The University of the State of New York

The State Education Department
State Review Officer
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No. 24-632

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

Appearances:
Liberty & Freedom Legal Group, Ltd., attorneys for petitioner, by Erik Seidel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily McNamara, 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 parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's tuition at the International Academy for the Brain (iBrain) for the 2024-25 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student in this matter has been the subject of five prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 24-410; Application of a Student with a Disability, Appeal No. 24-058; Application of a Student with a Disability, Appeal No. 23-311; Application of a Student with a Disability, Appeal No. 22-071; Application of a Student with a Disability, Appeal No. 20-138). The parties' familiarity with the student's educational history underlying those prior matters and the present matter is presumed and, therefore, the student's educational history, the facts and procedural history of this case, and the IHO's decision will not be recited here in detail.

The student has attended iBrain since the 2018-19 school year (see Parent Exs. H ¶ 7; I ¶ 13).[1]

A CSE convened on May 7, 2024, found the student eligible for special education as a student with a traumatic brain injury (TBI), and developed an IEP with a projected implementation date of May 20, 2024 (see generally Dist. Ex. 11).[2] The May 2024 CSE recommended that the student attend a 12-month school year program consisting of a 12:1+(3:1) special class for all subjects and adapted physical education in a district specialized school (id. at pp. 41, 43, 48). In addition, the May 2024 CSE recommended related services of 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 60-minute session per week of group parent counseling and training, together with a full-time individual paraprofessional for health, ambulation, safety and feeding (id. at p. 42). The CSE also recommended assistive technology in the form of switches, mount, and switch interface daily, and one 60-minute session per week of assistive technology services (id. at pp. 42-43). For special transportation, the IEP reflected that the student needed transportation from the closest safe curb location to school, a climate-controlled lift bus that could accommodate a regular size wheelchair, 1:1 nursing services, and limited travel time (id. at p. 47).

The parent disagreed with the recommendations contained in the May 2024 IEP and, further, indicated that, at that time, she had not received notice from the district assigning the student to attend a particular school location for the 2024-25 school year; accordingly, the parent notified the district of her intent to unilaterally place the student at iBrain and seek public funding for the costs thereof (Parent Ex. A-1).

In a prior written notice to the parent and a school location letter, both dated June 14, 2024, the district summarized the recommendations of the May 2024 CSE and notified the parent of the particular public school to which it assigned the student to attend for the 2024-25 school year (Dist. Ex. 18).

On June 18, 2024, the parent executed a "School Transportation Annual Service Agreement" (transportation agreement) with Sisters Travel and Transportation Services, LLC (Sisters Travel) to provide the student with round-trip transportation between his home and iBrain during the 2024-25 school year (Parent Ex. F-1). On June 20, 2024, the parent signed an enrollment contract with iBrain for the student's attendance during the 2024-25 school year (Parent Ex. E-1). Further, on June 20, 2024, the parent executed an annual nursing service agreement with B&H Health Care, Inc. – d/b/a Park Avenue Home Care (Park Avenue) to provide the student 1:1 private nursing services during school days and a 1:1 transportation nurse for the 2024-25 school year (Parent Ex. H).

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

[2] 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]).

A. Due Process Complaint Notice

In a due process complaint notice, dated July 2, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2024-25 school year based upon various procedural and substantive violations of the IDEA (see generally Parent Ex. A). Generally, the parent alleged that the district failed to provide a procedural safeguards notice or a prior written notice and school location letter; failed to evaluate the student; denied the parent the opportunity to participate in the CSE process and predetermined the outcome of the May 2024 CSE meeting; and that the May 2024 CSE failed to identify the student's disability and needs, lacked appropriate evaluations, did not recommend necessary training for assistive technology and medical needs, failed to develop measurable annual goals or recommend appropriate accommodations, inappropriately recommended a 12:1+4 special class, failed to recommend a 1:1 nurse or music therapy, and failed to recommend necessary special transportation accommodations (id. at pp. 4-8). As relief, the parent sought an order directing the district to directly fund iBrain for the student's tuition in addition to the costs of his related services, 1:1 nursing services, and the services of a 1:1 paraprofessional; to directly or prospectively fund the costs of the student's special education transportation services with "limited travel time, a 1:1 transportation nurse, air conditioning, a lift bus, and a regular-sized wheelchair"; to fund the costs of an independent educational evaluation (IEE) consisting of a neuropsychological evaluation by a provider selected by the parent; to reconvene a CSE meeting to "address changes if necessary"; and to conduct all necessary evaluations of the student within 30 days (id. at pp. 8-9).

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on August 14, 2024 and concluded on October 15, 2024, after four days of proceedings inclusive of a prehearing conference (see Tr. pp. 1-270). In an interim decision, the IHO found that the student's pendency placement consisted of the student's attendance at iBrain, as well as transportation for all school days from Sisters Travel, and 1:1 nursing services at school and during transportation on all school days from Park Avenue (Interim IHO Decision).

In a final decision dated November 14, 2024, the IHO found that the district offered the student a FAPE for the 2024-25 school year and, further, that the parent had failed to meet her burden to demonstrate that iBrain was an appropriate unilateral placement for the student for the 2024-25 school year (see IHO Decision at pp. 4-11). With respect to the May 2024 IEP, the IHO found that the CSE largely replicated iBrain's education plan with exception of the special class ratio, music therapy, and nursing services (id. at p. 5). The IHO determined that the 12:1+(3:1) special class recommended in the IEP was the student's "least restrictive environment" while providing necessary support (id. at pp. 5-6). The IHO found that the absence of music therapy in the IEP did not render it deficient, as the student's needs were addressed through other recommended services (id. at p. 6). With respect to nursing services, the IHO noted that the parent and iBrain personnel failed to return completed medical accommodation forms, which were necessary to define the student's nursing needs (id.). Further, the IHO indicated that the notation in the management needs section of the IEP that the student needed nursing services to assist him with all his medical needs would have alerted the school that the student required nursing services, "the full extent of which would be better known once [the p]arent submitted the completed"

medical accommodation forms (id.).[3] As for the assigned public school, the IHO found that the district presented evidence that it provided notice of a school location and the parent withdrew her claim regarding the notice during the impartial hearing (id.). Further, the IHO found that the parent did not raise any nonspeculative allegations regarding the assigned school's capacity to implement the student's IEP (id. at p. 9).

Regarding the unilateral placement, the IHO found that iBrain developed an education plan for the student that was "reasonably calculated to enable him to receive educational benefits" (IHO Decision at pp. 7, 11). However, the IHO indicated that the parent failed to demonstrate that iBrain has been adequately implementing the plan, noting that the student purportedly received remote instruction and services for the majority of the time but that the hearing record was unclear with respect to the delivery of PT or OT services in the home, the parent did not offer any progress reports into evidence, and the iBrain deputy director did not have knowledge regarding the student's program and did not testify credibly (id. at pp. 4, 7-8, 11). Given the foregoing, the IHO found it unnecessary to weigh equitable considerations (id. at p. 11).

Finally, the IHO denied the parent's request for an IEE at public expense given the parent's testimony that she never sought private evaluations from the CSE and did not disagree with any district evaluation (IHO Decision at p. 12).

IV. Appeal for State-Level Review

The parent appeals.[4] The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The following issues presented on appeal must be resolved on appeal in order to render a decision in this case:

1. whether the IHO erred in determining that the May 2024 IEP was appropriate to address the student's needs including the recommendation for the 12:1+(3:1) special class, the lack of a recommendation for 1:1 nursing services, and the special transportation accommodations;

2. whether the IHO erred in determining that the parent did not raise any nonspeculative allegations regarding the assigned public school site's capacity to implement the IEP and that, therefore, the district was not required to present evidence regarding the proposed school location;

[3] The IHO found that the parent did not testify credibly about "allegedly providing [the district] with completed [m]edical [a]ccommodation [f]orms" (IHO Decision at p. 4).

[4] The parent contends that the IHO's refusal to accept her closing brief, which was submitted before the deadline, severely prejudiced her case. The parent argues that this rejection likely influenced the IHO's decision to dismiss all of her claims for relief. The district asserts that the parent failed to comply with the IHO's directives regarding the closing briefs.

3. whether the IHO erred in determining that the parent did not meet her burden to prove that iBrain was an appropriate unilateral placement for the student for the 2024-25 school year; and

4. if so, whether equitable considerations favor the parent's requested relief.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at

203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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

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

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

As an initial matter, the parent has not appealed the IHO's determinations that the May 2024 IEP was not deficient for a lack of music therapy, that the parent withdrew her claims regarding the school location letter, and that the parent was not entitled to an IEE at public expense. 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]).

A. May 2024 IEP

Here, the student's needs are not in dispute, and the May 2024 CSE largely adopted its description of the student from the iBrain education plan; however, a brief description of the student's needs provides context to analyze the issues presented on appeal (compare Dist. Ex. 11, with Dist. Ex. 8).

According to the May 2024 IEP, the CSE relied on March and April 2024 evaluations conducted by iBrain, along with iBrain's May 2024 iBrain report and education plan to develop the May 2024 IEP (Dist. Ex. 11 at p. 1; see Parent Ex. B). During the impartial hearing, the school psychologist testified that she served as the district representative during the May 2024 CSE meeting (Tr. pp. 58, 65). The school psychologist testified that iBrain provided "a lot of robust information" about the student, which the CSE "used" to develop the student's May 2024 IEP (Tr. pp. 73, 75). The school psychologist testified in her affidavit that the student was "non-verbal and non-ambulatory" and he had "medical needs related to several diagnosed disorders" (Dist. Ex. 19 ¶ 9). Further, the school psychologist testified in her affidavit that the student "experienced intermittent extended absences" because of "medical-related issues" (id.).

According to the May 2024 IEP, the student was "non-verbal and non-ambulatory with a diagnosis of Cystic Encephalomalacia, global CNS injury, seizure disorder, hypoxic-ischemic encephalopathy, cerebral palsy, optic atrophy, cortical visual impairment, exotropia, developmental delay, feeding problems, gastroesophageal reflux disease, constipation, asthma, adenoid hypertrophy, scoliosis, and congenital subluxation of hip unilateral, and shoulder dystocia" (Dist. Ex. 11 at p. 1). The May 2024 IEP indicated that the student had "frequent pulmonary complications" that "caus[ed] respiratory distress" (id. at p. 2). The May 2024 IEP noted that the student's "rate of progress [was] dictated by his physical health and well-being" (id.).

1. 12:1+4 Special Class

The parent argues that the CSE's recommendation for a 12:1+(3:1) special class was too large for the student who required a 6:1+1 class size as per the iBrain educational plan, which the district used as a basis for its own IEP.

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 (8 NYCRR 200.6[h][4][ii][a]).[6] Further, State regulation 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 special class recommendation] 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]; but see Cruz v. Banks, 2025 WL 1108101 at *1, *4-*8 [2d Cir. Apr. 15, 2025] [certifying a question of State law to the New York Court of Appeals to determine whether or not the district may choose one class size over another when a student meets the regulatory requirements of two class size regulations, or must the district satisfy both regulations]).

The present levels of performance set forth in the May 2024 IEP state that the student "continue[d] to require [a] small class size of no more than six similar peers to meaningfully benefit from educational and therapeutic activities due to his high level of visual difficulties and auditory distractibility [and] his need for one-on-one direct instruction with the teacher," noting that the student would become "highly dysregulated and unable to participate when in larger and noisy settings" (Dist. Ex. 11 at p. 2). The May 2024 IEP described various student management needs, including a 1:1 paraprofessional, aided language stimulation, modeling, repetition, additional processing time, verbal praise, positive reinforcement, use of salient features, physical prompts, direct and individual instruction, an environment with fewer visual and auditory distractions, sensory and rest breaks, changes in position for comfort, modified materials, task lighting, high contrast materials, access to augmentative and alternative communication (AAC), instructional laptop, simplified directions, tactile experiences, small group setting, use of landmarks and cues, and "[m]anual prompting for facilitation of appropriate movement patterns" (id. at pp. 19-21).

The May 2024 IEP documented that, during the CSE meeting, the parent and staff from iBrain disagreed with the recommendation for a 12:1+(3:1) special class in a district specialized school (see Dist. Ex. 11 at p. 51). In particular, according to the IEP, iBrain staff "expressed that [the student] ha[d] high management needs in all areas and need[ed] to remain in the smallest possible class size for both educational and medical reasons," noting that a "large group of students pose[d] a substantial risk to [the student's] health" and would present visual and auditory distractions that would impede his ability to access his educational program (id.). According to the IEP, the parent and her advocate expressed agreement with the school concerns (id.).

In her affidavit, the school psychologist indicated that the May 2024 CSE's recommendation for a 12:1+(3:1) special class placement "provide[d]" the student with "the small, supportive setting [he] required" (Dist. Ex. 19 ¶ 10). The school psychologist explained in her affidavit that, "[w]hile in a 6:1:1 setting there [were] fewer students, a 12:1+(3:1) classroom ha[d] more adult support, which [the student] require[d] due to his intensive physical, medical,

[6] Management needs are defined by State regulations as "the nature of and degree to which environmental modifications and human or 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 achievement, functional performance and learning characteristics, and social and physical development (8 NYCRR 200.1[ww][3][i][d]).

learning[,] and communication needs" (id.). Further, the school psychologist testified in her affidavit that "[t]he teacher and paraprofessionals in a 12:1+(3:1) classroom [were] trained and equipped to support students with more unique and complex medical disability profiles" and that such a classroom had "compatible peers with similar levels of functioning" as the student (id.).

The school psychologist's testimony, however, does not reconcile the CSE's recommendation for a 12:1+(3:1) special class setting given the information included in the present levels of performance in the May 2024 IEP that the student demonstrated a "high level of visual difficulties and auditory distractibility" and required a classroom with no more than six students (Dist. Ex. 11 at p. 2). Accordingly, the hearing record does not support the IHO's determination that the 12:1+(3:1) special class recommended in the IEP was the student's "least restrictive environment" while providing necessary support (see IHO Decision at pp. 5-6).[7]

2. Nursing Services

The parent argues that the district denied the student a FAPE by failing to include 1:1 nursing services on the IEP, noting that, even without medical accommodations forms, the CSE had sufficient information about the student's medical needs from the iBrain educational plan upon which the district's IEP was based.

Generally, a student who needs school health services[8] or school nurse services[9] to receive a FAPE must be provided such services as indicated in the student's IEP (see School Health Services and School Nurse Services, 71 Fed. Reg. 46,574 [Aug. 14, 2006]; see also 34 CFR 300.34[a], [c][13]; 8 NYCRR 200.1[qq], [ss]; Cedar Rapids Community Sch. Dist. v. Garret, 526

[7] Within her appeal of the IHO's determination regarding the appropriateness of the CSE's recommendation for a 12:1+(3:1) special class, the parent also claims that the May 2024 IEP was inappropriate for the student because it did not include a recommendation for an extended school day. The parent's claim in this context relates to the design of the IEP (see Rivas v. Banks, 2023 WL 8188069, at *8 [S.D.N.Y. Nov. 27, 2023] [initially reviewing whether the student required extended school day services to receive a FAPE including whether the claim related to the "efficacy of push-in services"], reconsideration denied, 2024 WL 292276 [S.D.N.Y. Jan. 25, 2024], and aff'd sub nom., Rivas v. Ramos, 2024 WL 5244849 [2d Cir. Dec. 30, 2024]). Here, the May 2024 IEP provided for 35 periods per week of a 12:1+(3:1) special class placement for all core subjects, as well as three periods per week of adapted physical education and a total of 19 hours per week of related services for the student (Dist. Ex. 11 at pp. 41-42). According to the May 2024 IEP, the student's related service providers had discretion as to where the student's related services would be provided including in a separate location or in the student's special education classroom or in the therapy area (see id.). The May 2024 IEP also notes that the student "benefit[ted] from [a] push-in/pull-out method" and that his "arousal levels [were] significantly higher during co-treats with academics or other therapies" (id. at p. 2). Accordingly, the evidence demonstrates that the related services could be delivered in a flexible manner to accommodate the hourly recommendations in the IEP during the normal school day as opposed to an extended school day. Thus, there is an insufficient basis in the hearing record for a finding that the student required an extended school day in order to receive a FAPE for the 2024-25 school year.

[8] "School health services means health services provided by either a qualified school nurse or other qualified person that are designed to enable a student with a disability to receive a [FAPE] as described in the [IEP] of the student" (8 NYCRR 200.1[ss][1]).

[9] "School nurse services means services provided by a qualified school nurse pursuant to section 902(2)(b) of the Education Law that are designed to enable a student with a disability to receive a [FAPE] as described in the [IEP] of the student" (8 NYCRR 200.1[ss][2]).

U.S. 66, 79 [1999] [indicating that school districts must fund related services such as continuous one-on-one nursing services during the school day "in order to help guarantee that students . . . are integrated into the public schools"]). State guidance indicates that, in determining whether a student needs a 1:1 nurse, a CSE must obtain evaluative information in all areas of the student's disability or suspected disability; generally, it is expected that "[t]his information may include information from a physician, such as a written order to the school nurse from a student's health care provider" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 2, Office of Special Educ. Mem. [Jan. 2019], available at https://www.nysed.gov/sites/default/files/programs/special-education/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf). In providing school nurse services, "the school remains responsible for the health and safety of the student and ensuring the care provided to the student is appropriate and done in accordance with healthcare provider orders" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 5). However, there is also State guidance indicating that "[i]f the CSE/CPSE determine that a student's health needs in accordance with provider orders for treatment can be appropriately met by the school's building nurse, a shared nurse, [or] a 1:1 aide to monitor and alert the school nurse, then a 1:1 nurse is not necessary" ("Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs," at pp. 11-12, Office of Student Support Servs., [Jan. 2019], available at https://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf). To determine whether a student requires the support of a full-day, continuous 1:1 nurse, State guidance indicates the CSE "must weigh the factors of both the student's individual health needs and what specific school health and/or school nurse services are required to meet those needs" and provides the following set of factors to consider when making that determination:

- The complexity of the student's individual health needs and level of care needed during the school day to enable the student to attend school and benefit from special education;
- The qualifications required to meet the student's health needs;
- The student's proximity to a nurse;
- The building nurse's student case load; and,
- The extent and frequency the student would need the services of a nurse (e.g., portions of the school day or continuously throughout the day).

("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at pp. 2-3).

According to the school psychologist's affidavit, she "sent the [p]arent and representatives from iBrain an email" on April 15, 2024 to request "updated reports," and indicated that she "specifically explained that certain documentation would be required if the [p]arent was requesting medical-related accommodations" (Dist. Ex. 19 ¶ 7; see Dist. Ex. 1). The school psychologist testified via affidavit that she attached "blank medical accommodations forms" to that email and that, as of May 6, 2024, "neither the [p]arent nor iBrain had submitted any documents to be reviewed" (Dist. Ex. 19 ¶ 7). The school psychologist included in her affidavit that she "emailed that afternoon to follow up on [their] request for the documentation," and the documentation

returned by iBrain "the morning before the meeting" did not include "medical accommodations forms" (Dist. Ex. 19 ¶ 7; see Dist. Exs. 3, 4).

The school psychologist testified in her affidavit that "the [s]tudent demonstrated the need for nursing services" but the May 2024 CSE "did not have updated medication administration forms that could be relied on to determine what level of support he required" (Tr. p. 88; Dist. Ex. 19 ¶ 12). In her affidavit, the school psychologist testified that, if the CSE had the required forms in advance, the district's "nursing unit" would have had the opportunity to "consult[] with the [s]tudent's pediatrician and give[] an opinion on how the student's medical needs could be met by the" district (Dist. Ex. 19 ¶ 12). During the hearing, the school psychologist testified that the CSE discussed the issue with the parent during the May 2024 meeting and informed the parent that, when the CSE received "those forms, [they] could reconvene to readdress" the issue since "the student's medical needs [were] fairly intense" (Tr. pp. 88-89).

The parent testified during the hearing that she received communication from the district requesting various information as well as the medical forms on several occasions, and that she returned the required information, although she could not remember the specific date (Tr. pp. 128-29, 131-37, 184-85; see Dist. Exs. 1, 3, 14). The parent further testified that she did not respond to any of the district's requests for the medical forms indicating that she had sent them already (Tr. p. 137). Additionally, the parent testified that she usually sent all "documents" to iBrain (Tr. 134). The hearing record contains an email from iBrain representing that it was having difficulty downloading the medical accommodation forms but would send them "soon" (Dist. Ex. 4).

Review of the May 2024 IEP shows that the student previously "underwent a tracheostomy and now require[d] full time ventilation and a 1:1 nurse" (Dist. Ex. 11 at p. 1). Additionally, the IEP indicated that the student "require[d] a nurse for administration of medication, maintenance of his g-tube, tracheostomy tube, ventilator, and all other medical needs" (id. at p. 18). The May 2024 IEP's management needs indicated that the student "require[d] nursing to assist him with all his medical needs such as suctioning and monitoring his O2 level" (id. at p. 21).

As noted above, although the IEP documented the student's need for a 1:1 nurse in the present levels of performance and the management needs sections of the IEP, the CSE did not recommend the nursing services at that time (see Dist. Ex. 11 at pp. 10, 21). According to the IEP, during the CSE meeting, the parent's advocate expressed concern that the student required a 1:1 nurse, but the CSE "discussed the medical forms necessary for the nursing request which had not been received at the time of the meeting" (id. at p. 51).

According to her affidavit, the school psychologist indicated that "without the forms, the most appropriate recommendation the" CSE "could make was to include in the [s]tudent's management needs that he required nursing to assist him with all his medical needs such as suctioning and monitoring his O2 level" (Tr. p. 114; Dist. Ex. 19 ¶ 12; see Dist. Ex. 11 at p. 21). The school psychologist further testified in her affidavit that "it would be expected that the school would implement this need by securing the appropriate medical forms and determining what degree of nursing support the [s]tudent required" (Dist. Ex. 19 ¶ 12). During the hearing, the school psychologist testified that "by putting" the management need in the IEP, "it flag[ged] for

the receiving school that this need exist[ed] and allow[ed] them the opportunity to then gather the correct forms in order for the nurse to implement and monitor that service" (Tr. pp. 115-16).[10]

According to the school psychologist's affidavit, she again asked the parent on May 8, 2024 and June 4, 2024 to submit the medical accommodations forms, "in the event the [p]arent wanted the CSE to reconsider the [s]tudent's nursing or transportation needs," but that "the [p]arent ha[d] not provided completed medical forms" (Dist. Ex. 19 ¶ 16; see Dist. Exs. 14; 16).

Based on the foregoing, the CSE's failure to recommend 1:1 nursing services did not align with the present levels of performance in the May 2024 IEP indicating the student required 1:1 nursing and, although the district appears to agree that the student required 1:1 nursing, it refused to include the recommendation in the IEP, pointing to the parent's failure to submit medical accommodation forms. In doing so, it improperly placed the burden to obtain medical forms on the parents (see "Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 2 [referring to the district's obligation to evaluate the student in all areas of disability or suspected disability and noting that this "may include information from a physician, such as a written order to the school nurse from a student's health care provider"] [emphasis added]). Instead, the district's reference to the requirements of the Office of School Health indicates the district improperly relies on this office that is not part of the CSE to decide whether the student's IEP would include a 1:1 nurse (see also Application of a Student with a Disability, Appeal No. 23-102). The case bears considerable similarity to litigation that was brought against the district which complained of systemic "policies that never required [the Office of School Health (OSH)] or [Office of Pupil Transportation (OPT)]—agencies critical to providing the services at issue in this action—to appear for IEP meetings. . . . Accordingly, Plaintiffs were required to contact OSH and OPT separately after the IEP meeting. This policy created a disjointed bureaucracy in which OSH and OPT acted in isolation without coordinating—much less knowing—the services each was required to provide" (J.L. on behalf of J.P. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 464–65 [S.D.N.Y. 2018]).

During the policy litigation, the district represented to the court that the policy had been changed, but the court was unwilling to accept that the matter was moot due to evidence of continuing problems (J.L., 324 F. Supp. 3d at 465). The evidence in this case similarly shows that, despite the representations of a policy change which were made in the context of the J.L. matter, the district apparently continued to follow the practice of requiring parents to file paperwork that another office within the district would examine at another time and then would, perhaps, decide if the student's IEP would be amended to include 1:1 nursing services. This is not the process called for under the IDEA because it is the CSE that is required to make the determination of which services should be placed on a student's IEP and it is the district's responsibility to ensure that the

[10] In her affidavit, the school psychologist testified that the student "was recommended [for] special transportation" which included, among other things, "1:1 nursing services" because of his "significant medical needs" (Tr. pp. 87-88; Dist. Ex. 19 ¶ 15). By way of explanation, the school psychologist included in her affidavit that while the May 2024 CSE did not receive updated "transportation accommodation forms . . . prior to the [CSE] meeting," these were "no longer required to be submitted annually if a student had an approved accommodation from the prior year," which the student did (Tr. p. 89; Dist. Ex. 19 ¶ 15). However, the school psychologist testified in her affidavit that to recommend 1:1 nursing services, "updated medical accommodations forms" were "required yearly . . . to determine the [s]tudent's level of nursing support needed during the school day" (Dist. Ex. 19 ¶ 15).

individuals who can make appropriate decisions are part of the CSE process. Placing the onus on the parents, rather than the district to obtain the required medical forms is problematic since the district may not delegate its responsibilities to the student under IDEA to the parents (see 8 NYCRR 200.4[b][3]). The district members of the CPSEs and CSE in this case failed to appreciate that they were the entities responsible to determine whether the student needed a 1:1 nurse in order to receive a FAPE and recommend a 1:1 nurse if the student required one.

With that said, it is routine for most parents across the State to obtain and provide physical and medical documentation from their children's personal physicians at the request of evaluating district personnel in a cooperative fashion rather than subject their child to duplicative physical assessment procedures by the district.[11] While the hearing record may establish that the parent did not provide medical accommodation forms, at most, this goes to the parent's cooperation in the process.

Nevertheless, here, the IHO erred in accepting the district's explanation that a 1:1 nurse could not be placed on the IEP by the CSE and that the parent was required to send documentation to another office for a determination of whether the student required a 1:1 nurse, especially where there was no evidence in this case that the CSE was waiting to complete the student's IEP over the course of multiple meetings or that the May 2024 IEP was merely a draft document awaiting further action (see e.g., Application of the Bd of Educ., Appeal No. 22-092 [noting the development of the IEP over multiple meeting sessions]). Therefore, the CSE's development of the May 2024 IEP which failed to recommend 1:1 nursing services despite the student's documented medical needs was a denial of a FAPE and the IHO's determination to the contrary was error.

3. Transportation Services

The parent argues that the May 2024 IEP included insufficient special transportation accommodations, in that it did not include provision for oxygen and ventilator support during travel and did not limit travel time to 90 minutes.

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Specialized forms of transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891, 894 [1984]; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children

[11] Similarly, the district personnel across the State routinely conduct appropriate consultations with district medical directors, school nurses, and student's private health care providers so that upon meeting the CSEs are prepared to complete an appropriate IEP for each student with a disability.

with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The transportation must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

For school aged children, according to State guidance, the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate," which may include special seating, vehicle and/or equipment needs, adult supervision, type of transportation, and other accommodations ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at https://www.nysed.gov/sites/default/files/programs/special-education/special-transportation-for-students-with-disabilities_0.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]). For preschool students with a disability, State regulations provide that "[i]n developing its recommendation for a preschool student with a disability to receive programs and services, the committee must identify transportation options for the student and encourage parents to transport their child at public expense where cost-effective" (8 NYCRR 200.16 [e][5]).[12] However, in general it is not uncommon for parents to continue to transport their three- and four-year-old children to daycare and preschool programs themselves.

As noted above, the CSE recommended special transportation from the closest safe curb location to school, a climate-controlled lift bus that could accommodate a regular size wheelchair, 1:1 nursing services, and limited travel time (Dist. Ex. 11 at p. 47). As reasons for the special transportation recommendations, the May 2024 IEP documented the student's diagnoses and noted some of the student's medical history and stated that the student required "full time ventilation and a 1:1 nurse" (id. at pp. 47-48). Accordingly, read as a whole, with the recommendation for a 1:1 nurse during transportation and reference to the student's need for ventilation, the CSE sufficiently provided for the oxygen and ventilator support for the student during travel (id.). In addition, although the IEP did not specify that the travel time should be less than 90 minutes, it did state that the student required "limited travel time" (id. at p. 47). There is nothing in the hearing record to indicate that the IEP could be read to allow travel time in excess of 90 minutes. Accordingly, the special transportation recommendations included in the IEP do not contribute to a finding that the district denied the student a FAPE for the 2024-25 school year.

[12] For preschool students with disabilities "[t]he municipality in which a preschool student resides is responsible to provide suitable transportation, as determined by the board of education" ("Reimbursement to Counties for Transportation Costs for Preschool Students with Disabilities [Revised from June 2002]," Office of Special Educ. Memo [August 2011], available at https://www.p12.nysed.gov/specialed/publications/preschooltrans-811.pdf).

B. Assigned Public School Site

The parent argues that the district failed to meet its burden to prove that the assigned public school site had the capacity to implement the student's IEP, arguing that the district failed to establish that the assigned public school site was accessible, that the proposed classroom would be composed of student's with similar needs, or how it could implement the student's educational program and services without the recommendation for an extended school day.[13] With respect to the IHO's finding that the parent did not raise nonspeculative allegations about the assigned school, the parent points to her allegations about the school's inability to implement the IEP without an extended school day.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 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 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.

[13] With respect to the accessibility of the school, the district correctly argues that the parent did not raise this issue in the due process complain notice (see Parent Ex. A). Accordingly, the issue was outside the scope of the impartial hearing, and I decline to reach the issue raised for the first time on appeal.

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., 2016 WL 3981370, at *13; 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]).

As a final matter the parents' claim regarding an "extended school day" is really an IEP design claim, but to the extent it relates to the capacity of the assigned school to implement the IEP (see Rivas, 2023 WL 8188069, at *8 [S.D.N.Y. Nov. 27, 2023] [describing claims that the assigned school could not offer an extended school day as "entirety derivative of [the parent's] substantive objection that the IEP should have mandated an extended school day]), a brief comment is warranted. Even if the parent's claims regarding the capacity of the assigned public school to implement the May 2024 IEP were within the scope of the impartial hearing and not entirely speculative, given the parent's concession that she did not visit or otherwise obtain any information about the assigned school for the 2024-25 school year (see Tr. pp. 139-40), the allegations specific to the extended school day would fail because the IEP did not offer the student an extended school day. To be sure, as set forth above, the district failed to meet its burden to prove that the May 2024 IEP was substantively appropriate. However, the district could not be found to err in assigning the student to attend a public school that did not offer an extended school day given the lack of mandate therefor in the IEP.

C. Unilateral Placement

The parent claims that the IHO incorrectly found that the parent did not meet her burden to prove the appropriateness of the unilateral placement. The parent asserts that iBrain delivered the student's programming, including home-based services, which were suitable for the student's needs given his medical fragility and inability to attend school in person regularly.[14]

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the

[14] The parent also argues that the IHO applied a double standard by requiring evidence of iBrain's implementation of the student's IEP while accepting the district's IEP without such evidence. However, as the student did not attend the district's program but did attend iBrain, the proof relating to each is necessarily different. A review of the appropriateness of a unilateral placement is not restricted to only the evidence available to the parent at the time she made the unilateral placement decision insofar as implementation of the programming and services and the student's progress are relevant to the analysis (see Khanimova v. Banks, 2025 WL 722876, at *6 [S.D.N.Y. Mar. 6, 2025], citing C.L., 744 F.3d at 836).

State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

The hearing record includes a detailed May 2024 iBrain education plan, which, among other things, identified the student's present levels of performance and rate of progress, evaluations administered to the student, annual goals, management needs, a summary of the student's special education program and services, and a summary of supplementary aids and services, program modifications, and accommodations (see generally Dist. Ex. 8). To address the student's identified needs, the May 2024 iBrain education plan recommended that the student attend a 12-month program in a 6:1:1 special class along with the support of 1:1 paraprofessional and 1:1 nurse services throughout the day, and assistive technology devices and services (id. at pp. 1, 72-74). In addition, the May 2024 iBrain education plan recommended five 60-minute sessions per week of individual OT, five 60-minute sessions of individual PT, five 60-minute sessions per week of individual speech-language therapy, two 60-minute sessions per week of individual music therapy,

one 60-minute session per week of group music therapy, three 60-minute sessions per week of individual vision education services, and one 60-minute session per month of parent counseling and training (id. at pp. 72-73). The May 2024 iBrain education plan included a recommendation for specialized transportation that included a nurse, an air-conditioned lift-bus with a wheelchair ramp, oxygen, and a ventilator, and limited travel time to 90 minutes (id. at p. 72).

The IHO found the iBrain education plan for the student to be appropriate and the IHO's finding in this regard is not in dispute. Instead, the issue on appeal relates to the implementation of the plan during the 2024-25 school year.

The May 2024 iBrain education plan indicated that "[f]or health reasons, [the student] primarily receive[d] synchronous remote sessions with the support of a 1:1 aide and 1:1 nurse in the home," and "recently returned to school in person one day per week" (Dist. Ex. 8 at p. 1). The May 2024 iBrain education plan indicated the student's primary "social interactions occur[red] between him and his one-to-one paraprofessional and family" and that the student "participate[d] in virtual morning meetings with his class peers[] when he [was] up to it" (id. at p. 5). With respect to delivery of related services remotely, the May 2024 iBrain education plan indicated that the student required a "mounting system" for his speech-generating device, but that he did not have one "largely in part" to "remote instruction" (id. at p. 20). The student's speech-language therapist and physical therapist included in the May 2024 iBrain education plan that remote instruction made the provision of some services difficult (id. at pp. 29, 35).

The hearing record is unclear as to how consistently iBrain provided the student with the program and services set forth in his education plan. The hearing record does not include a progress report developed after the beginning of the 2024-25 school year or any attendance records, sessions notes, or other documentation reflecting the delivery of the program and services set forth in the May 2024 iBrain education plan during the 2024-25 school year. The parent testified that the student "g[ot] classes at home" and he attend[ed] school "depend[ing] how he [was] feeling" (Tr. p. 145). The parent further testified that, when the student received home instruction, both his paraprofessional and nurse were with him (Tr. p. 146). While she could not remember specifically, the parent testified that the student's day ended "[b]etween three and five" depending how the student felt (Tr. p. 149).

The deputy director offered testimony that the student was "fairly consistent in receiving his services" at home, that his home program was the same as his in-person program, and that the student "ha[d] a lot of equipment at home"; however, he could not "specifically" identify "what [was] actually at home versus what [was] in school" and acknowledged that there some differences between the student's remote and in-person program, such as that "there [were] a lot more resources" at iBrain "for providers to use" which could cause "some challenges" (Tr. pp. 207-08, 219, 223-24, 261-62). Ultimately, however, the IHO found that the deputy director's testimony was not credible. Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability,

Appeal No. 12-076). Here, on appeal, the parent does not point to any evidence to justify a conclusion contrary to the IHO's determination regarding the deputy director's credibility.

The parent argues that, given evidence that the student could not attend school in person daily given his medical needs, home-based services were appropriate. This may be the case; however, the IHO's concern was not that the student received home-based services but that the evidence failed to demonstrate if and how such services were provided to the student during the 2024-25 school year. Based on the evidence in the hearing record, I find insufficient ground to disturb the IHO's determination that the parent failed to meet her burden to demonstrate the appropriateness of iBrain for the 2024-25 school year.

VII. Conclusion

Although the IHO erred in finding that the district offered the student a FAPE for the 2024-25 school year, I find insufficient basis to disturb the IHO's determination that the parent failed to establish the appropriateness of the student's unilateral placement at iBrain for the 2024-25 school year. Accordingly, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations support an award of tuition funding (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 26, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER