The University of the State of New York

The State Education Department
State Review Officer
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No. 23-058

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Michael Gindi, Esq.

Brain Rights Injury Group, Ltd., attorneys for respondents, by Zack Zylstra, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from that portion of the decision of an impartial hearing officer (IHO) which awarded respondents (the parents) direct funding or reimbursement for tuition, related services, a 1:1 paraprofessional, a 1:1 nurse, transportation, and fees for the student's attendance at the International Institute for the Brain (iBrain) for the 2022-23 school year.[1] The 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];

[1] The hearing record includes letterhead for the school the student attended for the 2022-23 school year referencing the school as both the International Institute for the Brain, Ltd. and the International Academy for the Brain with both shortened to iBrain (Parent Exs. C at p. 1; E at p. 1).

34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has been the subject of prior State-level administrative reviews involving the student's 2019-20, 2020-21, and 2021-22 school years (see Application of a Student with a Disability, Appeal No. 22-050; Application of a Student with a Disability, Appeal No. 21-117; Application of a Student with a Disability, Appeal No. 21-099). Accordingly, the parties'

familiarity with the facts and procedural history preceding this matter—as well as the student's educational history—is presumed and will not be repeated herein unless relevant to the disposition of the issues presented in this appeal.

Briefly, the student began attending iBrain in July 2018 and has remained enrolled to date (Parent Ex. J ¶10).[2]

The student is non-verbal and non-ambulatory and presents with delays in his gross and fine motor skills and activities of daily living (ADL) skills; however, during the 2021-22 school year he was "functioning near or at grade-level" across multiple academic domains including reading, phonics, sight-word recognition, spelling, math, and writing, which was demonstrated via multiple assistive technology devices and software the student used to type out responses in sentences and to expressively communicate in full sentences, problem solve, and self-advocate (Parent Ex. C at pp. 1, 2-47; Dist. Exs. 3 at p. 3-4; 6 at p. 2; 8 at p. 1). The student has received several diagnoses including cerebral palsy, spastic quadriplegia, and neonatal hypoxic ischemic encephalopathy (Parent Ex. C at p. 1; Dist. Ex. 6 at p. 8). Further, the student also received a diagnosis of "nocturnal seizures" that were reportedly "under control with medication" (Parent Ex. C at p. 50; Dist. Ex. 3 at p. 32). The student utilizes two separate assistive technology devices for academic and communication purposes, respectively (Parent Ex. C at p. 22; Dist. Ex. 3 at p. 8). He communicates primarily via an eye gaze speech generating device (SGD) and facial expressions, vocalizations, body language, and gestures such as looking up to respond "yes" and shaking his head to respond "no" (Parent Ex. C at pp. 4, 26; Dist. Exs. 3 at p. 21; 6 at pp. 1, 7; 8 at p. 1). Regarding mobility, the student utilizes a power wheelchair with a "head array" activated by a switch that the student operates by turning his head to the side (Parent Ex. C at pp. 10-11). The student tolerates "mechanical soft textures" of a pureed consistency and his nutritional needs are met by a gastrostomy tube (Parent Ex. C at pp. 36-37). According to the February 2022 IEP, the student was described as "inquisitive, bright, and consistently engage[d] across subjects and across disciplines" (Dist. Ex. 3 at p. 5).

The district sought consent for and conducted a reevaluation of the student during the 2021-22 school year including a psychoeducational evaluation, classroom observation, social history, assistive technology evaluation, assistive technology trial, and level 1 vocational interview with the parent (see Dist. Exs. 6-12).

On February 15, 2022, iBrain completed an updated report and education plan for the student to be implemented beginning February 28, 2022 (Parent Ex. C at pp. 1, 72-74).[3] The iBrain education plan included recommendations that the student receive a 12-month program in a nonpublic school and instruction in an 8:1+1 special class with the support of a full-time 1:1 paraprofessional and individual school nursing services on an as needed basis (Parent Ex. C at pp. 72-74). With regard to related services, the February 2022 iBrain education plan provided five

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

[3] The iBrain education plan reflected a "Date of Report" of December 2, 2021, and a "Date of Report Updates" of February 15, 2022; for consistency purposes within this decision, the plan shall be referred to as the February 2022 "iBrain education plan" (see Parent Ex. C at p. 1).

60-minute sessions per week of individual occupational therapy (OT), five 60-minute sessions per week of individual physical therapy (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, two 60-minute sessions per week of individual music therapy, one 60-minute session per week of music therapy in a group, one 60-minute session per week of individual indirect assistive technology services, several assistive technology devices, and other adaptive equipment which the student required (Parent Ex. C at pp. 67, 72-74). In addition, the iBrain education plan provided one 60-minute session per month of individual parent counseling and training as well as other supports for school personnel on behalf of the student (id. at pp. 70, 73-74). The iBrain education plan also provided transportation services including supervision provided by a paraprofessional, air conditioning, a lift bus/wheelchair ramp, a wheelchair (regular size), and limited travel time of 60 minutes (id. at p. 72).

A CSE convened, on February 16, 2022, to conduct the student's annual review and developed an IEP with an implementation date of February 28, 2022 (Dist. Ex. 3). Finding that the student was eligible for special education as a student with a traumatic brain injury, the February 2022 CSE recommended 12-month services consisting of 35 "periods" per week of instruction in an 8:1+1 special class in a district specialized school, full-time individual health paraprofessional services, as needed individual school nurse services, and related services on a weekly basis, including five 60-minute sessions of individual OT, five 60-minute sessions of individual PT, four 60-minute sessions of individual speech-language therapy, one 60-minute session of speech-language therapy in a group (3:1), and one 60-minute session of individual assistive technology services, in addition to one 60-minute session per month of parent counseling and training (id. at pp. 1, 67-76).[4] The CSE also recommended an assistive technology device (SGD and applications) with mount and special transportation consisting of pick-up from the closest safe curb location, adult supervision by a 1:1 paraprofessional, lift bus, and equipment for student's use of a wheelchair (id. at pp. 68-69, 72-74). Additionally, the CSE recommended that the student participate in the same State and district-wide assessments of student achievement that are administered to general education students (id. at p. 71). Further, the CSE recommended testing accommodations including extended time, breaks, revised test directions, use of assistive technology, multiple day administration, on-task focusing prompts, an individual testing environment in a separate location/room with minimal distractions, and revised test format, i.e., answers recorded in a test booklet or on an assistive technology device and transferred (id. at p. 70). The February 2022 CSE noted the parents' concerns regarding their "reservations about the capacity" of a specialized school to offer the student "wholistic [sic] supports," "the lack of initiation of music therapy" on the IEP, and "concern about the removal of [his trialed assistive technology devices] upon competition of the trial" (id. at p. 75).

On April 12, 2022, the parent received an email from the district special education evaluation placement program officer with information about the location of the public school to which the student was assigned to attend (Parent Ex. D at p. 3). In an email dated May 16, 2022, the parent informed the special education evaluation placement program officer that she had spoken with someone at the assigned school location who indicated that the school was not wheelchair accessible (id. at p. 1). The parent further indicated that she had communications with

[4] 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]).

other district personnel regarding other school locations but none had a class available in an accessible building (id.). The parent requested assistance to "identify a school that c[ould] implement [the student's] IEP" (id.).

On June 15, 2022, the parent signed an enrollment contract with iBrain for the student's attendance from July 6, 2022, to June 23, 2023 (Parent Ex. E). By letter to the district dated June 17, 2022, the parents stated their intent to enroll the student at iBrain for the 2022-23 school year (Parent Ex. F). On June 20, 2022, the parent executed an agreement for the provision of transportation of the student to and from iBrain for the 2022-23 school year (Parent Ex. G).

In a prior written notice and a school location letter, both dated June 28, 2022, the district summarized the February 2022 CSE's recommendations and identified a different public school location to which the district assigned the student to attend for the 2022-23 school year (Dist. Exs. 4; 5 at pp. 1-2).[5]

On June 30, 2022, the student's mother sent an email outlining her questions and concerns regarding the second proposed assigned school location to the district's special education evaluation placement program officer (Parent Ex. H at pp. 1-4). In the email, the parent stated that since the 2022-23 school year would begin within days, the school location letter dated June 28, 2022, regarding the second proposed assigned school did not give the parent "adequate time to investigate the proposed school" (id. at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated July 6, 2022, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) because the district failed to offer a program and placement tailored to meet the student's unique needs for the 2022-23 12-month school year (Parent Ex. A at pp. 1, 6). Initially, the parents requested pendency and asserted that the student's pendency placement was at iBrain based on Application of a Student with a Disability, Appeal No. 22-050 regarding the 2021-22 school year (id. at pp. 1-2).

With respect to the 2022-23 school year, the parents contended that the district failed to evaluate the student in all areas of suspected need by failing to recommend or conduct an assistive technology evaluation and failing to conduct updated evaluations in 2022 (Parent Ex. A at p. 9). The parents alleged that the district never conducted a neuropsychological evaluation; failed to conduct the mandated three-year evaluations; and that the CSE failed to consider a psychoeducational evaluation or neuropsychological evaluation when developing the student's IEP for the 2022-23 school year (id.). The parents also claimed that the CSE denied them meaningful participation in the process for developing the student's IEP by failing to provide them with sufficient clinical evaluative material, failing to convene a properly composed CSE, and failing to provide them with appropriate and timely notices of meetings and evaluations (id. at p. 10). Additionally, the parents asserted that the February 2022 CSE predetermined the student's program (id.).

[5] The district special education evaluation placement program officer emailed the prior written notice and school location letter to the parent on June 28, 2022 (Parent Ex. H at p. 4; Dist. Ex. 2 at p. 1).

The parents asserted that the February 2022 IEP failed to: include sufficient clinical evaluative data; set a baseline against which progress could be measured; include appropriate annual goals; and recommend appropriate related services and special transportation accommodations (Parent Ex. A at pp. 9-10). Regarding the recommended placement, the parents claimed that the district failed to mandate an appropriate class size for the student in the least restrictive environment (LRE) and that the recommended 8:1+1 special class was "grossly inappropriate" because the student required a small class with intensive 1:1 attention from a special education teacher to make progress (id. at p. 6). Further, the parents asserted that a specialized school placement did not offer the student an appropriate environment, class composition, or amount of individualized instruction (id.). Additionally, the parents claimed that the CSE failed to recommend music therapy, sufficient and appropriate supports for assistive technology devices and services, parent counseling and training, and supports for school personnel who would work with the student, such as training for feeding techniques (id. at p. 9).

Further, the parents claimed that both assigned public school locations recommended by the district were inappropriate for the student (Parent Ex. A at p. 7). Specifically, the parents alleged that the first public school location assigned in the May 16, 2022 school location letter could not implement the February 2022 IEP as written because there were not enough hours in the week to provide the student with all his mandated related services and instructional hours (id.). The parents also claimed that that the first assigned public school location did not have dedicated areas for OT, PT, or speech-language therapy; that the other students who attended the proposed classroom were ambulatory which meant the student would not be placed with students who had similar needs and abilities; that the school presented safety risks for the student; that it was only partially wheelchair accessible; that it could not provide the quiet, distraction-free environment that the student needed to make progress; and that it could not provide the appropriate lighting for the student to be able to engage with educational materials (id.).

For the second public school assigned by a school location letter dated June 28, 2022, the parents reiterated the same claims as for the first assigned public school location, in addition to a statement that the second assigned public school location was "plagued by violence" and would not have been a safe environment for the student (Parent Ex. A at p. 8).

Further, the parents asserted that the district deprived them of the opportunity to tour the schools and failed to provide adequate information about the schools, which denied them the opportunity to investigate whether the schools were an appropriate placement for the student (Parent Ex. A at pp. 7, 8). In particular, the parents asserted that the second school location letter came "mere days before the start of the school year" (id. at p. 8). In addition, the parents claimed that the district provided two conflicting school recommendations without explanation, which deprived them of the opportunity to meaningfully investigate the appropriateness of the district's recommended program and placement for the student and further, that it was unclear which school location the district was "actually" recommending for the student for the 2022-23 school year (id. at p. 8).

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 (Parent Ex. A at p. 6). For relief, the parents requested a finding that the district failed to offer the student a FAPE for the 2022-23 school year; a finding that iBrain was an appropriate unilateral

placement for the student for the 2022-23 school year; an order directing the district to fund the costs of the student's tuition at iBrain for the 2022-23 school year in addition to the costs of related services, 1:1 private nursing services, and 1:1 paraprofessional services; direct funding for the student's special education transportation; an order directing the district to reconvene and develop a new IEP; an order directing the district to conduct new evaluations; and an order directing the district to fund an independent educational evaluation (IEE) of the student, including a neuropsychological evaluation (id. at p. 11).

B. Impartial Hearing Officer Decision

A prehearing conference was held on August 25, 2022, at which time the parties agreed that the last agreed upon placement was set forth in the prior unappealed SRO decision that found that the parents' unilateral placement at iBrain was appropriate (Tr. pp. 4-5).

In an interim decision dated September 15, 2022, the IHO determined that the student's pendency placement during this proceeding was based on the decision in Application of a Student with a Disability, Appeal No. 22-050 and consisted of the following: funding for the parents' unilateral placement of the student at iBrain, inclusive of the costs of related services, as well as funding for a 1:1 paraprofessional; nursing services; and "door-to-door" special education transportation services (September 15, 2022 IHO Decision on Pendency).

The parties proceeded to an impartial hearing beginning on September 20, 2022, which concluded on December 21, 2022, after four days of proceedings (see Tr. pp. 54-339).

In a final decision dated March 2, 2023, the IHO found that the district failed to offer the student a FAPE for the 2022-23 school year (IHO Decision at pp. 6-8). More specifically, the IHO found that the February 2022 IEP "was not reasonably calculated to enable the student to receive educational benefits" because the assigned public school location "was not designed to meet the unique needs of the [student], supported by the related services necessary to permit the [student] to benefit from the instruction" (id. at p. 6).[6]

The IHO found that the district failed to establish that, even with "pull-in or push-out" services, the student could have received all of the services recommended in his February 2022 IEP (IHO Decision at p. 6). More specifically, the IHO found that the district failed to demonstrate exactly how the assigned public school location would have been able to provide the student's services, even as push-in services, finding further that there was not enough time in the assigned public school's periods or school day to provide all of the services recommended in the IEP (id. at p. 7).[7]

[6] The IHO reviewed the parent's claims related to the assigned public school based on the public school location assigned to the student in the June 28, 2022 school location letter (compare IHO Decision at p. 5 with Dist. Ex. 5 at p. 1).

[7] The IHO stated in her decision that the recommended school's periods were only forty-five (45) minutes long, and the services were recommended to be provided for sixty (60) minutes each, four (4) to five (5) times per week, in addition to the student being provided thirty-five (35) periods in the recommended special education class per week (IHO Decision at p. 7).

The IHO further found that the student did not require music therapy and that the district's failure to mandate music therapy on the February 2022 IEP would not have rendered the IEP deficient (IHO Decision at p. 8). The IHO further determined that the February 2022 IEP was "otherwise sufficient" and that the parents' "additional arguments related to whether a FAPE was provided to the Student need not be addressed here" (id.).

Next, the IHO addressed whether the parents' unilateral placement of the student at iBrain was appropriate (IHO Decision at pp. 8-10). The IHO found that the parents presented sufficient affidavit testimony and submitted substantial documentary evidence in support of their position that the student's placement at iBrain was appropriate (id. at p. 10). Specifically, the IHO found that the parents were able to show that iBrain's school periods and school day were sufficient to provide the student's special education instruction and related services (id.). Further, the IHO held that the parents' documentary evidence established that iBrain was appropriate and had been providing the student with educational instruction that was specifically designed to meet his unique special education needs (id.). The IHO also noted that even though progress was not required for a determination that the student's unilateral placement was adequate, she found evidence that the student made progress while attending iBrain (id.).

Lastly, the IHO addressed the equitable considerations and found that there were no equitable issues that would preclude or limit the requested relief (IHO Decision at p. 12). The IHO noted that although the district attempted to cure its initial "inappropriate recommendation," with the school assigned in the second school location letter, she found that the district's attempt did not warrant a denial or reduction of the parents' requested relief (id.).

For relief, the IHO ordered the district to reimburse the parents and/or directly pay iBrain for the cost of the student's full-time tuition, a 1:1 paraprofessional, and transportation costs with a 1:1 nurse during transportation, for the 2022-23 school year (IHO Decision at p. 12).

IV. Appeal for State-Level Review

The district appeals the IHO's findings that it did not offer the student a FAPE for the 2022-23 school year; that iBrain was an appropriate unilateral placement for the student for the 2022-23 school year; and that equitable considerations weigh in favor of the parents.

The district claims that the IHO's decision contains an "incongruous statement" that the February 2022 IEP was inappropriate because the assigned public school location was inappropriate. The district argues that the IHO based her FAPE findings on the sole issue of whether the district's recommended assigned school could have implemented the February 2022 IEP and was not based on any finding that the recommended IEP was insufficient. Further, the district argues that any issue with implementation of the IEP at the recommended assigned school did not render the IEP defective and is contrary to the IHO's finding that the February 2022 IEP was "otherwise sufficient."

Additionally, the district claims that the assigned public school location could have implemented the recommendations contained in the February 2022 IEP. The district argues that the thirty-five hours per week of special education instruction and sixteen hours per week of related services could have both been accommodated if push-in services were utilized for all services,

which was permitted by the February 2022 IEP.[8] According to the district, the unit coordinator at the assigned public school explained how the school could have implemented the student's IEP.

The district also claims that the IHO erred in finding that the parents sustained their burden to show that the student's program at iBrain was an appropriate placement. Specifically, the district argues that the iBrain program did not permit the student, who had physical limitations but "significant cognitive abilities and potential," access to nondisabled students.

Further, the district claims that the equitable considerations disfavor the parents. The district asserts that the issues raised in the parents' ten-day notice were cured by the district assigning the student to a different school. Further the district argues that the assignment of the student to the second school was made timely, prior to the start of the school year, and the parents were not entitled to a school tour.

The district requests that the IHO's decision be reversed in its entirety and that the SRO should find that the district offered the student a FAPE for the 2022-23 school year; that iBrain was not an appropriate unilateral placement; and that equitable considerations weigh in favor of the district.

In an answer, the parents respond to the allegations raised in the request for review and argue for upholding the IHO's decision in its entirety. Initially, according to the parents, the IEP placement recommendation carried with it a presumption that the school could not offer an extended school day and, accordingly, it was reasonable to find the IEP was flawed without a recommendation for an extended school day. The parents further assert that the school location is inseparable from the substantive recommendations in the IEP and that the IHO was correct in finding the IEP was not reasonably calculated to enable the student to receive an educational benefit based on the assigned school. The parents further argue that the assigned school could not provide all of the student's related services, instructional time, and the time required to prepare the student for the school day and for departure, into a regular school day with 45-minute periods. Additionally, the parent argues that in delivering all related services as push-in services, the implementation of the IEP would eliminate the discretion for providers to provide services on a pull-out basis, which was recommended in the IEP. The parents further assert that the IHO correctly found that iBrain was an appropriate placement for the student for the 2022-23 school year, that equitable considerations weigh in the parents' favor, and that the IHO properly ordered direct payment for the cost of the student's attendance at iBrain, including transportation.

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

[8] The district in its request for review claims that the IHO's decision contains "faulty reasoning" regarding push-in services in finding that they needed to be provided "in addition" to the recommended 35 periods per week of special education (Req. for Rev. at ¶ 12). The district argues that the IHO's reasoning "completely misunderstands the phrase push-in services. If services are provided on a push-in basis (i.e. pushed into the classroom), then there is no need to provide an additional 35 periods of classroom instruction" (id.).

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]).[9]

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

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

VI. Discussion

A. Preliminary Matters

In this case, the IHO held that the district did not offer a FAPE to the student for the 2022-23 school year because the proposed public school the district assigned the student to attend in the June 2022 school location letter could not meet his unique needs (IHO Decision at p. 6; see Dist. Ex. 5). The district argues that this finding was based on the sole issue of whether the assigned public school could implement the student's February 2022 IEP and not whether the program

[9] 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).

recommended in the February 2022 IEP was sufficient. The district points to contradicting statements made by the IHO in her decision in its request for review. Specifically, the district argues that the following statement in the decision was incongruous with the rest of the IHO's findings:

> Here, I find that the IEP created was not reasonably calculated to enable the student to receive educational benefits because the District's recommendation to place the Student at the [assigned] public school was not designed to meet the unique needs of the handicapped child, supported by the related services necessary to permit the child to benefit from the instruction
>
> (IHO Decision at p. 6).

The district argues that the IHO contradicted the above statement when addressing whether music therapy was required to offer the student a FAPE. In particular, the IHO found "that a mandate of music therapy is not necessary in this case and the failure to mandate it would not render the IEP deficient" and that "[t]he IEP was otherwise sufficient" (IHO Decision at p. 8).

Despite the IHO's apparently contradictory statements, the IHO's finding of a denial of FAPE was based on her findings regarding the assigned school's ability to implement the IEP (IHO Decision at pp. 6-8). Additionally, the parents do not cross-appeal from the IHO's adverse finding that the February 2022 IEP was sufficient nor the IHO's finding that the parents' additional arguments related to whether a FAPE was provided to the student did not need to be addressed (see IHO Decision at p. 8). Accordingly, the IHO's determination that the February 2022 IEP was substantively sufficient in its recommendations as to educational programming for the student 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]). [10]

[10] The parents in their July 2022 due process complaint requested public funding for an IEE in the form of an independent neuropsychological evaluation (Parent Ex. A at p. 11). The IHO did not address this issue in her decision (see generally IHO Decision). State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review " and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4] [emphasis added]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at *4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]). Thus, since the parents did not cross-appeal from the IHO's failure to address the parents' request for an IEE, the claim has been abandoned on appeal.

B. Assigned School

The district alleges that the IHO's finding that the assigned public school location could not implement the student's February 2022 IEP as written—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.[11] In response, the parents assert that it was impossible for the assigned school to implement the student's recommended program as it could not be "squeeze[d]" into a regular school day. Upon review, the evidence in the hearing record, together with the applicable law, supports the district's contention that the IHO erred and therefore, the IHO's finding that the district failed to offer the student a FAPE must be reversed.

As an initial matter, the parents raised allegations that the timing of the June 28, 2022 school location letter they received "mere days before the start of the school year" deprived them of a meaningful opportunity to investigate the appropriateness of the assigned public school location (Parent Ex. A at p. 8). There is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

However, in this instance, the June 28, 2022 school location letter appears to have been sent in response to the parents' June 15, 2022 letter in which the parents expressed their belief that the school the student was originally assigned to attend—in the April 2022 school location letter—was not able to implement the February 2022 IEP (Parent Ex. F; Dist. Ex. 5). The student's mother testified that she called the school on June 30, but was not able to speak with anyone (Tr. p. 326; Parent Ex. I at ¶17). She then sent an email to the district special education evaluation placement program officer on June 30, 2022, in which she indicated that she did not have adequate time to investigate the school, she requested a tour of the school, and she listed seventy questions regarding the school (Parent Exs. H at pp. 1-3; I at ¶18). The parents asserted that they did not receive a response from the district prior to the filing of their July 6, 2022 due process complaint notice (Parent Ex. A at pp. 5-6). Given the timing of the parent's rejection of the initial placement in a letter dated June 15, 2022, the district's attempt to resolve the parents' concerns by assigning the student to a new school on June 28, 2022, and the parents' filing of the due process complaint

[11] As indicated above, the district sent two school location letters for the 2022-23 school year dated April 12, 2022 and June 28, 2022 respectively (Parent Ex. D at p. 3; Dist. Ex. 5). However, on appeal, the only assigned public school location at issue is the one identified in the June 28, 2022 school location letter. Thus, for the remainder of this decision, when referring to the assigned public school location, the reference is to the public school location assigned in the June 2022 school location letter.

notice on July 6, 2022, it does not appear that the assignment of the student to a school just prior to the start of the 2022-23 school year denied the parents the opportunity to obtain information about the school. Any other finding would foil the purposes of the ten-business day notice requirement, which is to give the district an opportunity to determine if it can provide a suitable education to the student (see Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]).

Turning to the substance of the parents' complaint, 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).[12] 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. 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

[12] 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]).

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]).[13]

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 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]).

Turning now to the district's argument regarding implementation, 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 location was not capable of implementing all of the recommendations in the February 2022 IEP, and as discussed herein, ignored testimonial evidence that directly contradicted this determination.

The IHO found that the district did not establish that the assigned public school location could have provided the student with all his related services, even with the services being recommended on a push-in or pull-out basis, and that on redirect examination the district attempted to clarify the issue but "to no avail" (IHO Decision at p. 6). The IHO cited to the testimony of the unit coordinator at the assigned school who was responsible for ensuring that the school was in compliance with students' IEPs, to further support her finding (id. at pp. 6-7; see Tr. pp. 245-46). Specifically, the IHO referred to the following line of questioning:

[13] 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 February 2022 IEP. Any conclusion that the district would not have implemented the student's IEP or that the assigned public school location 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 February 2022 IEP.

[District Attorney]: So looking at the occupational therapy mandate, so it states, "separate location, provider's discretion, classroom and/or therapy space". Could you explain to us what that means?

[Unit Coordinator]: That the location is up to the provider's discretion. It says classroom or therapy space. So (audio interference) is that it can be given in the classroom or in a separate therapy space, given the (audio interference).

[District Attorney]: Okay. So if there were any issues, given the class mandate and the related service mandate, if there were issues in providing all these services during the time provided in the school week, these services can be provided push-in in the classroom to allow for all mandates to be sustained; is that correct?

[Unit Coordinator]: Yes.

(IHO Decision at pp. 6-7; see Tr. p. 280).

When asked specifically at the impartial hearing if the assigned public school location had the ability to implement the related services and education program recommended in the February 2022 IEP, the unit coordinator responded "[y]es" (Tr. p. 253). When questioned by the parents' attorney on whether the assigned public school would be able to accommodate sixteen hours of related services per week as mandated in the IEP, the unit coordinator again responded "[y]es" (Tr. pp. 261-62). The unit coordinator further testified that if the assigned public school needed more support for the amount of related services, the district would "provide us with outside providers" but also that the assigned school had "the personnel in our school specifically who implement those services" (id.). She further testified that although it "would take some coordinating" to implement all of the student's related services within a given day and within the school week, "if it's on the IEP, we're mandated to implement it" (Tr. p. 262). The unit coordinator additionally testified that if the assigned public school could not accommodate a student's related services during the school day, she was aware of some cases where related services were provided "after school or after hours or outside of regular hours"; however, she did not recall the details of a specific case where that happened (Tr. pp. 263-64).

The unit coordinator further testified that the IEP was a "living document" and that if it was determined that the student needed pull-out services to receive a FAPE "there would most likely have to be more specification included in the IEP" and that the CSE would reconvene "to update [the IEP] based on the student's progress . . . given the parents' consent" (Tr. pp. 272-73).[14] According to the February 2022 IEP, the student's related services were recommended to be provided in the classroom and/or therapy space, at the providers' discretion (Dist. Ex. 3 at pp. 67-68). Overall, the unit coordinator testified, while acknowledging that all of the student's

[14] The unit coordinator testified that if a related service can "only happen in a certain manner, then it should be included in the IEP" (Tr. p. 273; see ("Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 57, Office of Special Educ. [Dec. 2010] [indicating that the location for services should be clearly stated], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf).).

recommended related services would have needed to be provided on a push-in basis, the assigned school location could have implemented the February 2022 IEP (Tr. pp. 261-62, 270-72).

When asked by the parents' attorney about the periods of the assigned school, the unit coordinator testified that the assigned school had eight 45-minute periods in the school day, including a period for lunch (Tr. pp. 258-59). Further, she testified that school began at 8:30 a.m., ended at 2:50 p.m., and end of the day bus transition took place from 2:15 p.m. to 2:50 p.m. (Tr. p. 257). She further testified that instruction continued during the end of the day bus transition – though a shortened period – and that students partook in reading instruction (Tr. p. 258).

In her decision, the IHO—while noting that the unit coordinator had explained a process by which the assigned school could have fulfilled the student's related services recommendations—construed this testimony as a "conclusory assertion that the public school would [have] be[en] able to provide the services as push-in services" (IHO Decision at p. 7). The IHO also construed the unit coordinator's testimony that the assigned school would have been able to provide the student's services as push-in services as "not persuasive" noting that "the public-school periods [we]re only forty-five [] minutes long, and the services to be provided [we]re sixty [] minutes each long four [] to five [] times per week, in addition to providing 35 periods [of] special education per week" (id.). However, the unit coordinator's testimony fell short of providing a basis to conclude that the assigned school could not implement the student's related services. When she was specifically asked how the student would have received 60-minute sessions of related services when the assigned public school's periods were 45-minutes long, the unit coordinator testified:

> It would just be in a period and a half, whether it's pull-out, they would stay in the related service offices for that amount of time and be transitioned back into the period that it's currently at, or they would -- the related service would push-in, and transitioning from one class period to another would be a part of the session.
>
> (Tr. pp. 269-70).

In an answer, the parents point to the unit coordinator's testimony to argue that the district would have modified the student's IEP to fit the school. Specifically, the parents argue that the unit coordinator testified that to fulfill the student's related services mandates, most or all of the student's related services would have had to be delivered as push-in services, or there would have had to be a "'reconvene with the IEP team and the parents, given the amount of related services and the special classes'" (Answer ¶ 22; see Tr. pp. 271-73). However, a review of the unit coordinator's full testimony directly contradicts the parents' argument that the assigned school would have modified the related services as written in the IEP; rather, the evidence points to processes for providing push-in services or reconvening the CSE with the parents' consent to fulfill student's related service mandates if it were determined that push-in services were not meeting the student's needs (Tr. pp. 261-63, 269-73).

Furthermore, as alluded to by the unit coordinator, if the assigned school was unable to provide the student's related services, the district would have provided outside providers and if services needed to be delivered outside of the school day, the unit coordinator was aware of some cases where services were delivered outside of regular hours (Tr. pp. 261-64). As has been noted in at least one prior State level administrative appeal, school districts may utilize a related services

authorization (RSA) procedure as an acceptable method of providing related services (see Application of a Student with a Disability, Appeal No. 23-017). 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 [a] FAPE. The Department recognizes that there will be situations in which school districts will not be able to deliver [a] 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 school may have been required to, as a last option, retain outside related services providers to fulfill the mandates of the student's related services recommendations, use of this process, alone, would not have denied the student a FAPE.[15]

Indeed, the unit coordinator's testimony reflects 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. Counsel for the parents conceded as much during the hearing, where in response to an objection that counsel for the

[15] In addition, to the extent that the February 2022 IEP specified that the student's related services could be provided in a "therapy space" (see Dist. Ex. 3 at pp. 67-68) it is not entirely clear whether the therapy space specified in the IEP referred to a separate location within the public school, assuming that it did (and further assuming that the related service providers would not have come to the school to provide services), the use of outside providers to fill the mandated level of related services would not constitute such a material or substantial deviation from the student's IEP that he 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 utilized outside providers for related services, the hearing record does not support a finding that it would have denied the student a FAPE.

parents' line of questioning during cross-examination of the unit coordinator was speculative, parents' counsel responded "[e]verything's speculative. They've never seen an IEP like this" (Tr. p. 263). As a result of this line of questioning, 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. As a legal matter, the IHO should not have considered the parents' speculation as to the school's ability to implement IEP because, as noted above, the Second Circuit has held that speculation that the school district will not adhere to the IEP is not an appropriate basis for a unilateral placement (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]). Nonetheless, factually, the unit coordinator's testimony provided ample evidence that the assigned school had the capacity to implement the student's IEP as written. Accordingly, the IHO erred in finding that the district denied the student a FAPE by not proving that it could have implemented the February 2022 IEP.

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 for the 2022-23 school year, the 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 or whether equitable considerations supported the parents' request for relief (Burlington, 471 U.S. at 370).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 2, 2023 is modified by reversing the determination that the district failed to provide the student a FAPE for the 2022-23 school year.

Dated: **Albany, New York**
June 2, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER