The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 23-073

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 Injury Rights 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 a decision of an impartial hearing officer (IHO) which determined that the educational program/services recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2022-23 school year was not appropriate. The parents cross-appeal from the IHO's failure to reach certain additional claims underlying the parents' allegation that the district denied the student a free appropriate public education (FAPE). The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has received diagnoses of a seizure disorder, cerebral palsy, and cortical visual impairment (CVI) (Parent Exs. E at p. 1; F at p. 1). The student is nonverbal and non-ambulatory

(Parent Ex. N at p. 3). The student has attended iBrain since the 2020-21 school year (Parent Ex. M ¶ 3).[1]

On March 30, 2022, a CSE convened for an annual review and developed an IEP with a projected implementation date of April 4, 2022 (Parent Ex. G).[2] The March 2022 CSE determined that the student remained eligible for special education services as a student with a traumatic brain injury (TBI) (see Parent Ex. G).[3] In addition to the reevaluation information, the district relied on an iBrain report and education plan (see Parent Ex. F; Parent Ex. G at pp. 1-42). The March 2022 CSE determined that, because of the student's "brain based, physical and cognitive impairments," he required "highly intensive interventions, specifically designed instruction, modifications and adaptations such as a 1:1 [paraprofessional], 1:1 academic instruction, [assistive technology] devices, extended processing time, verbal prompts, adapted materials, breaks, redirection, environmental modifications" (Parent Ex. G at p. 42). The March 2022 CSE recommended a 12-month school year program consisting of a 12:1+(3:1) special class placement for all subjects in a district specialized school together with five 60-minute sessions per week of individual occupational therapy (OT), five 60-minute sessions per week of individual physical therapy (PT), five 60-minute sessions per week of individual speech-language therapy, three 60-minute sessions per week of individual vision education services, and one monthly 60-minute session of group parent counseling and training (id. at pp. 63-64).[4] The CSE also recommended a full-time individual paraprofessional for health, ambulation, feeding, and safety (id.). The March 2022 CSE recommended assistive technology including a switch interface and switch throughout the school day and once weekly 60-minute sessions of assistive technology services (id. at pp. 63-64). In addition, the March 2022 CSE recommended special transportation consisting of transportation from the closest safe curb location, a 1:1 paraprofessional, and a lift bus for the student's wheelchair (id. at pp.68-69).

On June 17, 2022, the parents notified the district of their disagreement with the recommended program and placement in the March 2022 IEP and of their intent to unilaterally place the student at iBrain for the 2022-23 school year (see Parent Ex. I). On June 21, 2022, the parents executed an enrollment contract for the student to attend iBrain for the 2022-23 school year (see Parent Ex. H). On June 22, 2022, the parents also executed a school transportation

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

[2] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits were cited in instances where both a parent and district exhibit were identical. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

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

[4] The March 2022 IEP specified the student's special class as 12:1+(3:1) in accordance with the State regulation that "[i]n addition to the teacher, the staff/student ratio shall be one staff person to three students" (see Parent Ex. G at p. 63; see also 8 NYCRR 200.6[h][4][iii]). For purposes of the decision, although the parties at times referred to the class as a 12:1+4 special class, the special class program for the student will be referred to in this decision as a 12:1+(3:1) special class.

service agreement for the transportation of the student to and from iBrain for the 2022-23 school year (see Parent Ex. K).

On June 24, 2022, the district sent the parents a prior written notice, summarizing the recommendations from the March 2022 CSE meeting, and a school location letter identifying the particular public school site to which the district assigned the student to attend for the 2022-23 school year (see Dist. Exs. 4-5).

A. Due Process Complaint Notice

In a due process complaint notice dated July 6, 2022, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (see generally Parent Ex. A).

The parents requested pendency based on an unappealed IHO decision from a prior matter that determined iBrain was an appropriate unilateral placement for the student for the 2021-22 school year (Parent Ex. A at p. 2).

In a description of the student's educational needs and abilities, the parents described the student as having "highly intensive management needs" that required "a high degree of individual attention and intervention" (Parent Ex. A at p. 2). Further, the parents indicated that the student required a program of 1:1 direct instruction with intensive related services which operated on an extended school day (id. at pp. 2-3).

Next, the parents argued that during the March 2022 CSE meeting the parents and iBrain staff stated that the student required "a small classroom environment with minimal distractions" to benefit from instruction but that, instead, the CSE recommended a large 12:1+(3:1) special class in a district specialized school (Parent Ex. A at p. 3). The parents contended that the March 2022 recommendation for a 12:1+(3:1) special class could not offer the student the 1:1 instruction and attention that he required (id. at pp. 3, 5). Further, the parents disagreed with the March 2022 CSE's failure to recommend music therapy by a licensed music therapist (id.).

The parents claimed that upon receipt of the school location letter they contacted the assigned school to schedule an appointment to tour the school but did not receive a response and therefore were denied the opportunity to evaluate the appropriateness of the assigned public school site (Parent Ex. A at pp. 4-6). In addition, the parents stated their concern that the assigned public school could not implement the March 2022 IEP within the school day (id. at p. 4). Furthermore, the parents expressed concern about the "appropriateness of the recommended placement for reasons including, but not limited to, class size ratio, class functional and academic grouping, staffing, accessibility, availability of adequate resources, and the lack of individualized attention and support as the recommended placement [wa]s not the least restrictive setting" (id. at pp. 4-5). The parents further asserted that the March 2022 CSE predetermined the recommendation for a 12:1+(3:1) special class (id. at p. 6).

The parents argued that iBrain was an appropriate unilateral placement for the student as it offered a small 6:1+1 special class that minimized distractions and offered intensive related services (Parent Ex. A at p. 4). According to the parents, the student made progress at iBrain and received special education instruction that met the student's unique needs (id.). Furthermore, the

parents asserted that they made the student available for evaluations and participated in the March 2022 CSE meeting such that equitable considerations favored an award of district funding of the student's tuition at iBrain (id. at pp. 4, 6).

The parents requested findings that the district failed to offer the student a FAPE for the 2022-23 school year and that iBrain was an appropriate placement for the student (Parent Ex. A at p. 7). As relief, the parents requested an order requiring the district to make direct payment to iBrain for the tuition for the 2022-23 school year and direct payment for the special education transportation for the 2022-23 school year (id.).

B. Impartial Hearing Officer Decision

On July 25, 2022, the parties proceeded to an impartial hearing, which concluded on January 5, 2023, after seven days of proceedings (see Tr. pp. 1-294). The parties agreed to pendency in the unappealed findings of fact and decision dated December 23, 2021 (see Aug. 23, 2022 Pendency Form).

In a decision dated March 28, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year, that iBrain was an appropriate unilateral placement, and the parents were entitled to funding for the cost of tuition and transportation at iBrain for the 2022-23 school year (IHO Decision at pp. 8-9, 11-12).

In her discussion of the March 2022 IEP, the IHO noted that most of the CSE's recommendations came from iBrain and held that the district failed to explain why it did not recommend a 6:1+1 special class, which "seem[ed] like the best setting in order to implement the [s]tudent's services, in the least restrictive environment" (IHO Decision at p. 6). The IHO stated that the March 2022 IEP discussed that the student benefitted from a small class with "minimal auditory distractions" and " individual and small group instruction" (id.). The IHO further found that the March 2022 IEP stated that the student required a program with "highly individualized attention and support, via small class size and continual adult supervision via a 1:1 paraprofessional, throughout the duration of the school day" (id. at p. 7). Accordingly, the IHO found that the district "failed to demonstrate that such a large size classroom could support the [s]tudent[']s unique needs" and that, therefore, the hearing record did not support a finding that the recommendation for a 12:1+(3:1) was appropriate for the student (id.).[5] The IHO also referenced that available evaluative information supported the "need for a smaller classroom" as the least restrictive environment (LRE) for the student (id.).

Next, the IHO reviewed the recommended program and related services all of which were to be implemented at 60-minute intervals but found that the public school's class periods were only 45 minutes in length (IHO Decision at p. 7). The IHO cited the testimony of the district's interim principal who testified that to accommodate the 60-minute related services the student "could potentially miss 15 minutes of the service or instruction" and found that missing instructional time "would hinder the [s]tudent's progress" (id.). Accordingly, the IHO found that the "[d]istrict failed to establish exactly how the public school would be able to provide such services, even as push in

[5] In one place in her decision, the IHO referred to the recommendation as a 12:1 special class (IHO Decision at p. 7), however, the recommendation was for a 12:1+(3:1) special class (see Parent Ex. G at p. 63).

services, if there [wa]s not enough time in its periods or school day to provide such services" (id. at pp. 7-8). Furthermore, the IHO agreed with the parents' argument that "it would be mathematically impossible for the public school to provide the [s]tudent with the mandated instruction and related services" (id. at p. 8).

Then, the IHO addressed the parents' contention that the district should have recommended music therapy (IHO Decision at p. 8). The IHO found that the district failed to offer specific reasons why the student did not require music therapy and the district's "conclusory statements" regarding music therapy were "insufficient to support a finding that it should not have been included in the [s]tudent's IEP" (id.).

The IHO found that the March 2022 IEP "was not reasonably calculated to enable the student to receive educational benefits" because the recommendation for placement of the student at a district specialized school would not meet the unique needs of the student and as such the district failed to offer the student a FAPE for the 2022-23 school year (IHO Decision at p. 8).

The IHO next addressed whether the parents met their burden to demonstrate that iBrain was an appropriate unilateral placement (IHO Decision at pp. 9-11). She found that the parents' evidence in the hearing record established that iBrain was appropriate as the program had sufficient time in the school day for all of the student's recommended instruction and related services (id. at p. 10). The IHO additionally found that the class size at iBrain "prevent[ed] distractions and promote[d] instruction" for the student (id.). The IHO further determined that, based on the evidence in the hearing record, the student made progress at iBrain (id. at p. 11).

Lastly, the IHO found no equitable considerations that would either preclude or limit an award of tuition reimbursement to the parents (IHO Decision at p. 11). Based upon the foregoing, the IHO found that the parents were entitled to the costs of tuition and transportation for the 2022-23 school year at iBrain (id. at pp. 11-12).

IV. Appeal for State-Level Review

The district appeals the IHO's finding that the district failed to offer the student a FAPE for the 2022-23 school year.[6]

More specifically, the district alleges that the IHO erred in finding that the 12:1+(3:1) special class was not appropriate for the student. The district contends that the 12:1+(3:1) was appropriate for the student to make progress towards his goals. The district also argues that staff in the 12:1+(3:1) was "better aligned to handle" the student's needs and the students in the special class had "similar learning profiles." Further the district argues that the 12:1+(3:1) special class was appropriate for the student due to "the global nature of [his] developmental delays, health needs, and highly intensive management needs" and further that it represented the student's LRE.

[6] The district is not challenging the IHO's findings that iBrain was an appropriate unilateral placement for the 2022-23 school year or that equitable considerations did not bar reimbursement. Accordingly, these findings have 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]).

Next, the district argues that the student did not require music therapy in order to receive a FAPE. The district relies on the testimony of the district's school psychologist that the classroom instruction and related services recommended by the district "target[ed]" the same areas as the music therapy at iBrain. Further, the district contends that the speech-language therapy offered by the district addressed the student's communication deficits and the OT services would have worked on fine motor skills both of which iBrain addressed in music therapy. Accordingly, the district asserts that the deficits demonstrated by the student could be addressed by related services other than music therapy.

The district also asserts that the IHO erred in finding that the March 2022 IEP could not be implemented at the assigned public school location. The district relies on the testimony of its interim principal that the 60-minute related services could be accommodated as the services could be pushed into the classroom . The district also argues that the IHO incorrectly found that it was "mathematically impossible" for the district to implement the IEP. The district asserts that the IHO's analysis of the assigned school is "speculative" and not "tethered" to the mandates contained in the March 2022 IEP.

In an answer, the parents generally deny the material allegations contained in the request for review and argue that the IHO's finding that the district denied the student a FAPE should be upheld. In a cross-appeal, the parents argue that the IHO failed to make certain findings with respect to the district's denial of a FAPE. The parents argue that the IHO failed to find that the district predetermined the recommendation for the 12:1+(3:1) special class and that by failing to offer the parents the ability to tour the recommended assigned school the district denied them information and the ability to meaningfully participate in the CSE process.

In an answer to the cross-appeal, the district generally denies the substantive allegations contained in the parents' cross-appeal. The district argues that the hearing record fails to support the parents' claims of predetermination and a lack of meaningful parental participation.[7]

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]).

[7] The parents prepared, served, and filed a reply to the district's answer to the cross-appeal in this case. However, State regulation limits the scope of a reply to "any claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). In this instance, the contents of the parents' reply did not comport with the regulatory requirements cited above. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

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]).[8]

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. CSE Process—Predetermination

The parents argue that the IHO failed to address their allegation that the district predetermined the March 2022 CSE's recommendation for the 12:1+(3:1) special class. The district argues that the CSE determined its program recommendation at the meeting after considering input from "all team members" including the concerns of the parents, and therefore, the district did not engage in impermissible predetermination.

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the

[8] 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).

CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *10-*11 [E.D.N.Y. Sept. 2, 2011], aff'd 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012]; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506; [S.D.N.Y. 2008]; see B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

Here, the school psychologist testified that the IEP program recommendation was determined at the CSE meeting (Tr. p. 144). She also stated that the team considered other district specialized school "size ratios" (noted on the March 2022 IEP as 6:1+1, 8:1+1, and 12:1+1 special classes) for the student but determined that those programs would not meet the student's needs (Tr. pp. 145-46, 151-52; see Parent Ex. G at p. 72; Dist. Ex. 4 at p. 2). The school psychologist stated that the parents, iBrain, and parent advocate had concerns with "the program that did ultimately end up being recommended" and that their concerns were all memorialized on the IEP (Tr. p. 146; see Parent Ex. G at pp. 71-72).

To support their contention that the district predetermined the recommendations, the parents point to the CSE's decision to recommend a 12:1+(3:1) special class despite the recommendations of the iBrain staff and the parents' statements of concern. However, as discussed below, the CSE's recommendation was supported by the information available to it. Considered as a whole, the hearing record reflects the parents' disagreement with the district's proposed IEP, but this does not amount to predetermination by the district or a denial of the parents' meaningful participation in the development of the program (see E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013]; DiRocco, 2013 WL 25959, at *18-*20; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; Sch. For Language & Commc'n Dev. v. N.Y. State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006]).

B. March 30, 2022 IEP

1. Student Needs

Although the student's needs are not in dispute, a discussion thereof is necessary to frame the remaining issues to be determined pertaining to the March 2022 IEP; specifically, whether a 12:1+(3:1) special class was appropriate to address the student's needs, including his need for individualized instruction, attention, and a quiet, distraction-free environment, and whether the student required music therapy in order to receive a FAPE.

According to a March 2022 psychoeducational evaluation report, the student communicated through vocalizations, body language, and with a single button switch that he activated with a wobble/ribbon stick (Parent Ex. E at p. 1). The student was observed to be distracted by his hands and often put his fingers in his mouth and sucked on his thumbs, did not make eye contact, his arms were in constant motion and he benefitted from the use of an arm immobilizer to isolate his arm in order to use his right hand to activate a switch (id. at pp. 1-2). The student required prompts and modifications to attend, focus his gaze, and participate in tasks; showed pleasure through vocalizations and smiling; enjoyed vibration which helped to sooth and calm him; and responded well to breaks, reinforcement, praise, and wait time (id. at p. 2). With respect to both cognitive and academic functioning, the examiner noted that no formal scores were reported as the student did not respond to standardized presentation of materials and, therefore, informal assessment was employed to gain information regarding the student's functioning (id. at pp. 5-6). The examiner found the student was not able to match items in an array, had difficulty focusing on objects, did not imitate feeding a boy, was not able to respond to questions when shown pictures, and did not respond to greetings (id. at p. 6). However, she also found the student was able to push puzzle pieces into a form board with hand over hand and positional prompts, was able to locate an object hidden under a cup on one occasion, was able to clap his hands with hand over hand prompts, was able to grasp and release objects with full prompts, was able to request "more" using a wobble switch activated by his hand, and was able to follow some routine instructions with full prompts and context cues (id.). Informal assessment found the student was able to look at pictures in a book with prompting, was able to request "more" and say "turn the page" with his device given assistance, was able to make marks on paper and trace some letters with full prompts, was able to place blocks in a cup and in a bin with proximal and verbal prompts and given wait time to process instructions, and was able to look at a number in isolation with an audible cue, verbal prompts, movement, and wait time (id.). Behavioral observations, informal interviews with staff and interpretation of the Maladaptive Behavior Domain on the Vineland-3 were all used to assess the student's social emotional and behavioral functioning (id.). Assessment of the student's performance of everyday tasks found the student functioning in the low adaptive level or below the first percentile in the areas of overall adaptive behavior, communication, activities of daily living, and socialization, with relative strengths noted in some areas of communication and activities of daily living (id.).

In addition to the needs identified above, the March 30, 2022 iBrain report and educational plan (iBrain plan) identified the following student needs which were incorporated into the March 2022 IEP (see Parent Exs. F-G). With respect to classroom participation skills the iBrain plan stated that the student benefitted from engaging in a multi-sensory environment to increase arousal, attention, and body awareness for participation in functional activities (Parent Ex. F at p. 9). The student required extended processing time, sensory breaks, repetition, tactile and verbal cueing, and the use of assistive technology and supportive seating and benefitted from a "small classroom size" with minimal auditory distractions (id. at pp. 9, 20, 22). The iBrain plan indicated that the student responded better in a quiet environment and an intermittent sensory diet in the form of rhythmic vestibular, deep tactile, and proprioceptive input helped him to execute tasks better (id. at p. 36). In addition, the iBrain plan noted that the student needed close supervision, at all times, due to a lack of self-awareness and sensory-seeking behavior (id. at pp. 36-37). Regarding social skills, the iBrain plan stated the student had been working on maintaining his attention during an activity with his peers and benefitted from highly structured, familiar activities where he could anticipate what was coming next (id. at p. 14). The student was found to be an "[e]mergent

communicator" in the area of social interaction and was learning how to make choices with his eyes or with his switch, turn-taking in simple play, and planning and carrying out cooperative activities (id. at pp. 1-2, 19, 26-28). According to the iBrain plan, assessments in the area of receptive language skills found the student to be considered an "[e]mergent communicator" with scattered "[e]mergent [t]ransitional skills" noted in the area of literacy, and the iBrain plan reported that the student demonstrated limited or no understanding that symbols (pictures, words) represent ideas (id. at pp. 18, 24). An assessment of expressive language skills found that the student may communicate most successfully using facial expressions, body language, and/or behaviors noting that he may indicate rejection by turning away but did not reliably answer yes/no questions (id. at pp. 18-19, 25). The iBrain plan further noted that the student required help from a communication partner and that sensory behavior was very important for calming and determining likes and dislikes (id. at pp. 19, 22)

In the area of fine motor skills, the iBrain plan indicated that the student required continuous support to use items appropriately, required minimal/moderate tactile cues on his hands to initiate reaching, was unable to maintain a "modified 3-jaw chuck" when grasping small manipulatives, did not demonstrate finger isolation, did not demonstrate translational movements in-hand, was inconsistent with crossing midline with most toys and classroom materials, and required constant redirection for attention to task due to visual fixation on his hands and oral seeking behaviors (Parent Ex. F at pp. 6-7, 9, 30-31). Regarding physical development, the iBrain plan noted that the student required a 1:1 paraprofessional to support physical, cognitive, and sensory needs throughout the day; one person total assist transfers; maximal support for functional mobility and navigation of all environments; maximal assistance for completion of all activities of daily living (ADLs); and support throughout the day to aid in attention to tasks, use of adapted devices, don/doff orthotics, position changes/gross motor transitions, and safety (id. at pp. 8, 10, 32).

According to the iBrain plan, the student presented with "severe spasticity involving bilateral lower extremity with sensory seeking behavior" and had difficulty participating in activities with his peers which required visual processing and focus, exploring different textures and performing functional activities that require one hand or bi-manual manipulation, and tracking materials smoothly horizontally and vertically (Parent Ex. F at pp. 11-13). Regarding self-care skills the March 2022 plan indicated that the student needed support in donning and doffing articles of clothing, managing fasteners, toileting, grooming, feeding, and transfers (id. at pp. 3-5, 23, 28-32).

2. 12:1+(3:1) Special Class

The district argues that the IHO erred in finding that the district failed to establish that the 12:1+(3:1) class ratio was appropriate for the student and determining that the student instead needed a smaller class size. The district points to the testimony of the school psychologist that the 12:1+(3:1) was "an appropriate class size to allow for [the student] to make progress towards the goals" in his IEP. Further, the district argues that the 12:1+(3:1) special class was the LRE for the

student as the staff ratio in the special class was appropriate for the student's "global developmental delays," "health-related needs," and "highly intensive management needs."[9]

The parents argue that the IHO correctly found that the district failed to establish that the recommended 12:1+(3:1) special class size ratio was appropriate for the student. Specifically, the parents argue that the class was "too large and too crowded to provide the individualized instruction, quiet and distraction-free environment" that the student needed to benefit from the instruction. The parents argue that the district "deviated" from the iBrain recommendation of a 6:1+1 special class and failed to offer an explanation as to why the smaller class size was not recommended at the March 2022 CSE meeting.

State regulation indicates that the maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction (see 8 NYCRR 200.6[h][4][ii][a]). Management needs, in turn, are defined by State regulations as "the nature of and degree to which environmental modifications and human material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social and physical development (8 NYCRR 200.1[ww][3][i][d]).

State regulation also provides that the maximum class size for those students whose programs consist primarily of habilitation and treatment, shall not exceed 12 students (see 8 NYCRR 200.6[h][4][iii]). In addition to the teacher, the staff/student ratio shall be one staff person to three students (id.). The additional staff may be teachers, supplementary school personnel, and/or related service providers (id.). The Second Circuit has recently observed that "[i]n the continuum of classroom options, the 12:1:4 is the most supportive classroom available" (Navarro Carrillo v. New York City Dep't of Educ., 2023 WL 3162127, at *3 [2d Cir. May 1, 2023]).

Where a student's needs could be deemed to fit within the definitions for both 6:1+1 and 12:1+4 special classes set forth in State regulation, the student's unique needs must dictate the analysis of whether the CSE recommended an appropriate class size (Carrillo v. Carranza, 2021 WL 4137663, at *17 [S.D.N.Y. Sept. 10, 2021], aff'd sub nom., Navarro Carrillo, 2023 WL 3162127).

[9] Regarding the district's reference to the 12:1+(3:1) being the student's LRE—as well as the IHO's finding that a 6:1+1 special class seemed to be the best setting to meet the student's needs in the LRE (IHO Decision at p. 6)—I note that class size and the level of adult support are, generally speaking, unrelated to the IDEA's LRE requirement (34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]; R.B. v. New York Dep't of Educ., 603 Fed App'x 36, 40 [2d Cir. Mar. 19, 2015] [stating that "[t]he requirement that students be educated in the [LRE] applies to the type of classroom setting, not the level of additional support a student receives within a placement"]; see T.C. v. New York City Dep't of Educ., 2016 WL 1261137 at *13 [S.D.N.Y. Mar. 30, 2016] [stating that "[a] less restrictive environment refers to the ratio of special education to general education students in the same classroom, not the ratio of special education students to teachers"]). As neither party disputes that the student should not attend a general education class setting or otherwise participate in school programs with nondisabled students, there is no basis for a finding that the March 2022 CSE's recommendations ran afoul of LRE requirements.

Here, a review of the March 2022 iBrain plan alongside the March 2022 IEP developed by the district reveals that the March 2022 IEP included the same present levels of performance, management needs, and annual goals and objectives (except for music therapy goals recommended by iBrain) as detailed within the iBrain plan (compare Parent Ex. G at pp. 5-42, 44-62, with Parent Ex. F at pp. 1-44, 46-62). It is undisputed that the student demonstrated global developmental delays related to his impairments in cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psycho-social behavior; physical functions; information processing; and speech, along with accompanying health-related needs (Parent Exs. F at p. 38; G at p. 42).

As summarized above, the March 2022 CSE recommended a 12-month program in 12:1+(3:1) special class in a district specialized school (Parent Ex. G at pp. 63, 69). To address the student's significant management needs, the March 2022 IEP recommended for the student use of prone stander and bilateral ankle-foot orthosis "for lower extremity weight bearing and ambulation"'; a gait trainer; a wheelchair; a "Benik Vest for proprioceptive input"; and a paraprofessional to attend to the student's highly intensive physical, cognitive, and sensory needs, which required a high degree of individualized attention and 1:1 adult support for "functional mobility and navigation of all environments," "for completion of all activities of daily living," and for participation and access to the educational environment (id. at pp. 38-42). In addition, the March 2022 CSE recommended the student receive assistance with hygiene, grooming, and toileting; that he be allow "ample time to accomplish [a] task," provided with two-person assistance for all transfers, and assistance with assistive technology (id. at pp. 39-42). Further, the March 2022 CSE recommended close monitoring for aspiration, urinary elimination, bowel incontinence, skin integrity, seizures, and the administration of "anti-epileptic medications" (id. at pp. 40-41).

The March 2022 IEP indicated that the CSE also considered special class ratios of 6:1+1, 8:1+1, and 12:1+1 for the student but rejected these programs as they would not have met the student's needs (Parent Ex. G at p. 72). The school psychologist testified that at the time of the meeting the CSE did not feel that the 6:1+1 was the best class ratio within the district continuum of service to provide the optimal level of support for the student (Tr. p. 151). The school psychologist explained that the 12:1+(3:1) special class provided a similar staffing ratio of adult-to-student support but that it typically allowed for staff that were trained to work with students who had a variety of intensive medical and adaptive similar to the student's needs as described in his IEP (id.). The school psychologist testified that in her opinion the student would have received enough individualized instruction in a 12:1+(3:1) classroom and that there would have been opportunities to work with the teacher as well as for the teacher to assign specific tasks to the other adults in the room including the student's 1:1 paraprofessional (Tr. p. 147).

In finding that the district failed to meet its burden to prove that the 12:1+(3:1) special class was appropriate, the IHO focused on the district's adoption of the iBrain plan in most other respects (IHO Decision at p. 6). However, the district was not required to replicate the identical setting used in the private school in order to offer a FAPE to the student (see, e.g., M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). Nor was the district required to adopt all of the recommendations of the iBrain staff (see Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735,

753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson, 325 F. Supp. 2d 141, 145 [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see also Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

Focusing on the parents' preference for a 6:1+1 special class, the parents believed that the student required "a lot of attention and less distraction and that [he] require[d] a smaller class size of 6:1:1 as it [wa]s more appropriate to him" (Parent Ex. G at p. 71).[10] The parents indicated that "they ha[d] tried [a 12:1+(3:1) special class] in the past and they did not see the progress they ha[d] observed at iBrain" (id.). The iBrain director of special education (director) stated that she did not believe that the district's recommended program was appropriate due in part to the student's distractibility and his need for intensive 1:1 support throughout the day as well as his need for more individualized attention from his special education teacher (Parent Ex. N ¶ 14). During the March 2022 CSE meeting, the iBrain director stated, "institutionally with a larger class size, [the student] will have half as much time with the teacher; with the double amount of students" and that she did not believe the student's academic needs could be met in a 12:1+(3+1) setting (Parent Ex. G at p. 71).

However, review of the March 2022 IEP reveals that the recommended program addressed the student's distractibility and need for 1:1 support. To address concerns regarding the student's distractibility the school psychologist stated that within the descriptive narrative and the management needs section of the March 2022 IEP there were supports listed which specifically related to those needs (Tr. p. 171). A review of the March 2022 present levels of performance shows they include details such as the student "responds best" to modified environments (dark, quiet room), that he benefits from a small classroom size with minimal auditory distractions, and he requires a classroom with a modified environment with reduced visual and sound distractions (Parent Ex. G at pp. 6-7). The March 2022 IEP also noted that in speech-language therapy sessions the student was "best able to participate" in his sessions when conducted in a quiet, non-distracting environment and that he became easily distracted by people in and around his sessions (id. at p. 12). The IEP identified the student's environmental management as including the need for a highly structured classroom or corner room with less stimulus from visual and auditory distractions and an environment with low light exposure and auditory distractions (id. at pp. 38-39). The school psychologist testified that, while the recommended program had more students than a 6:1+1 special class, there were ways within the 12:1+(3:1) special class, using classroom management strategies and spacing, to provide for quieter sections and to allow for opportunities where the student would not be as impacted by distractions (Tr. p. 172).

[10] While the student's mother expressed concern at the CSE meeting about the 12:1+(3:1) special class ratio because the student had come from that setting in a district specialized school before attending iBrain and had been unable to make progress (Parent Exs. G at p. 71; M ¶ 8), under cross examination, the student's mother acknowledged that the student had never attended a district specialized school and that prior to his attendance at iBrain "he was in a regular school, in a regular [district] in school" (Tr. pp. 239-40).

In addition, the March 2022 IEP addressed the student's distractibility needs through the inclusion of annual goals which targeted improving attention span and participation during academic activities, maintaining attention during activities with a peer, demonstrating joint attention in structured activities, improving functional endurance by maintaining a functional seated position, improving auditory discrimination, and improving attention, functional endurance and active reaching to activate switch-based case and effect toys (Parent Ex. G at pp. 44, 46, 52, 56-57).

With respect to the student's need for individual instruction and "intensive 1:1 support," the March 2022 IEP present levels of performance indicated that the student required individual and small group instruction and the assistance of a 1:1 paraprofessional throughout the school day to assist with sensory regulation, completion of all ADLs, functional mobility and navigation of environments, transfers, attention, access to assistive technology, donning/doffing or orthotics, and safety (Parent Ex. G at pp. 7, 21, 38). Along with the 12:1+(3:1) special class recommendation, the March 2022 IEP provided for a full-time 1:1 health paraprofessional and a 1:1 paraprofessional on the bus (id. at pp. 62-63, 68-69). In addition, the student's recommended program provided that all of the student's related service sessions (five hours per week each of OT, PT, and speech-language therapy; three hours per week of vision therapy; and one hour per week assistive technology service) were to be provided individually (id. at pp. 63-64).

The adult-to-student ratio required in a 6:1+1 special class and a 12:1+(3:1) special class is similar; however, the 12:1+(3:1) special class ratio provides for variety in the category of school personnel working with the student and which may not be found in other special classes on the continuum designed to address the needs of a student with intensive management needs. Generally, while the student does exhibit highly intensive management needs and requires a high or significant degree of individualized attention and intervention (see 8 NYCRR 200.6[h][4][ii][a]-[b]), his needs include those which require the highest level of support consisting of the type of habilitation and treatment contemplated by regulation to be available in a 12:1+(3:1) setting (see 8 NYCRR 200.6[h][4][iii]; see Navarro Carrillo, 2023 WL 3162127, at *3).

Based upon the foregoing, the hearing record supports the district's position that the recommended 12:1+(3:1) special class placement was appropriate and reasonably calculated to enable the student to receive educational benefits and afford him the opportunity to make appropriate progress in light of his circumstances for the 2022-23 school year.

3. Music Therapy

The district contends that the student did not need music therapy in order to receive a FAPE. The district argues that the evidence in the hearing record demonstrates that the classroom instruction together with the related services recommended by the district addressed the same deficits as iBrain did during music therapy. The parent argues that music therapy benefitted the student in connection with his "communication needs, cognition needs, sensory-motor needs, and gross motor and fine motor needs in one" service.

An IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]). "Related services" is defined by the IDEA as "such developmental,

corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" and includes psychological services as well as "recreation, including therapeutic recreation" (20 U.S.C. § 1401[26][A] [emphasis added]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]).

According to the March 2022 iBrain plan, at the time it was developed the student was receiving three 60-minute sessions per week of individual music therapy services and one 60-minute session per week of group music therapy (Tr. p. 275; Parent Ex. F at p. 37). The iBrain plan stated that the student engaged in non-verbal purposeful communication through his imitation and responses to the music therapist's instrumental and vocal accompaniment using both vocalizations and his upper extremities to engage in instrument playing (Parent Ex. F at p. 37). The March 2022 iBrain plan recommended that the student to continue to receive three 60-minute sessions per week of individual music therapy and one 60-minute session per week of group music therapy and offered the rationale that the student would be able to "work on his alertness, motor planning, and interpersonal communication 1:1 with the clinician, while also having the opportunity to generalize those skills into social interactions with his peers in a group setting" (id. at pp. 59-60). The March 2022 iBrain plan included music therapy annual goals which involved increasing "[the student's] body awareness and motor planning when engaging with peer(s) and adult(s)," increasing "intentionality" of "reciprocal responses," and increasing and initiating "appropriate interpersonal communication behaviors" (id. at pp. 58-59).

The district school psychologist acknowledged that iBrain provided the student with music therapy and that iBrain staff requested that it be a part of the student's IEP; however, the school psychologist suggested that music could be provided instructionally within the recommended program and that the CSE did note within the March 2022 IEP the student's preference for music and the belief that the student could make reasonable progress with instructional access to music (Tr. p. 148; see Parent Ex. G at pp. 8, 21-22). Moreover, the school psychologist testified that the classroom instruction and instructional supports, together with the recommended related services, addressed the areas targeted by the provision of music therapy and were sufficient to address the student's needs (Tr. pp. 156-57).

The March 2022 IEP included mandates for speech-language therapy, PT, and OT with accompanying annual goals which would have addressed the deficits which were targeted at iBrain through music therapy (Parent Ex. G at p. 63). The March 2022 IEP included a speech-language therapy annual goal targeting receptive language skills which included following simple one-step commands, discriminating between two core words, and making a selections and another speech annual goal targeting expressive language skills, which involved initiating and continuing an adapted cause-effect activity, commenting during a desired activity, and initiating/terminating conversations during structured activities (id. at pp. 50-51). The IEP also included an annual goal targeting pragmatic language skills such as responding to his name, demonstrating joint attention, and exhibiting exploration and functional play as well as an oral motor/feeding annual goal targeting the student's tolerance for oral-motor exercises and increasing his awareness and range of motion (id. at pp. 52, 53). The IEP contained PT annual goals targeting transition from sitting to standing to maintain proper body mechanics and targeting waking 20 feet with support of gait trainer (id. at p. 55). The IEP also included an OT annual goal addressing pre-handwriting skills, bilateral coordination, and functional endurance and another OT annual goal targeting participation in play activities (id. at pp. 56-57). As argued by the district, the student's

communication and fine motor skills deficits were addressed in the district's recommended program of speech-language therapy (communication deficits) and OT (fine motor deficits)..

The iBrain director testified that she believed music therapy was beneficial for the student and that it was not duplicative of "any other services" (Tr. p. 212). She stated that "the skills that music therapy works on are support[ive] of the skills that he's working on in other areas" (Tr. p. 213). However, she added that "the vocalization, understanding of a conversation as something he can participate in a back-and-forth fashion with someone," were goals that helped to support his language development but in a way that was different than what was done in speech therapy because "music is processed in a different part of the brain than speech" (Tr. pp. 213-14). The iBrain director continued to explain that "when speech is approaching that skill from their discipline and they're really focused on spoken language, that is kind of channeled, you know, using specific areas of the brain that process speech and language," but that "when it's done with the musical component using the music therapist techniques, that same concept is -- can be developed using other pathways" (Tr. p. 214). She noted that given that the student's history of brain injury, helping to develop a wider range of neurological pathways to enhance skills was "a unique benefit" because it was building similar skills using different neural networks (id.).

The iBrain music therapist stated that in music therapy iBrain addressed a lot of the student's pre-linguistic skills and that it helped to address self-regulation, shared attention, communication as well as fine and gross motor skills (Tr. pp. 268-70). However, she also stated that the student's deficits were also being addressed in other therapies and specifically noted that his fine and gross motor skills were also being addressed in PT and his communication skills were addressed "through the speech and language pathologist" (Tr. p. 271). The music therapist testified that there was a difference between using music programmatically (recreational music) and music therapy and that music therapy goals would not be addressed by recreational music (Tr. p. 272; see Tr. pp. 273-74).

At the March 2022 CSE meeting the student's mother shared that the parents wanted the student to continue to receive music therapy as it was an essential component to the student's program and the provider added that, if music was not provided by a board-certified music therapist, then it would "just be recreational" (Parent Ex. G at pp. 71-72). In addition, the student's mother testified that the parents wanted the student to continue to have music therapy because they saw a lot of benefits for the student including improved vocalization and "making more cues" and she stated that music therapy helped the student interact with people (Tr. pp. 234, 240). In her written affidavit testimony, the student's mother stated that the student "love[d] music" and that he received music therapy as part of his educational program and had made "excellent progress" (Parent Ex. M ¶ 6). The student's mother added that music "calm[ed] [the student] down and it [made] him really happy" and so music was very beneficial for the student, for his learning and for his development and that it would "calm him down" so that he was able to benefit from the other therapies (Tr. pp. 235, 240-41).

Although it is undisputed that iBrain recommended that the student receive music therapy during the 2022-23 school year and the March 2022 IEP did not include a recommendation for music therapy services (compare Parent Ex. F at pp. 59-60, with Parent Ex. G at pp. 63-64), comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE; rather it must be determined whether

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

Accordingly, review of the March 2022 IEP reveals that it provided related services—albeit different than those the parents may have preferred—and supports to address the student's needs that iBrain addressed through music therapy (see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 592-93 [S.D.N.Y. 2013] [finding that, although the evidence may have supported that music therapy was beneficial for the student, it did not support the conclusion that the student could not receive a FAPE without it]). Accordingly, the district did not fail to offer the student a FAPE because it did not opt to recommend music therapy as a related service for the student in the same manner as iBrain and instead recommended different supports and services to address the needs which iBrain targeted, in part, with music therapy.

C. Assigned Public School Site

1. Parents' Ability to Tour the School

In their cross-appeal, the parents argue that the IHO failed to address their claim that they were denied meaningful participation in the development of the student's IEP by not having the opportunity to tour the recommended assigned school placement. The district alleges that the parents' inability to tour the assigned public school is not a relevant part of the analysis when considering whether the parent had a meaningful opportunity to participate in the process of developing the IEP.

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 3012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24,

2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]). Thereafter, and once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401 [9][D]; 34 CFR 300.17 [d]; see 20 U.S.C. § 1414 [d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see also Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). There is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420).

Moreover, while parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191–92 [finding that a district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]).

Regarding the parents' ability to tour an assigned public school site, the United States Department of Education's Office of Special Education Programs (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities or their professional representatives to observe proposed school placement options for their children (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1267 [11th Cir. 2012] [noting that rather than forbidding or mandating access for parents, "the process contemplates cooperation between parents and school administrators"]; J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 195 [E.D.N.Y. 2017] [noting that the IDEA does not afford parents a right to visit an assigned school placement before the recommendation is finalized]; J.C. v New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14 [S.D.N.Y. Mar. 31, 2015] [acknowledging that courts have rejected the argument that parents have a right under the IDEA to visit assigned schools and listing authority], aff'd, 643 Fed. App'x 31 [2d Cir. Mar. 16, 2016]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [finding that a district has no obligation to allow a parent to visit an assigned school or

proposed classroom before the recommendation is finalized or prior to the school year]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011] [same]).[11]

On the other hand, 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]).

Here, according to the district's Special Education Student Information System (SESIS) events log, a school location letter was sent to the parent via email on May 19, 2023 for the 2021-22 school year (Dist. Ex. 2 at p. 1). That letter is not in the hearing record but it appears that the assigned school was the same for both the 2021-22 and 2022-23 school years (compare Dist. Ex. 5, with Parent Ex. I at p. 1).

In her written affidavit testimony, the student's mother stated that she agreed to visit any proposed school (Parent Ex. M ¶ 8). She indicated that she "attempted on several occasions" to contact the school that the district assigned the student to attend, "but received no reply" (id. ¶ 9). The student's mother indicated that she did not receive any call from the school after June 3, 2022, when she was told someone would call her back (id.; see also Parent Ex. I). During the impartial hearing, the student's mother testified that she reached out to the school "the first time" in order to set an appointment for a tour "or even do a virtual tour" and was told someone would get back to her (Tr. p. 236). The mother testified that she called "a second time" and was, again, told someone would get back to her (id.). The student's mother acknowledged that someone called her once when she was in a meeting and could not answer the call and she reached out to request a return call to schedule a tour, but that nobody reached out again (Tr. p. 237). According to the student's mother, the parents wanted to tour the school because they were "curious to know what the school ha[d]" and "if that would be a good fit for [the student]" (Tr. p. 236).

In the parent's 10-day notice letter, dated June 17, 2022, they informed the district that they had been unable to reach the school to schedule a tour (Parent Ex. I at p. 1).

[11] Nothing in this decision is intended to discourage districts from offering parents the opportunity to view school or classroom placements, as such opportunities can only foster the collaborative process between parents and districts envisioned by Congress as the "core of the [IDEA]" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5]).

Thereafter, the district provided the parents with a school location letter for the 2022-23 school year, dated June 24, 2022 (see Dist. Ex. 5).[12] The letter stated that the parents could "visit the recommended placement site" and set forth contact information for an individual the parents could contact to arrange the visit (Dist. Ex. 5). As previous school location letters sent in May 2022 are not included in the hearing record (see Dist. Ex. 2 at p. 1), it is unclear if the contact person was the same individual identified in earlier notices. There is no indication in the hearing record that the parent attempted to contact the individual listed on the notice after the June 2022 school location letter was issued.

The interim principal of the assigned school testified that the assigned school "typically . . . set up family tours" so that parents could "get a tour of the physical space" and possibly speak to staff (Tr. p. 62). He also testified that the school had a website with information about the school (id.). He indicated that parents could call the school site to which their child was assigned to attend, and a tour would be arranged (Tr. pp. 63, 85).

As discussed above, the district is not required to allow a parent to visit an assigned school (see J.B., 242 F. Supp. 3d at 195; J.C., 2015 WL 1499389, at *24 n.14; E.A.M., 2012 WL 4571794, at *11; S.F., 2011 WL 5419847, at *12). However, while a general entitlement to visit an assigned school is not supported by the relevant legal authority, there is some authority that a district's failure to accommodate a parent's inquiries concerning an assigned school could, under certain circumstances, constitute a procedural violation that could either contribute to a finding that FAPE was denied to a student or in itself rise to the level of a FAPE denial. Such circumstances, however, are not present here. While the evidence in the hearing record supports a finding that there were some communication difficulties in arranging for a visit to the assigned school and a school visit ultimately was not scheduled, the district did provide the parents with information pertaining to how to contact the school and arrange for a visit and did not ignore the parents' requests to visit the school or refuse to allow a school visit. Moreover, while a parent need not particularize his or her questions and concerns in order to justify a request to visit the assigned school, it does appear in this instance that the parents' main concern with the district's ability to implement the IEP was not related to any lack of capacity particular to the assigned school but instead was focused on the structure and length of a district school day. Accordingly, the parent's argument that the IHO should also have found that the district denied the student a FAPE on the ground that the parents were not able to visit the assigned school must fail.

2. Capacity to Implement the IEP

The district argues that the IHO's determination that it failed to demonstrate that the March 2022 IEP could be implemented at the assigned public school site was not supported by the evidence in the hearing record. The district further argues that, since the student never attended the assigned public-school site, the parents "objections to the proposed placement [were] speculative and untethered to the IEP." The parent argues that the IHO correctly found that the assigned public school site was unable to provide all of the mandates set forth in the March 2022

[12] The district's SESIS log also indicates that a school location letter for the 2022-23 school year was emailed to the parents on June 22, 2023 (Dist. Ex. 2 at p. 1).

IEP and that it was "mathematically impossible" for the student to receive all of his related services and instruction during a regular school day.

The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y., 584 F.3d at 419; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O., 793 F.3d at 244; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F., 746 F.3d at 79). 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]).

With respect to implementation of the March 2022 IEP, , the interim principal of the assigned school testified that she had reviewed the student's March 2022 IEP and indicated that the assigned school could have implemented the IEP exactly as written for the student (Tr. pp. 62, 64). She testified that at the start of the 2022-23 school year the assigned school had a 12:1+(3:1) class with a seat available for the student in a suitable age grouping, kindergarten through second grade (Tr. pp. 61-62, 83). The interim principal also indicated that the assigned school would be able to implement the student's related services as mandated on his IEP (Tr. p. 62). She explained that the assigned school offered related services of OT, PT, speech-language therapy, hearing services, vision services, and counseling that could be provided either in the special education classroom or a therapy room depending on the needs of the student (Tr. p. 61). The interim principal testified that the school employed a collaborative model and the teachers/providers at the

assigned school "work[ed] together to support [a] student across different environments" to implement the student's goals (Tr. pp. 63-64).

The IHO determined that the assigned school location could not implement the IEP because the amount of academic instruction and the amount of related services recommended for the student in the March 2022 IEP made it "mathematically impossible" for the entirety of the IEP services to be implemented (IHO Decision at p. 8). According to the district, the hearing record shows that the staff at the assigned school could have implemented the IEP because the student's related services could have been provided within the classroom during instruction.

The March 2022 IEP included a special class recommendation noting a frequency and duration of 35 periods per week (Parent Ex. G at p. 63). Additionally, the March 2022 IEP included extensive recommendations for related services totaling 19 hours per week (including assistive technology support) with each related service session being 60 minutes in duration (id. at pp. 63-64). Each of the related services recommendations indicated that they were to be provided in a "[s]eparate [l]ocation [p]rovider's discretion (classroom/therapy area)" (id.). The school psychologist testified that, in collaboration with the information shared by iBrain staff, the 60-minute related services sessions were appropriate to address the student's related services (Tr. pp. 152-53).

The interim principal testified that the school day at the assigned public school was 6 hours and 20 minutes long and was divided into eight 45-minute periods (Tr. pp. 67-68). She testified that lunch and recess were combined in one 50-minute period (Tr. p. 68). The interim acting principal was asked how the student's 60-minute related services sessions fit into the 45-minute periods at the assigned school (Tr. p. 69). The interim principal testified that the difference would be accommodated by the student missing 15 minutes of the next period if the related service was being delivered outside of the classroom (Tr. pp. 69-70). However, the principal indicated that, if the related service was delivered in the classroom, the student would be "supported in the room for the related services" and "attending instruction" (Tr. pp. 69-70). The assistant principal testified that the assigned school used "a collaborative model and a lot of the services were pushed into the classroom during academic periods and/or special periods like art, gym, music, those types of things where there[were] opportunities for both things to happen in conjunction with each other" (Tr. pp. 73-74). The interim acting principal also testified that, if the school did not have enough staff to deliver the services, the district would either obtain a contractor from an agency or provide the parent with a related services authorization (RSA) letter to obtain the services outside of school at the district's expense (Tr. pp. 74-76).[13]

[13] 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

Acknowledging that the March 2022 IEP program recommendation consisted of up to 19 hours of related services per week—including five hours per week of OT, five hours per week of PT, five hours per week of speech-language therapy, three hours of vision education services, and one hour of assistive technology services—the hearing record supports the district's position that the IHO erred in finding that the assigned school was "mathematically" incapable of implementing all of the services in the student's IEPs because a majority of the student's recommended related services could have been accommodated by pushing into the student's classroom in the manner described by the interim principal for fitting 60-minute related service sessions into the 45-minute classroom periods. Accordingly, I find that the IHO erred in determining that it would be mathematically impossible for the district to implement the March 2022 IEP. The proposed IEP aligns with the district interim principal's statements that the providers could have "pushed in" the related services to the special class the student attended or otherwise arranged for the student to receive some of the related services outside of the regular school day if necessary.

In light of the above, the IHO's determination that the district failed to offer the student a FAPE for the 2022-23 school year because the assigned school was incapable of implementing the student's IEP must be reversed.

VII. Conclusion

Based on the foregoing, 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 APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated March 28, 2023, is modified by reversing those portions which determined that the district failed to offer the student a FAPE for the 2022-

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.

23 school year, and ordered funding for the unilateral placement at iBrain including tuition, a 1:1 paraprofessional, and transportation costs for that school year.

Dated: **Albany, New York**
June 30, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER