The University of the State of New York

The State Education Department
State Review Officer
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No. 23-017

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

Liz Vladeck, General Counsel, attorneys for respondent, by Gail M. Eckstein, 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 denied their request to directly fund the costs of the student's tuition at the International Academy for the Brain (iBrain) for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for that year. The appeal must be dismissed. The cross-appeal must be sustained.

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[a]). 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 two prior State-level administrative appeals concerning the student's 2018-19 school year (Application of a Student with a Disability, Appeal No. 20-036) and the 2021-22 school year (Application of a Student with a Disability, Appeal No. 22-138).[1]

[1] The evidence in the hearing record reflects that the parents also challenged the district's special education programs recommended for the 2019-20 and 2020-21 school years, which resulted in an IHO decision, dated May 29, 2021 and which ordered the district to, among other things, fund the student's unilateral placement at iBrain

Accordingly, the parties' familiarity with the student's educational history preceding that matter is presumed and such history will not be repeated herein. Briefly, however, the student in this case has continuously attended iBrain since 2018 (see Application of a Student with a Disability, Appeal No. 22-138; Application of a Student with a Disability, Appeal No. 20-036). During the 2021-22 school year, the student attended iBrain in a 6:1+1 special class "with a 1:1 paraprofessional and a 1:1 nurse," and received the following related services: five 60-minute sessions per week of occupational therapy (OT), five 60-minute sessions per week of physical therapy (PT), five 60-minute sessions per week of individual speech-language therapy, three 60-minute sessions per week of individual vision education services, one 60-minute session per week of individual assistive technology services, and three 60-minute sessions per week of individual music therapy (one session of group music therapy in the classroom) (Parent Ex. C at pp. 1, 14, 21, 25, 32, 34, 37).[2]

On January 7, 2022, a CSE convened to conduct the student's annual review and to develop an IEP for the 2022-23 school year (see Dist. Ex. 2 at pp. 1, 49; see generally Dist. Ex. 4 [representing the CSE meeting minutes]). Finding that the student remained eligible for special education as a student with a traumatic brain injury, the January 2022 CSE recommended a 12-month school year program, consisting of a 12:1+(3:1) special class placement in a specialized school with the following related services: five 60-minute sessions per week of individual OT, five 50-minute sessions per week of individual PT, four 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of speech-language therapy in a group, three 60-minute sessions per week of vision education services, and one 60-minute session per month of parent counseling and training services in a group (id. at pp. 44-46).[3] In addition, the January 2022 CSE recommended that the student receive the services of a full-time, individual paraprofessional (health, ambulation, and safety); assistive technology devices and services (dynamic display speech generating devices, eye gaze, software, assistive technology services, switch, and mount); and supports for school personnel on behalf of the student (two-person transfer training, training for vision adaptations and functioning, seizure safety training, training for assistive technology use, and safety training for tracheostomy care and precautions) (id. at pp. 45-46). The January 2022 CSE also developed annual goals with corresponding short-term objectives, which targeted the student's skills in the areas of literacy, mathematics, social skills, vision education, assistive technology, pragmatic speech, receptive and expressive language, oral motor skills, PT, OT, parent counseling and training services, and with respect to the individual

for both the 2019-20 and 2020-21 school years (see Parent Ex. B at pp. 1, 3, 60).

[2] As noted in the student's December 2021 iBrain IEP, she received speech-language therapy services via "telehealth services weekly on Monday, Tuesday, and Friday," and "in person services on Wednesday and Thursday" (Parent Ex. C at p. 25). In the December 2021 iBrain IEP, it was recommended that the student continue to receive four 60-minute sessions per week of individual services and one 60-minute session per week of group services (id. at pp. 31, 64). The iBrain IEP also reflected that the student received music therapy "in-person . . . twice per week and remote home program [m]usic [t]herapy sessions once per week" (id. at p. 37). In the December 2021 iBrain IEP, it was recommended that the student continue to receive two 60-minute sessions per week individually (id. at p. 64).

[3] The January 2022 CSE recommended that all of the student's related services, respectively, would be delivered in a "[s]eparate location provider's office" and in the "special education classroom" (i.e., push-in and pull-out services) (Dist. Ex. 2 at pp. 44-45).

paraprofessional services provided to the student (id. at pp. 31-44). The January 2022 CSE also recommended special transportation for the student (id. at p. 48).[4]

As noted in the January 2022 IEP, the parents expressed their disagreement with the January 2022 CSE's decision to recommend a 12:1+(3:1) special class placement because "it [wa]s too distracting for [the student]" (Dist. Ex. 2 at p. 50). Instead, the parents voiced their preference for a 6:1+1 special class placement (id.). In addition, the January 2022 IEP reflected that the parents did not agree with the recommendation for a specialized school, as "they [we]re concerned for [the student's] safety, health and skills progression in such a setting" (id.). In particular, the student's mother noted that, in a specialized school setting, "many students [we]re much more assertive in the way they interact[ed] with others and that [the student] would have difficulty 'defending herself'" (id.). The parents also disagreed with the fact that the January 2022 CSE did not recommend music therapy (id.).

In a prior written notice to the parents dated May 24, 2022, the district summarized the student's special education program recommendations for the 2022-23 school year (see Parent Ex. D at pp. 1-2). In a separate school location letter to the parents of the same date, the district identified the specific school site (assigned public school site) where the student's January 2022 IEP would be implemented (id. at p. 5).

On June 14, 2022, the parents executed an enrollment contract with iBrain for the student's attendance during the 2022-23 school year from July 6, 2022 through June 23, 2023 (see Parent Ex. E at pp. 1, 6).[5] On June 16, 2022, the parents executed a school transportation service agreement, effective July 1, 2022 through June 30, 2023 (see Parent Ex. F at pp. 1, 5).

By letter dated June 17, 2022, the parents notified the district of their intentions to unilaterally place the student at iBrain for the 2022-23 school year (12-month program) and to seek funding from the district for the student's placement (see Parent Ex. G at p. 1). In the letter,

[4] As reflected in the January 2022 CSE meeting minutes, it was reported that the student received the services of a "24/7 nurse via private family insurance" (Dist. Ex. 4 at p. 5).

[5] As reflected in the iBrain enrollment contract, the student's tuition costs for the 2022-23 school year (12-month program) included the following: the base tuition fees, which included the "cost[s] of an individual paraprofessional and school nurse as well as the academic programming" described therein; and the supplemental tuition, which included the costs of related services consisting of five 60-minute sessions per week of OT, five 60-minute sessions per week of PT, four 60-minute sessions per week of individual speech-language therapy and one 60-minute session per week of speech-language therapy in a small group, three 60-minute sessions per week of individual vision education services, one 60-minute session per week of individual assistive technology services, two 60-minute sessions per week of individual music therapy, one 60-minute session per week of music therapy in a small group, and one session per month of parent counseling and training services (Parent Ex. E at pp. 1-2). The base tuition fees did not include the "cost of related services, transportation paraprofessional, any individual nursing services or assistive technology devices and equipment" (id. at p. 1). Based upon a review of the parents' enrollment contract with iBrain for the 2022-23 school year, the contract did not include the provision of individual nursing services to the student by iBrain or by any other entity affiliated with iBrain (id. at pp. 1-6).

the parents indicated that, while they had contacted the assigned public school site to schedule an appointment for a tour, they had not yet reached anyone to do so (id. at p. 2).[6]

A. Due Process Complaint Notice

By due process complaint notice dated July 6, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A at p. 1). Specifically, the parents asserted that the 12:1+(3:1) special class placement was not appropriate because it was too large and failed to provide the student with the "intensive 1:1 attention from a special education teacher" provided in a 6:1+1 special class placement (id. at p. 4). The parents also indicated that they disagreed with the recommendation for the 12:1+(3:1) special class placement at the CSE meeting as it failed to offer the student the "appropriate amount of individualized instruction" (id.). In addition, the parents noted that the student's "highly intensive management needs" required the support of a classroom with "no more than six students" (id. [emphasis in original]). With respect to the assigned public school site, the parents noted that it was the "same school that ha[d] been found to be inappropriate for [the student] for the prior two school years," but regardless, they participated in a "telephone conference" on June 22, 2022 with several staff members from the assigned public school site (id.).[7] According to the parents, during that telephone conference, they "learned that the standard duration of related services was 30 minutes, and that the school would 'attempt' to keep to [the student's] 60-minute mandates, but would likely shorten the duration" (id.). In addition, the parents indicated that the assigned public school site did not offer music or aquatic therapy and did not have an accessible playground (id.). As a result, the parents noted that the district failed to recommend an appropriate public school location and that the assigned public school site could not implement the student's recommendations for a 1:1 health paraprofessional or the recommended durations of the student's related services, and among other things, the student would not be appropriately functionally grouped in the 12:1+(3:1) special class (id. at pp. 4-5). Next, the parents alleged that they had not yet received a copy of the student's IEP, which deprived them of the opportunity to meaningfully participate in the IEP process (id. at p. 5). The parents further alleged that the district failed to use appropriate measures in conducting the student's most recent evaluation in December 2021, and the student required an independent neuropsychological

[6] Although the parents identified individuals whom they had either emailed or called, neither person so identified by the parents was the contact person identified on the May 2022 school location letter (compare Parent Ex. G at p. 2, with Parent Ex. D at p. 5).

[7] To the extent that the parents' statement in the due process complaint notice about IHO findings related to the alleged inappropriateness of the assigned public school site for the prior two school years referred to the assigned public school site that was the subject, in part, of the unappealed, May 2021 IHO's decision, a review of that decision reflects that the district conceded that it failed to offer the student a FAPE for the 2020-21 school year (see Parent Ex. B at pp. 53-59). Consequently, the IHO who issued the May 2021 decision did not conduct any analysis of whether the assigned public school site was appropriate or was otherwise capable of implementing the student's IEP for the 2020-21 school year at issue in that case. Similarly, with respect to the parents' assertion that another IHO found the same assigned public school site was not appropriate for the student for the 2021-22 school year, a review of the appeal of that IHO's decision to the Office of State Review reflects that the district did not present any documentary or testimonial evidence regarding whether it offered the student a FAPE for the 2021-22 school year (see Application of a Student with a Disability, Appeal No. 22-138). Therefore, the IHO in that case did not conduct any analysis of whether the assigned public school site was appropriate or was otherwise capable of implementing the student's IEP for the 2021-22 school year at issue.

evaluation to determine her needs and abilities (id.). In addition, the parents asserted that the district failed to recommend music therapy, 1:1 nursing services, and appropriate special transportation services, and the January 2022 CSE impermissibly engaged in predetermination in recommending a 12:1+(3:1) special class placement (id. at pp. 5-6).

In addition to the above, the parents asserted that iBrain was an appropriate unilateral placement for the student and equitable considerations weighed in favor of their requested relief, namely, direct or prospective payment of all costs associated with the student's attendance at iBrain for the 2022-23 school year, which included the following: tuition, related services, 1:1 nursing services, 1:1 paraprofessional services, and special education transportation (see Parent Ex. A at pp. 6-7). The parents also requested an order directing the district to convene an IEP meeting to "address changes if necessary," and to fund an independent neuropsychological evaluation of the student (id. at p. 7).

B. Facts Post-Dating the Due Process Complaint Notice

In a document executed by the district on September 27, 2022, the parties agreed that an unappealed IHO decision, dated May 29, 2021, formed the basis for the student's pendency services during this proceeding (see IHO Ex. V at pp. 1, 3). More specifically, and as set forth in the pendency form, the parties agreed that the following constituted the student's pendency placement during these proceedings: a 12-month school year program at iBrain (paid via reimbursement to the parents and direct payment to the school); five 60-minute sessions per week of individual OT (direct payment to iBrain); five 50-minute sessions per week of individual PT (direct payment to iBrain); five 60-minute sessions per week of individual speech-language therapy (direct payment to iBrain); three 60-minute sessions per week of vision education services (direct payment to iBrain); and one 60-minute session per month of parent counseling and training services in a group (direct payment to iBrain); a full-time, individual paraprofessional (direct payment to iBrain); a full-time, individual nurse (direct payment to iBrain); one 60-minute session per week of assistive technology services (direct payment to iBrain); and transportation services (direct payment per the unappealed IHO decision, dated May 29, 2021) (id. at pp. 1-2). The pendency agreement indicated that the student's pendency placement was retroactive to the date of the due process complaint notice, July 6, 2022 (id. at p. 2).

C. Impartial Hearing Officer Decision

On October 3, 2022, the parties proceeded to an impartial hearing, which concluded on December 8, 2022, after six total days of proceedings (see Tr. pp. 1-390). In a decision dated December 21, 2022, the IHO concluded that, although the student's January 2022 IEP was appropriate, the district failed to sustain its burden to establish that the assigned public school site could implement the IEP, as written, and thus, the district failed to offer the student a FAPE for the 2022-23 school year (see IHO Decision at pp. 1, 9-20, 35).[8] More specifically, the IHO found that the unit coordinator at the assigned public school site—who had "conducted a 'virtual tour' with the student's parents" in this case—testified that the "significant related services mandate for [the student] would be provided at [the assigned public school site]" (id. at p. 17). In addition, the

[8] The IHO decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see generally IHO Decision).

IHO noted that the unit coordinator also testified that "if there were hours or sessions that [the school providers] were not able to serve the student, the [district] would contract out a therapist to come into the school to pick up those additional hours" (id., citing Tr. p. 57). According to the IHO, the unit coordinator further testified that "if the related services were provided off site, [the assigned public school site] could implement the IEP, suggesting that the IEP as written, could not be implemented" (IHO Decision at pp. 17-18). The IHO opined that the unit coordinator's "testimony did not instill confidence in the school's ability to implement the IEP as written," and the IEP, itself, did not indicate that the "related services could be delivered by contract out of school" (id. at p. 18).

In further support of the finding that the district failed to offer the student a FAPE, the IHO pointed to testimony by the student's father (see IHO Decision at p. 18). Initially, the IHO noted that, at the impartial hearing, the student's father testified that he "participated by phone" during the tour of the assigned public school site because the "link sent for the 'virtual tour' did not work" (id.).[9] The IHO also noted that the student's father testified that the unit coordinator "informed the parents that they would have to bring [the student] to contracted related services providers that could not be delivered in school," and the student would "have to be evaluated once she arrived at the school, to determine whether or [n]ot the services on her IEP were 'something they could provide'" (id., citing Tr. pp. 314-15). In addition, the IHO indicated that the student's father testified that they were "told that the length of related services provided at the school was [30] minutes," and he "credibly testified that during the meeting he was told that the paraprofessional would be a shared para[professional], not individual as [wa]s mandated on the student's IEP" (IHO Decision at p. 18, citing Tr. p. 318).

Returning to examine the unit coordinator's testimony on cross-examination, the IHO noted that she "admitted . . . that during the phone call [with the parents] they discussed a concern that the time frame for the related services would be difficult to meet at school," and moreover, that she conveyed to the parents that the "mandated related services could be reduced 'if there was a reevaluation and it was determined by the therapist that those times and frequenc[ies] w[ere not] needed'" (IHO Decision at pp. 18-19, citing Tr. p. 62). In addition, the IHO indicated that the unit coordinator testified that she "could not recall the related service providers at the meeting stating that they could not provide the student with the mandated services," and she could also not recall "any specific discussion about the 1:1 paraprofessional, but [that] since it was on the student's IEP, she would have told the parent[s] it would [have] be[en] provided" (IHO Decision at p. 19, citing Tr. p. 67). Next, the IHO pointed to the unit coordinator's testimony wherein she "recalled saying 'that it [wa]s an extensive amount of therapies that [we]re on there, that it could be a possibility to look to see what would really work in the school and what could not work in the school,'" and then, "from there, look—if this level of therapy [wa]s needed, what to get somewhere else'" (IHO Decision at p. 19, citing Tr. p. 65). Based on the foregoing, the IHO concluded that, "[b]ased upon [the unit coordinator's] testimony, the parent[s] could easily get the impression that the school staff may [have] be[en] intending to work toward a reduction in the related services therapy, rather than arrange to have the related services provided"—noting further, that the unit coordinator "telegraphed this impression during her testimony" (IHO Decision at p. 19). The IHO also

[9] The unit coordinator testified that she could not recall whether the parents participated in the "virtual tour" (IHO Decision at p. 18, citing Tr. p. 61).

concluded that, because the "related services [we]re essentially the heart of the student's program, any attempt to gut the IEP would make the placement at [the assigned public school site] untenable" (id.). In summary, the IHO found that the parents had "good reason to find fault with the recommended location for the services"—and therefore, that the district failed to sustain its burden to establish that the assigned public school site could implement the IEP—notwithstanding the fact that the IHO also found the "IEP recommended for [the student] to be appropriate" (id.).

Having found that the district failed to offer the student a FAPE, the IHO turned to the analysis of the student's unilateral placement at iBrain by, initially, reviewing the student's needs and by determining that she required a "program with extensive and intensive related services of OT, [s]peech, PT, [a]ssistive [t]echnology, and vision services" (IHO Decision at pp. 20-24). The IHO also determined that the student required a "program in a small class where she ha[d] access to her peers and the therapies [we]re integrated into the classroom activities," as well as the assistance of a "1:1 paraprofessional and an individual nurse" (id. at p. 24). Based on the evidence in the hearing record, the IHO found, however, that "iBrain's description of the program provided [to the student] was more aspirational than based in reality," and the IHO ultimately concluded that iBrain was not an appropriate unilateral placement for the student (id. at pp. 24-32).

In finding that the parents failed to sustain their burden to establish the appropriateness of iBrain as a unilateral placement, the IHO supported this conclusion by pointing to the "inconsistent and equivocal testimony concerning the student's attendance in school" (IHO Decision at p. 31). The IHO found that, based on the evidence, the student "benefit[ted] from being with adults and her peers in a classroom" (id.). The IHO also found that the evidence demonstrated that the student required "intensive support during her [related services] sessions," as the student had been accompanied by "two physical therapists, an individual paraprofessional[,] and an individual nurse" during a PT session (id.). Additionally, the IHO determined that, given the intensity of the student's related services, the "student's needs c[ould]not possibl[y] be appropriately delivered via telehealth" as the student required "constant stretching and repositioning" (id.). The IHO also noted that the "equipment that might be available in the school setting to work with the student would not be similarly available at home," and furthermore, the student's "ability to focus on a screen and the communication device simultaneously [wa]s a question which went unanswered" at the impartial hearing (id.). According to the IHO, the iBrain director who testified at the impartial hearing "assiduously avoided any mention of the student receiving telehealth, [which] le[d the IHO] to conclude it was a topic, in her mind, better left unsaid" (id. at pp. 31-32). The IHO further noted that the student's attendance records—which had been "specifically requested"—had not been entered into the hearing record as evidence (id.).

Next, the IHO found "[a]nother glaring concern with the program at iBrain [wa]s the periodic absence of the individual nurse at school, which the [d]irector testified was 'crucial' to the program offered to the student" (IHO Decision at p. 32). "While it was not crystal clear," the IHO found that the student "was often not in school, because there was no individual nurse available," and the IHO pointed to the social history completed by the parents, which indicated that the "student [wa]s not in school when a nurse [wa]s not available" (id.). Accordingly, the IHO expressed her concerns that the "witnesses were not forthcoming in their descriptions of the program or the student's needs" (id.). The IHO opined that "[i]f the student's health [wa]s such that at least [50] percent of the time [the student wa]s unable to attend school, that [wa]s a topic which should[have be]en disclosed and reviewed with the CSE," and, as noted by the IHO, the

hearing record did not include any evidence that the "CSE discussed whether the student was safe to attend school because they were told the student was accompanied by an individual nurse" (id.). At that point, the IHO indicated that the parties must work together to find a location for the student to attend school safely and where she could receive the "rigorous related service program" that was "paramount" to her needs (id.).

Next, the IHO indicated that even if the evidence had demonstrated that iBrain was an appropriate unilateral placement, equitable considerations would "lead to a denial of tuition funding" (IHO Decision at p. 32). Here, the IHO found that the "only documentary evidence" in the hearing record concerning the student's "program at iBrain was the progress and plan from the previous school year," dated December 2021, and none with respect to the current school year (id. at p. 33). In addition, the IHO noted that the student's schedule was not entered into the hearing record as evidence, and the IHO opined that since the student "was not in regular attendance in school, it may [have] be[en] that there [wa]s no schedule to follow" (id. at pp. 33-34). According to the IHO, the parents "presented evidence of a program the student was not receiving and [wa]s now seeking tuition funding and transportation costs," which equitable considerations would not favor (id. at p. 34).

In summary, having found that the "IEP developed for the student was appropriate, but [that] the location of the placement was not," the IHO concluded that the district "should offer the student a viable option for the remainder" of the 2022-23 school year" (IHO Decision at p. 34). As relief, the IHO ordered the district to reconvene a CSE meeting to review the student's "health needs and ability to attend school," and further ordered the district to "invite a physician familiar with the student's medical condition to the [CSE] meeting"; to consider a smaller class size for the student; and to refer the student's case to the Central Based Support Team (CBST) "to locate a placement that c[ould] safely implement the IEP, including all the individual related services at the rate and frequency as described therein" (id. at p. 35). Next, the IHO ordered the district, in the interim, to "arrange for all related services presently described on the student's IEP to be provided either at home in person or via telehealth" and to similarly "arrange for the student's paraprofessional to be provided in the home" (id.). The IHO further ordered the district to conduct an assistive technology evaluation of the student (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by finding that iBrain was not an appropriate unilateral placement for the student for the 2022-23 school year and that equitable considerations did not weigh in favor of the parents' requested relief. In addition, the parents contend that the IHO demonstrated bias by failing to conduct the impartial hearing within the statutory timeframe and by refusing to issue an interim decision on pendency. The parents also contend that the IHO "has issued indefensible decisions concerning [this student] and iBrain, wherein she misstated legal standards and disregarded undisputed [hearing] record evidence." As relief, the parents seek an order granting their requested relief. In support of their appeal, the parents submit additional documentary evidence for consideration on appeal.

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's findings that iBrain was not an appropriate unilateral placement and that equitable considerations did not weigh in favor of the parents' requested relief. As a cross-appeal, the district

argues that the IHO erred by finding that the assigned public school site could not implement the student's IEP as written, and thus, that the district failed to offer the student a FAPE.

In a reply and answer to the district's answer and cross-appeal, the parents respond to the district's assertions and argue to uphold the IHO's finding that the district failed to offer the student a FAPE for the 2022-23 school year. In addition, the parents continue to argue that the IHO erred by finding that iBrain was not an appropriate unilateral placement, that equitable considerations did not support the parents' requested relief, and moreover, that the IHO demonstrated bias.[10]

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

[10] The impartial hearing record filed by the district in this matter contained eight IHO Exhibits which were admitted into the record but did not include IHO Exhibit-IX, described in the IHO Certification of Record as a Scheduling Order dated November 4, 2022.

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]).[11]

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-

[11] 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).

70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matters

1. IHO Bias

Initially, the parents have asserted that the IHO was biased because the IHO's decision was issued in an untimely manner and the IHO did not issue an interim decision regarding the student's pendency placement. As for the first basis, the alleged untimely decision, as described above the parents unilaterally placed the student at iBrain for the 2022-23 school year and that decision was caused by their disagreement with the district, not by any alleged delay in issuing an IHO decision. Accordingly, even if the IHO had issued the decision late, a delayed administrative decision by the IHO in this instance does not warrant overturning the IHO's findings, much less lead to a determination that the IHO was biased. Courts have found that as long as the student's substantive right to a FAPE is not compromised because of the late decision, an untimely administrative decision, by itself, does not deny the student a FAPE (Jusino, 2016 WL 9649880, at *6 citing J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000] ["Case law's emphasis on substantial vindication of substantive rights and ensuring a fair opportunity to participate is equally present in resolving disputes arising out of the decision deadline date. With respect to the 45–day deadline, "relief is warranted only if... [a] forty-five-day rule violation affected [the student's] right to a free appropriate public education"]; see A.M. ex rel. J.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660, 689 n.15 [E.D.N.Y. 2012] aff'd, 513 F. App'x 95 [2d Cir. 2013] [same]). According to the courts, the substance of an administrative decision is not flawed just because it is issued late (J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *14 [S.D.N.Y. Mar. 31, 2015], aff'd 643 F. App'x 31 [2d Cir. 2016] [noting that "(t)he untimeliness of the SRO's decision does not suggest a flaw in its logic and reasoning, however. Moreover, Plaintiffs have cited no authority supporting their assertion that an SRO decision is entitled to no deference when issued outside the '30–day statutory timeline'"], citing M.L., 2014 WL 1301957, at *13 ["Although the Court agrees with Plaintiffs that the State Review Office's routine delays in issuing decisions is problematic, it has found no authority in IDEA cases that allows it to declare the SRO's decision a nullity"]).

As for the parents' argument that the IHO was biased because she erroneously declined to issue an interim decision regarding pendency, as the IHO noted there is no need for the IHO to hold an evidentiary hearing and issue an order identifying a student's pendency placement if the administrative record indicates that parties have already reached an agreement on the issue—that is, do not dispute what the student's pendency programming should consist of (IHO Ex. V; see Tr.

pp. 4-9, 17-19, 23, 24-26). While the parent may have preferred that the IHO issue an order in addition to the district's own agreement that it is required to fund the student's pendency placement, it does not lead to the conclusion that the IHO was biased for declining to do so.[12]

2. Scope of Review

As noted above, the IHO reviewed the evidence in this matter and rejected the parents' claims that the January 2022 IEP developed by the CSE was inappropriate (see IHO Decision at pp. 9-18, 19, 34). The parents did not challenge the IHO's adverse finding that the January 2022 IEP was appropriate either directly in their appeal or in response to the district's cross-appeal. Accordingly, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Assigned Public School Site

Turning first to the cross-appeal, the district contends that the IHO's finding that the assigned public school site could not implement the related services in the student's January 2022 IEP—which formed the sole basis for the IHO's determination that the district failed to offer the student a FAPE—was contrary to both the applicable law and the facts of this case. In response, the parents point to what they characterize as "conflicting" and "inconsistent" testimony by the unit coordinator as support for the IHO's conclusion. Upon review, the evidence in the hearing record, together with the applicable law, supports the district's contentions that the IHO erred and therefore, the IHO's finding that the district failed to offer the student a FAPE must be reversed.

The Supreme Court and the Second Circuit have continually reminded litigants that "[t]he IEP is 'the centerpiece of the [IDEA's] education delivery system for disabled children (Endrew F., 137 S. Ct. 988, 994 [2017]; see D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 157 [2d Cir. 2020]). Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (id. at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B., 589 Fed. App'x at 576).[13] 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

[12] The parents appeared to desire an order due to expressed concerns over the ability to enforce the student's pendency placement (Tr. p. 4). In this appeal the parents have not alleged that the district has refused to fund pendency in accordance with the party's agreement, and I am not convinced that the IHO would have any power to issue an order to enforce such an agreement. It is not debatable that the district is required to fund the services in accordance with the agreement for the duration of these proceedings.

[13] The district is required to implement the IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan (20 U.S.C. §§ 1401[9][D]; 1414[d][2]; 34 CFR 300.17[d]; 300.323; 8 NYCRR 200.4[e]).

district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the 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]).[14]

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 [p]arents' argument boil[ed] down to a purely speculative one: the school would not implement the IEP's recommendation of [60]-minute speech therapy sessions, even though it had the ability to accommodate the sessions" (Thomason, 2023 WL 1966207, at *17). Although the district in Thomason had offered some testimony that it was capable of implementing the 60-minute related services sessions—which the district in the present appeal also provided—the court reached its

[14] At the outset, the parents' claims regarding the provision of related services to the student were not borne out by the evidence, as the student never attended the assigned public school site pursuant to the January 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]). In view of the foregoing, the IHO erred, as the parents could not prevail on their claims regarding implementation of the related services recommended in the January 2022 IEP.

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] [finding that, "[b]y 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, a review of the hearing record reveals that the IHO relied on portions of the testimonial evidence to reach her conclusion that the assigned public school site was not capable of implementing the related services recommendations in the student's January 2022 IEP, and as discussed herein, ignored testimonial evidence that directly contradicted this determination. For example, although the unit coordinator characterized the frequencies and durations of the related services recommendations in the student's January 2022 IEP as "extensive," she went on to describe the process that would be used by the assigned public school site to fulfill those services (Tr. pp. 55-59).[15] When asked specifically at the impartial hearing how she described the assigned public school site's ability to implement the related services recommended in the January 2022 IEP to the parents during their tour, the unit coordinator testified about that process, noting first that the school would "plug in what we could with the services that we ha[d] available in our school," and, second, "if there [we]re hours or sessions that [we]re not able to be served, . . . a transmittal process" would occur, which would involve the "related service department" attempting to "contract out a therapist to come into the school and pick up those additional hours or those additional sessions that [we]re unserved" (Tr. pp. 47, 49, 56-57).[16] The unit coordinator further explained that if the school was then still not able to fulfill all of the student's related services sessions at that point, then the third step occurred wherein it would "transition into a [related services authorization (RSA)], and that RSA in turn would require the services to be done outside the school and the [parents would] take the student after school hours to have those therapies serviced"—noting further that the district would provide those services "at another location" (Tr. p. 57).[17] She also testified that the assigned public school site had, in the past, used this process to fulfill the related services mandates of other students, and stated: "if it's needed, we have seen it, and it's happened in the past" (see Tr. pp. 57-59). Overall, the unit coordinator testified, while acknowledging that some related services may need to be provided "offsite," the assigned public school site could implement the student's IEP (Tr. pp. 57-58).

[15] The unit coordinator testified that, in her experience, she typically saw related services recommendations for OT and PT services in 30-minute sessions and for up to three sessions per week; with respect to speech-language therapy, the unit coordinator testified that it was she had seen recommendations for individual and group sessions for up to five sessions per week, but generally for 30-minute sessions (see Tr pp. 55-56).

[16] The unit coordinator testified that the virtual tour existed "by virtue of the COVID[-19] situation," which "limited people's ability to meet" (Tr. pp. 49-50).

[17] During cross-examination, the parents' attorney asked the unit coordinator whether she "mentioned" RSAs during the tour, and in response, the unit coordinator testified that she could not recall if the "specific acronym was used," but she did recall speaking about the "level of therapies" in the student's IEP and that it "would be difficult to accommodate during the classroom day with the one therapist—with the couple of therapists that [they] ha[d] onsite" (Tr. p. 77).

Consistent with the parents' assertion in their reply and answer to the cross-appeal, the unit coordinator testified on cross-examination that she could not recall whether the parents were unable to join the "virtual tour" and had to participate, instead, through the telephone, as the tour had taken place "last year" (Tr. p. 60). The unit coordinator could not recall the exact date of the tour, but was reminded that it took place on June 22, 2022 (id.).[18] According to her testimony, the unit coordinator recalled that a speech-language therapist and the then-current unit coordinator also participated in the tour, and she recalled reviewing the student's related services recommendations with the parents (see Tr. p. 61). More specifically, the unit coordinator recalled discussing that the assigned public school site offered OT, PT, speech-language therapy, and vision services, "but the concern was the time frames and meeting the mandate of . . . the hours, how frequent and the duration and whether or not all of that could be provided during the school day by the same therapist" (Tr. pp. 61-62). When asked if she told the parents that the durations of the student's related services "would be reduced," the unit coordinator testified that "that could happen if there was a reevaluation, and it was determined by the therapist that those times—that amount of frequency wasn't necessarily appropriate or needed, then that could be a possibility" (Tr. p. 62). However, the unit coordinator further explained that "if they reevaluated [the student] and saw that it was appropriate, then again, that other process would have to go into place" (id.). To clarify this point, the parents' attorney specifically asked the unit coordinator if the student would have been reevaluated at the assigned public school site; in response, the unit coordinator testified that "[e]very year, we do an updated IEP," so "every year, it's looked at what work[ed] for the student, what [wa]s best for the student, [and] what the student need[ed]" (Tr. pp. 62-63). As part of that process, and "depending on what the therapist thought," as well as the parents and the "whole team," the unit coordinator testified that "could be a possibility . . . [b]ut that didn't necessarily mean that that's the way it would happen" (Tr. p. 63).

When asked on cross-examination if the related services providers who participated in the tour "confirm[ed] that they could not provide 60-minute sessions," the unit coordinator testified that that was not something she recalled (Tr. p. 64). In addition, when asked if she specifically communicated the process that may have been used by the assigned public school site to fulfill the student's related services mandates to the parents, the unit coordinator testified that "we did say that some . . . of the therapies could be picked up outside of the school" (id.). The unit coordinator was also questioned about whether she told the parents that the student would be reevaluated "to see that she needed those services," and in response, she explained, again, about evaluations "done on a yearly basis" when the student's IEP would be updated every year (Tr. pp. 64-65). She did not, however recall any conversation with the parents about evaluating the student "outside of the annual review process" (Tr. p. 65). The unit coordinator further testified that she remembered discussing the student's "extensive amount of therapies," "that it could be a possibility to look to see what would really work in the school and what could not work in the school," and then "if this level of therapy [wa]s needed, what to get somewhere else" (Tr. pp. 65-66).

Next on cross-examination, the parents' attorney asked whether she recalled discussing the student's need for a 1:1 paraprofessional with the parents (see Tr. p. 66). In response, she testified

[18] During questions posed by the IHO, the unit coordinator clarified that the "virtual tour" was "essentially an online meeting" with a "slideshow" presentation showing "what a classroom would look like, what the therapy room look[ed] like and things like that" (Tr. p. 89).

that the "one-to-one paraprofessional was on the IEP," therefore, "we would be able to provide that" (id.). The student's father testified that that "[t]hey kept insisting and clarifying to [him] that [the student] would be having a shared para[professional]," which the student's father did not believe to be safe for the student or in her "best interest" (Tr. p. 318). He also testified that he did not remember the unit coordinator indicating at the tour that the student would be provided with a 1:1 paraprofessional, but instead, testified that the "only part of the conversation that [he] remember[ed] from that meeting was the, . . . , sort of urging or sort of clarifying that there would be a shared para[professional] amongst the students in the classroom that [the student]" would attend (Tr. pp. 319-20).

At the impartial hearing when the student's father testified, he noted that he "took issue" with the accuracy of a "couple things" the unit coordinator testified about, and specifically indicated that it was not a "virtual tour" (Tr. pp. 313-14). On this point, the student's father testified that the link shared with them did not work and they "wound up conference calling the group for the tour" (Tr. p. 314). He also testified that he could not view the "PowerPoint presentation" and the assigned public school site failed to send it to him afterwards (id.).[19] Next, the student's father testified that the unit coordinator "never mentioned" the "RSA option" to provide services to the student during the tour (Tr. pp. 314-15). According to his testimony, the "only thing that . . . the people from the school mentioned was that they would have to evaluate [the student], if she enrolled in that school, to determine whether or not the services on her IEP were something that they could provide" (Tr. p. 315). He also testified that the therapists who participated in the tour "stated that they don't necessarily provide one-hour-length services, and so that they would then have to contract other providers to come into the school to fill the gaps"—"[a]nd that was it" (id.). He further testified that he was "100 percent certain that [the RSA] never came up in our discussion" (id.). Upon further questioning, the student's father testified that if the assigned public school site offered RSAs, he would have "pointed out that it—the school d[id not] seem like an appropriate fit for [the student] if they c[ould not] provide the services that her IEP mandate[d]" and there would be no need to "continue engaging in that discussion" because it did not "seem to make sense to send [the student] to a school that c[ould not] provide the services that she require[d] based on her IEP" (Tr. pp. 315-16).

When asked about his recollection of discussions during the tour concerning the need to evaluate the student, the student's father testified that, although he "c[ould not] speak to what specifics they said, . . . [he] got the impression" that the assigned public school site would evaluate the student "upon enrollment" (Tr. p. 316). He further explained that, once the student was enrolled, the assigned public school site "would then determine what services they would be able to provide for her" (id.). In addition, the student's father testified that the "therapists there all stated that the services that they provide[d] [we]re all 30-minute lengths," and the student's related services were 60-minute sessions (id.). The student's father clarified that the people involved in the tour had access to the student's IEP, "because they were reading from the IEP" (Tr. p. 317).[20]

[19] During cross-examination, the student's father testified that while he asked the assigned public school site to send him the PowerPoint presentation, he did not follow-up with the assigned public school site seeking it after the tour when he did not receive it (see Tr. pp. 325-26).

[20] The student's father also had a copy of the student's January 2022 IEP during the tour (see Tr. pp. 326-27).

In her decision, the IHO—while noting that the unit coordinator had explained a process by which the assigned public school site could fulfill the student's related services recommendations—construed this testimony as "suggesting that the IEP as written, could not be implemented" and noted further that the unit coordinator's testimony "did not instill confidence in the school's ability to implement the IEP as written" (IHO Decision at pp. 18-19 [emphasis added]). The IHO also construed the unit coordinator's testimony concerning a reevaluation of the student as part of the student's annual review of her IEP as a basis for the parents to "easily get the impression that the school staff may [have] be[en] intending to work toward a reduction in the related services therapy, rather than arrange to have the related services provided"—and moreover, according to the IHO, that the unit coordinator "telegraphed this impression during her testimony" (id. at p. 19 [emphasis added]). In her decision, the IHO noted that the student's father "credibly testified that during the meeting he was told that the paraprofessional would be a shared para[professional], not individual as [wa]s mandated on the student's IEP" (IHO Decision at p. 18). The IHO also noted, however, that although the unit coordinator "did not recall any specific discussion about the 1:1 health paraprofessional," the unit coordinator had testified that it would have been provided because it was on the student's IEP (id. at pp. 18-19). Ultimately, the IHO's finding that the district failed to sustain its burden to establish that the assigned public school site lacked the capacity to implement the student's January 2022 IEP appears to rest primarily on the analysis of evidence concerning the related services recommendations, as a review of the decision reveals no analysis of the import of the testimonial evidence concerning the provision of the paraprofessional on her conclusion concerning the overall capacity of the assigned school to implement the student's IEP (id. at pp. 17-19).

However, a review of the unit coordinator's full testimony—as well as the testimony by the student's father—directly contradicts these conclusions, and neither the IHO nor the parents in response to the cross-appeal, point to any testimony that the assigned public school site could not implement the related services, as written, in the IEP; rather, the evidence points to a process that the assigned public school site would use, if necessary—and to a process that the assigned public school site had used in the past—to fulfill students' services, as well as the assigned public school site's yearly obligation to review and revise the student's IEP, as necessary. In addition, both the unit coordinator's testimony, as well as the student's father's testimony, fall short of providing a basis upon which to conclude that the assigned public school site could not implement the student's related services or provide the 1:1 paraprofessional, even assuming for the sake of argument that the related service providers at the tour made statements that the services provided were all 30 minutes in length, as 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 alleged, the school could not implement an IEP with mandates for 60-minute related service sessions. Indeed, the unit coordinator's testimony and the IHO's analysis thereof reflect both the inherently speculative nature of assigned school site claims where the student never actually attended the district placement and the difficulty of determining such claims without resort to hypotheticals. As a result, the unit coordinator was compelled to consider a variety of potential complications concerning the delivery of related services without having actual knowledge as to whether or not any of the scenarios contemplated would have occurred if the student attended the assigned school. Nonetheless, as noted above, the unit coordinator provided in her testimony ample evidence that the assigned school had the capacity to implement the student's IEP as written.

Furthermore, specifically with respect to the issuance of RSAs, a district may utilize this procedure as an acceptable method of providing related services (IHO Decision at p. 11). In fact, a June 2, 2010 "Q and A document" issued by the State Education Department to district superintendents clarified that it was permissible for a school district to contract for the provision of special education related services in limited circumstances and with qualified individuals over whom the district had supervisory control. According to the document:

> [S]chool districts also have obligations under the IDEA and Article 89 of the Education Law to deliver the services necessary to ensure that students with disabilities receive FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver FAPE to students with disabilities without contracting with independent contractors. Where a school district is unable to provide the related services on a student's individualized education program ("IEP") in a timely manner through its employees because of shortages of qualified staff or the need to deliver a related service that requires specialized expertise not available from school district employees, the board of education has authority under Education Law §§1604(30), 1709(33), 2503(3), 2554(15)(a) and 4402(2)(b) to enter into contracts with qualified individuals as employees or independent contractors to provide those related services (see also §§1804[1], 1805, 1903[1], 2503[1], 2554[1]).

("Questions and Answers Related to Contracts for Instruction," Question 5, P-12 Education Mem. [Jun. 2, 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html; see http://www.p12.nysed.gov/resources/contractsforinstruction). Moreover, caselaw also supports a finding that it is permissible for the district to offer parents vouchers to obtain related services in response to a recognized shortage of service providers (see A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011]). Thus, to the extent that the assigned public school site may have been required to, as a last option, issue RSAs to fulfill the mandates of the student's related services recommendations, the use of RSAs, alone, would not have denied the student a FAPE.[21]

VII. Conclusion

Having determined that, contrary to the IHO's finding, the evidence in the hearing record establishes that the district offered the student a FAPE in the LRE for the 2022-23 school year, the

[21] In addition, the January 2022 IEP specified that all of the related services be provided to the student on a push-in (in the special education classroom) and pull-out (in a separate location provider's office) basis (see Dist. Ex. 2 at pp. 44-45). While it is not entirely clear whether the "separate location provider's office" specified in the IEP referred to a separate location within the public school, assuming that it does (and further assuming that the related service providers would not have come to the school to provide services), the use of RSAs to fill the mandated level of related services would not constitute such a material or substantial deviation from the student's IEP that she was denied a FAPE thereby (A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 [9th Cir. 2007]; Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th Cir. 2000]). Therefore, even if the district provided the student with an RSA for related services, the hearing record does not support a finding that it would have denied the student a FAPE.

necessary inquiry is at an end and there is no need to reach the issue of whether iBrain was an appropriate unilateral placement for the student (Burlington, 471 U.S. at 370).

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated December 21, 2022, is modified by reversing the determination that the district failed to offer the student a FAPE in the LRE for the 2022-23 school year.

Dated: **Albany, New York**
April 5, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER