pp. 2, 26). The iBrain plan further noted that, once the student started working with the hearing education services provider, she began to demonstrate "increased attention, participation, following directions, retaining information and completing tasks" (id. at p. 26).

With respect to the student's receptive language skills, the present levels of performance in the March 2022 iBrain plan indicated that the student had started to follow simple directions within familiar routines and activities given necessary verbal, visual, and tactile prompts and cues, and that she responded to common gestures and greetings (Parent Ex. K at pp. 16, 20). Regarding expressive language skills, the plan noted that the student was beginning "to use clear and simple symbols" in motivating situations or preferred activities via her SGD to communicate her wants and needs and used a total communication approach consisting of facial expressions, conventional gestures, body language, behavior, one to two word verbal approximations, and her SGD to express her wants and needs and participate in daily routines (id. at pp. 16-17).

The March 2022 iBrain plan included annual hearing goals related to increasing the student's auditory comprehension skills by expanding her working vocabulary through use of sign language paired with auditory input and visual supports and by expanding her working vocabulary of frequently used words/educational concepts through use of maximal sign language paired with auditory and visual supports (Parent Ex. K at pp. 46-47). To support her achievement toward these annual goals the student was recommended to receive two 60-minute sessions per week of individual hearing education services (id. at pp. 47, 62).

The March 2022 IEP indicated that hearing education services were "requested and recommended" in the draft March 2022 iBrain education plan presented by the school team and discussed in the IEP's present levels of performance but "were not initiated on this IEP" (Dist. Ex. 2 at p. 29). The IEP noted that iBrain used hearing education services "as a part of a total communication program to teach sign language as a method of communication" (id.). The March 2022 IEP stated that hearing education services, within the district, were recommended "for students with hearing loss who require intervention related to that documented hearing loss" (id.).

According to the March 2022 IEP, the parents acknowledged at the CSE meeting that the student did not suffer from hearing loss and that "[h]earing [e]ducation at i[B]rain [wa]s used as a communication method" (Dist. Ex. 2 at p. 28). Further, neither the December 2021 social history update nor the February 2022 psychoeducational evaluation report indicated that the student had hearing issues (see Dist. Exs. 4; 6).

While the March 2022 IEP did not provide for instruction in sign language, the March 2022 IEP identified a variety of other interventions and supports to be used to address the student's needs in attention, focus and participation, and to enhance her learning, such as increased sensory inputs, heavy work proprioceptive input, irregular vestibular input, alerting music, a quiet environment, verbal and gestural redirection, dimmed lighting, breaks, functional activities, verbal praise, "small class size" and the 1:1 support of a paraprofessional, and incorporating educational videos and music into academic routines and tasks (compare Parent Ex. K at pp. 2-3, 10, 15, 18, 27, 30, 31, with Dist. Ex. 2 at pp. 3-7, 9, 12, 21, 23, 26). Further, a review of the March 2022 IEP shows that many of the annual goals developed for the student incorporated verbal, visual, and tactile cues; verbal, visual and gestural supports; use of her SGD; and the use of a total communication approach to address the student's speech-language and communication needs (Dist. Ex. 2 at pp. 33-38). The IEP included annual goals involving increasing her pragmatic, receptive, and expressive communication skills, which targeted the skills (increasing auditory comprehension skills and expanding her working vocabulary) addressed by iBrain through hearing education services annual goals (compare Parent Ex. K at pp. 46-47, with Dist. Ex. 2 at pp. 35-38).

As with the music therapy, the evidence in the hearing record supports a finding that the hearing education services utilized by iBrain were one method of addressing the student's needs but that the CSE different in its approach, on its own, does not establish that the district denied the student a FAPE, particularly given the constellation of supports and services included in the IEP.

Thus, the evidence in the hearing record shows that hearing education services at iBrain offered a different approach for addressing the student's skill needs that were also identified and addressed by the March 2022 IEP through related services and annual goals. As such, there is no reason to overturn the IHO's determination that the student was not denied a FAPE on the basis that the March 2022 IEP did not recommend hearing education services.

C. Assigned School

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. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). 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., 746 F.3d at 79 [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

1. Related Services

The parents argue that the assigned school was unable to implement the March 2022 IEP as written because it only provided related services in 30-minute sessions.

Recently, a district court reviewing a similar challenge characterized it as "precisely the kind of speculative challenge that is prohibited" (Thomason v. Porter, 2023 WL 1966207, at *17 [S.D.N.Y. Feb. 13, 2023]). The court described that, "[s]tripped of its non-speculative rhetoric, the Parents' argument boil[ed] down to a purely speculative one: the school would not implement the IEP's recommendation of sixty-minute speech therapy sessions, even though it had the ability to accommodate the sessions." (Thomason, 2023 WL 1966207, at *17). Although the district in that matter had offered some testimony that the district was capable of implementing the 60-minute related services sessions—which is lacking in the present matter—the court reached its conclusion even assuming that the testimony presented demonstrated the school's hesitancy about implementing the sessions (id.). The court distinguished a school's capacity to implement services from the school's willingness to do so (id., citing N.M. v. New York City Dep't of Educ., 2016 WL 796857, at *8 [S.D.N.Y. Feb. 24, 2016] ["By its terms, however, a claim based on what a school 'would not have' done—as opposed to a claim based on what the school could not do—is speculative and barred under R.E. and M.O."] [emphasis in original]).

Here, in her written testimony, the parent stated that she visited and was provided a tour at the assigned school site and that she "learned" that the assigned school could not implement the March 2022 IEP because it "only provides 30-minute sessions for related services" (Parent Ex. N at p. 2). Here, the parents' consistent and guarded use of the word "learned" in their pleadings, written testimony, and 10-day notice, with regard to their portrayal of how they determined the assigned school purportedly could not implement related services as mandated in the IEP, falls short of articulating a nonspeculative allegation sufficient to trigger the district's burden to prove that the school had the capacity to implement related services in 60-minute sessions (Parent Exs. B at p. 2; N at p. 2). If indeed a district representative made the statement that the school "only provides 30-minute sessions for related services," this statement alone does not provide clarity on whether, at the time of the parents' tour, the school only had students whose IEPs required 30-minute sessions or if, as the parents allege, the school could not implement an IEP with mandates for 60-minute related service sessions.

In view of the foregoing, the parents' claim relating to the assigned school's capacity to implement 60-minute sessions of related services is speculative, and the IHO did not err in his determination that the claim did not support a finding of a denial of a FAPE.

2. Nursing Services

The parents argue that the IHO "erred by shifting the burden to [p]arents to show that one school nurse for nearly 200 students . . . could meet [the student's] need for close monitoring due to her frequent seizures" (Req. for Rev. at p. 7).

Here, any claim that the one nurse at the assigned public site would not have been able to properly monitor the student and her frequent seizures 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., 793 F.3d at 245).

Here, the March 2022 IEP recommended school nurse services for the student "As Needed" but did not specify that the student required a school with a particular ratio of students to nurses (see Dist. Ex. 2 at p. 46). Instead, the March 2022 IEP also addressed the student's medical and safety needs through the recommendation for a 1:1 paraprofessional, noting in an annual goal that the student's "[p]araprofessional w[ould] consistently consult with the school nurse regarding close monitoring of [the student's] medical needs and w[ould] ensure that [the student's] toileting, feeding, and ambulation needs [we]re addressed" (id. at p. 44). The March 2022 IEP addressed the student's seizure safety needs by noting that "[t]he paraprofessional w[ould] observe fall precautions . . . and seizure precautions at all times; monitor seizure type(s), triggers, medications taken; monitor administration of anticonvulsive mediations (by the nurse) including side effects" (id.). As the claim regarding the sufficiency of the ratio of students to nurses is not tethered to a recommendation in the IEP, it is not a permissible challenge to the assigned school's capacity to implement the IEP (see Y.F., 659 Fed. App'x at 5).

Moreover, even assuming that the IEP required the student to attend a school with a smaller student to nurse ratio, claims relating to an assigned public school site's ability to staff a program or service mandated on an IEP tend to be speculative where the student has not attended the recommended program, as the district could have hired or shifted staff if the student had attended.

Therefore, 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 is 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 parent's claims (R.B., 589 Fed. App'x at 576; 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]).

In view of the foregoing, the parents cannot prevail on their claims regarding the assigned school 's alleged lack of capacity to implement the IEP based on the number of nurses available, and the IHO did not err in dismissing this claim.

VII. Conclusion

Based on the foregoing, I find that the hearing record supports the IHO's finding that the March 2022 IEP was reasonably calculated to enable the student to receive educational benefit in light of her unique circumstances (Endrew F., 580 U.S. at 404; Gagliardo, 489 F.3d at 112). Having found that the district offered the student a FAPE, I need not reach the issues of whether iBrain was appropriate for the student or whether equitable considerations support the parents' request for relief and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
March 13, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER