The University of the State of New York

The State Education Department
State Review Officer
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No. 24-634

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

Appearances:
Liberty & Freedom Legal Group, Ltd., attorneys for petitioners, by Peter G. Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Irene Dimoh, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund the costs of their daughter'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 prior State-level administrative appeals related to the 2018-19, 2021-22, 2022-23, and 2023-24 school years (see Application of a Student with a Disability, Appeal No. 23-235; Application of a Student with a Disability, Appeal No. 23-017; Application of a Student with a Disability, Appeal No. 22-138; Application of a Student with a Disability, Appeal No. 20-036).

The student has received diagnoses including traumatic brain injury, Lennox-Gestalt syndrome, hypoxic ischemic encephalopathy, cortical visual impairment, Hirschsprung's disease, cerebral palsy, and a seizure disorder (Parent Ex. B at p. 1; Dist. Exs. 1 at pp. 2, 22; 5 at p. 2). Additionally, the student "relies on a tracheostomy and gastrointestinal tube," is nonverbal and

non-ambulatory, and requires maximal assistance for all activities of daily living (Parent Ex. B at p. 1).

The student attended iBrain during the 2023-24 school year (see Parent Ex. B at p. 1). A CSE convened on March 6, 2024, determined the student was eligible to receive special education as a student with a traumatic brain injury, and developed an IEP for the 2024-25 school year (see Dist. Ex. 1).[1] The CSE recommended 12-month programming consisting of a 6:1+1 special class placement for all core subjects (35 periods per week) in a specialized school, with three periods per week of adapted physical education and related services of five 60-minue sessions per week of individual occupational therapy (OT), five 60-minute sessions per week of individual physical therapy (PT), four 60-minute sessions per week of individual speech-language therapy, one 60-minute per week of group speech-language therapy, and three 60-minute sessions per week of individual vision education services (id. at pp. 51-53, 58). Additionally, the CSE recommended one 60-minute session per month of group/individual parent counseling and training (id. at p. 51). The CSE also recommended daily, full time school nurse services on an individual basis and daily, full time health paraprofessional services for ambulation, health, and safety on an individual basis (id. at pp. 51-52). For assistive technology, the CSE recommended a dynamic display speech generating device (SGD) with eye gaze, software, switches, assistive technology services and mount, all on a daily, individual basis throughout the school day (id. at p. 52).[2] The CSE recommended special transportation services consisting of transportation from the closest safe curb location to school; a 1:1 paraprofessional; 1:1 nursing services; air conditioning; two seats for the student; regular size wheelchair use; limited travel time; and door to door service (id. at p. 57).

In a prior written notice to the parents dated May 3, 2024, the district summarized the recommendations made by the March 6, 2024 CSE (see Dist. Ex. 3 at pp. 1-8). The hearing record includes a school location letter, also dated May 3, 2024, by which the district purportedly notified the parents of the school location to which the student had been assigned to attend for the 2024-25 school year, including the name of the school, the address, and telephone number (id. at p. 9).

By letter to the district dated June 17, 2024, the parents indicated that they were rejecting the district's "program and school placement" for the 2024-25 extended school year because the district failed to offer the student a free appropriate public education (FAPE) (Parent Ex. A-A at p. 1). The parents asserted that they would maintain the student's last agreed upon placement, iBrain, for the 2024-25 school year and seek public funding (id.). The parents asserted multiple disagreements with respect to the May 2024 IEP and the "proposed school location" (id. at p. 2). Regarding the assigned school, the parents stated that the assigned school site could not implement the student's May 2024 IEP and that they were "concerned [with] the physical structure and facility of the proposed school location" (id.).

[1] 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]).

[2] The CSE also recommended the following training for staff on behalf of the student: two-person transfer, vision adaptions and functioning, seizure safety, assistive technology, and safety for tracheostomy care and precautions (Dist. Ex. 1 at p. 53).

On June 21, 2024, the student's mother signed an enrollment contract with iBrain for the student's attendance for the 2024-25 extended school year (see Parent Ex. A-E).[3] The contract indicated that the academic and related services program ran from July 2, 2024 through June 27, 2025 (id. at p. 1). The base tuition fee was $213,000 and the supplemental tuition fee was $127.112.40 (id. at pp. 1-2).[4]

On June 27, 2024, the student's father signed a school transportation agreement with Sisters Travel and Transportation Services, LLC (Sisters Travel) (see Parent Ex. A-F).[5] The agreement indicated that Sisters Travel would provide the student with transportation services to and from iBrain for the extended 2024-25 school year, and that the vehicle transporting the student would include air-conditioning, regular size wheelchair accessibility, and sitting space for a person to travel with the student, as needed (id. at pp. 1-2).

On June 13, 2024, iBrain created a report and education plan for the student for the 2024-25 school year (see Parent Ex. B). The student attended iBrain during the 2024-25 school year (see Parent Ex. D at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated July 2, 2024, the parents alleged that the district denied the student a FAPE for the 2024-25 extended school year based on numerous procedural and substantive violations (see Parent Ex. A at pp. 1, 3-4). The parents invoked pendency and requested an interim order on pendency directing the district to fund the cost of the student's tuition and supplemental services pursuant to the parents' enrollment contract with iBrain and fund the student's transportation services pursuant to the parents' contract with Sisters Travel (id. at pp. 2-3).

The parents argued that the March 2024 CSE recommendations were not reasonably calculated to provide the student with educational benefits or enable her to make progress (Parent Ex. A at p. 3). They listed a number of procedural violations that they asserted impeded the student's right to a FAPE, significantly impeded the parents' opportunity to meaningfully participate in the decision-making process regarding a FAPE to the student, and caused a deprivation of education benefits to the student (id.). The parents further listed substantive violations of the IDEA and asserted that the district failed to offer the student a FAPE because it "failed to provide a placement uniquely tailored to meet [the student's] needs" for the 2024-25 extended school year (id. at pp. 3-4).

[3] A representative for iBrain signed the contract on June 24, 2024 (Parent Ex. A-E at p. 6).

[4] The terms of the contract indicated that supplemental tuition included the cost for the student's related services such as PT, OT, speech-language therapy, vision education services, assistive technology services, music therapy, hearing education services, and parent counseling and training (Parent Ex. A-E at p. 2).

[5] The agreement was created and sent to the parents on June 17, 2024, and the father electronically signed the agreement on June 27, 2024 (Parent Ex. A-F at p. 7).

More specifically, the parents contended that the "district failed to recommend an appropriate public school" by failing to provide the parents with a school location letter in advance of the 2024-25 school year; that there was no recommended school location at which the student could be placed with peers who had similar needs; and that a recommendation for a district specialized school would be dangerous for the student and deny her a FAPE by depriving her access to peers with similar needs (Parent Ex. A at p. 5).

The parents also alleged that the district failed to recommend music therapy, 1:1 nursing services, and appropriate supports for the student as well as for the staff who would be assisting the student (Parent Ex. A at p. 5). The parents argued that the related services and supports recommended in the March 2024 IEP could not be implemented in a district specialized school because the district failed to recommend an extended school day and the program could not be implemented during the hours of a regular school day (id.). The parents asserted that the district failed to evaluate the student in all areas of suspected disability and failed to conduct all necessary evaluations, such as a neuropsychological evaluation (id. at pp. 6-7).

The parents asserted that iBrain was an appropriate unilateral placement and that equitable considerations warranted full funding for the cost of the student's tuition and related services, including transportation and nursing, at iBrain for the 2024-25 school year (Parent Ex. A at p. 7). For relief, the parents requested direct funding for the full cost of tuition and related services at iBrain, direct funding for transportation services provided to the student pursuant to the parents' contract with Sisters Travel, and direct funding for the 1:1 nursing services for the 2024-25 extended school year, as well as funding for independent evaluations (id. at p. 8).

In a due process response dated July 16, 2024, the district generally denied the allegations contained in the due process complaint notice and asserted several defenses (IHO Ex. I).

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on August 2, 2024 and August 7, 2024 to address the issue of pendency (see Tr. pp. 1- 50), followed by five hearing dates devoted to the merits, with the impartial hearing concluding on October 3, 2024 (see Tr. pp. 51-317). At the September 16, 2024 hearing date, after the completion of the parents' opening statement that referred to the parents visiting the assigned public school site, the district's representative objected to the parents providing any testimony about their visit (Tr. pp. 103-08). The district's representative argued that allowing such testimony would contradict the allegation in the parents' due process complaint notice that the district failed to provide the parents with a school location letter and, consequently, prejudice the district who relied on such allegation and presented its case in chief based on the premise that it only needed to show that it offered the student an assigned school, not prove that the assigned school was appropriate (id.).

In an interim decision dated October 3, 2024, the IHO ruled on the district's objection to the parents testifying about their visit to the assigned public school site (see IHO Ex. VII). The IHO quoted language from the parents' July 2, 2024 due process complaint notice that stated "the [district] has not sent the [p]arent a [s]chool [l]ocation [l]etter ("SLL") for the [20]24/25 [extended school year]," which "effectively prevented the [p]arents from properly and timely

investigating/touring a proposed school for [student]" (id. at p. 10; see Parent Ex. A at p. 4). The IHO rejected the parents' argument that other statements in the due process complaint notice, such as the heading "the [district] failed to recommend an appropriate public school" notified the district that the parents were challenging the appropriateness of the assigned public school or negated the parents' "clear assertions" that the lack of a school location letter prevented the parent from touring the proposed school (IHO Ex. VII at pp. 9-10). The IHO further found that the district relied on the parents' assertion in the due process complaint notice that no school location letter was offered and that the district therefore only needed to show that it offered an assigned school, which the parents' representative did not attempt to correct to state that the parents were challenging the appropriateness of the assigned school (id. at p. 7). Based on the foregoing, the IHO held that it would be "improper and unfair" to the district to allow the parents to present testimony about their visit, particularly after the district rested its case in chief (id. at p. 10).

In an interim decision on pendency dated October 10, 2024, the IHO held that the student's pendency placement was based on the decision in Application of a Student with a Disability, Appeal No. 23-235, which awarded the parents direct funding for the student's base tuition in the amount of $190,000 and supplemental tuition in the amount of $108,696 at iBrain for the 2023-24 school year (IHO Ex. X at pp. 6-7). The IHO further explained that the costs of the student's iBrain tuition increased for the 2024-25 school year to $213,000 for the base tuition and $127,112.40 for the supplemental tuition, but that the student was receiving the same level of services as the prior school year and that the increases in the base and supplemental tuition did not constitute a "change or modification" of the student's pendency placement (id. at pp. 7, 13). The IHO ordered the district during the pendency of the proceeding to directly fund the student's iBrain base tuition at a cost not to exceed $213,000 and the supplemental tuition at a cost not the exceed $127,112.40 (id. at p. 15).

In a decision dated November 14, 2024, the IHO found that the district offered the student a FAPE for the 2024-25 school year (IHO Decision at pp. 31, 37). First, the IHO found that the district timely provided the parents a school location letter prior to the start of the 2024-25 school year (id. at pp. 17-18). The IHO found that the parents received the district's school location letter as evident by the parents' ten-day notice dated June 17, 2024 that rejected the district's "program and placement" and asserted the reasons the parents believed the assigned public school site would be inappropriate for the student (id. at p. 18).

The IHO then addressed the parents' claims regarding the assigned public school site and determined that such claims were outside the scope of the due process complaint notice as the IHO held in his interim decision dated October 3, 2024 (IHO Decision at pp. 19-21). The IHO reiterated that the district was denied an opportunity to present its case to establish the appropriateness of the assigned school (id. at p. 20). The IHO further held that any lack of knowledge of the district's witness about the assigned school could not be held against the district because the district's witness was not called to testify about the assigned school (id.). Moreover, the IHO noted that the student never attended the assigned public school site and, had the parents properly asserted that the assigned school could not implement the student's IEP, that such claims would be based on "impermissible speculation" (id. at p. 21).

Regarding the March 2024 IEP, the IHO concluded that the lack of music therapy as a related service did not deny the student a FAPE (IHO Decision at pp. 21-25). The IHO found that

the testimony from the district regarding music therapy was not retrospective testimony and therefore could be considered because it related to what was described in the March 2024 IEP (id. at p. 23). The IHO also held that the March 2024 CSE considered sufficient evaluative data and developed an IEP that identified the student's needs (id. at pp. 26-28). The IHO noted that the March 2024 IEP incorporated information provided by the parents and iBrain team and that the March 2024 IEP was consistent with the iBrain IEP and progress reports (id. at p. 28). The IHO noted that the parents no longer pursued their insufficient nursing services claim in their closing brief and that the parent agreed during her testimony that the IEP recommended a 1:1 full-time school nurse for the student (id. at p. 29). The IHO rejected the parents' claim that they did not receive a procedural safeguards notice because the IHO found that the student's social history update indicated that a procedural safeguards notice would be sent to the parents and that the school social worker discussed the parents' due process rights (id.). The IHO determined that questions about the extended school day and the inability to implement the program at the assigned school were speculative (id. at pp. 29-30). The IHO found that the iBrain witness was "combative in his demeanor and responses," that he was "evasive" to the district's questions, and that he did not testify "neutrally" as he was not disinterested in the outcome (id. at p. 30). Based on the foregoing, the IHO found that the district offered the student a FAPE for the 2024-25 school year and denied the parents' requested relief (id. at p. 31).[6]

IV. Appeal for State-Level Review

The parents appeal. The parents assert that the IHO erred in finding that the district offered the student a FAPE for the 2024-25 school year and that the IHO should have addressed whether iBrain was an appropriate unilateral placement and whether equitable considerations favor them. Further, the parents contend that the IHO erred in "capping" pendency because the IHO acknowledged there was no change in the student's program at iBrain.

Regarding the issue of a FAPE, the parents contend that the district failed to offer the student a FAPE because the CSE's recommendation of "school nurse services" on the student's IEP "cannot be equated to a 1:1 nurse." Next, the parents assert that the district's failure to offer music therapy was also a denial of a FAPE, arguing that the IHO erred by dismissing the testimony and evidence from iBrain that showed that music therapy was an essential aspect of the student's program.

The parents further argue that the IHO incorrectly concluded that the district sent them a school location letter.[7] The parents contend that there was no documentation or testimony to confirm the district's delivery of the letter. With respect to the implementation, the parents argue that the IHO held the parties to an erroneous legal standard. The parents assert that the cases cited by the IHO were not binding authority in this jurisdiction and that a district must implement an IEP as written. Additionally, the parents argue that the district failed to present a witness to testify how the assigned public school could implement the March 2024 IEP, including how the

[6] The IHO also addressed the parents' claims that related to section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a) (IHO Decision at pp. 32-36).

[7] Related to this point, the parents allege that the IHO erred in inferring from statements in their 10-day notice that they had received a school location letter.

recommended services could be effectively delivered during a standard school day. Moreover, the parents assert that they visited the assigned public school and gave it serious consideration before rejecting it. The parents allege that the IHO unfairly precluded the parent from testifying about the assigned public school and denied them due process.

The parents argue that iBrain was an appropriate unilateral placement and that the IHO should have addressed this issue. Lastly, the parents contend that equitable considerations favor their claim for relief because they cooperated with the CSE process and timely sent the ten-day notice to the district.

In an answer, the district avers that the IHO correctly determined that it offered the student a FAPE for the 2024-25 school year. The district argues that the IHO correctly found that the district offered the parents a timely school location letter for the 2024-25 school year because a school location letter dated May 2024 was included in the hearing record, it was presumed to be delivered to the parents, the parents failed to rebut the presumption of mailing, and the parents' attorney conceded that the parents received the school location letter. The district argues that the IHO properly precluded the parents from testifying about the assigned public school because it was outside the scope of the due process complaint notice. Moreover, the district contends that the student never attended the assigned school so the parents' claims that the assigned school could not implement the March 2024 IEP were impermissibly speculative. The district also notes that the IHO properly found that the iBrain witness provided evasive testimony. The district also argues that having found that the district offered the student a FAPE for the 2024-25 school year, it was permissible for the IHO to end his analysis. However, the district contends that the parents failed to demonstrate that iBrain was appropriate and that equitable considerations favor their claim for relief.

The parents submitted a reply to the district's answer. State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the parents' reply merely reasserts many of the same allegations as raised in the request for review and does not appear to address any of the issues permitted in a reply; accordingly, the parents' reply will be disregarded.

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]).[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. Pendency

First, I will address the parents' claim that the IHO erred in "capping" pendency. The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency

[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).

has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197 [OSEP 2007]).

Here, the parties agree that Application of a Student with a Disability, Appeal No. 23-235 formed the basis of the student's pendency placement at iBrain, but at the time of the pendency hearings, the district argued that it should not be required to fund the student's pendency services at iBrain at the increased tuition and supplemental tuition rates that the parents' contracted with iBrain for the 2024-25 school year (see IHO Ex. X). In the interim decision on pendency, the IHO determined that the increase in the base tuition and supplemental tuition at iBrain for the 2024-25 school year did not constitute a change or modification in the student's pendency placement and, consistent with the parents' request, ordered the district to fund the student's pendency services at iBrain for the base tuition at a cost not to exceed $213,000.00 and the supplementary tuition at a cost not to exceed $127,112.40 (id. at pp. 13, 15). The parents argue on appeal that the IHO erred in "capping" the pendency funding (see Req. for Rev. ¶¶ 7-10), which the district did not specifically address in its answer other than generally deny the parents' allegations (see Answer).

The IHO included in his pendency order the costs for the tuition and supplemental tuition as reflected in the iBrain enrollment contract for the 2024-25 school year (see Parent Ex. A-E). The IHO apparently did so to reflect that he was rejecting the district's position that it should not have to fund the increased tuition charged by iBrain for the 2024-25 school year and finding in the parents' favor on the issue of pendency. Accordingly, I do not find that the parents were aggrieved by the IHO's pendency order. To the extent that the parents' appeal is premised on some hypothetical future increase in the student's tuition and speculation that the district would violate the student's pendency, such a dispute is not before me. Accordingly, I find no basis to disturb the IHO's pendency order.

B. March 2024 IEP

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly determined that the March 2024 CSE offered the student a FAPE for the 2024-25 school year (IHO Decision at pp. 7, 17, 31, 36). The IHO found that the March 2024 IEP was consistent with the evaluative information available to the CSE and identified the student's needs related to academic, social/emotional, and executive functioning (id. at p. 28). Specifically, the IHO noted that the IEP was consistent with the iBrain report and education plan (iBrain education plan) and progress reports, and also incorporated the information which the parents and the iBrain staff (academics, assistive technologist, and teacher assistant paraprofessional, music therapist, social worker, speech, vision, occupational therapist, physical therapist, and a parent advocate) all provided to the CSE members (id.).

The student's needs are not in dispute on appeal, although a brief description provides context for the IEP issues to be resolved.[9] The March 2024 IEP indicated that the CSE relied on evaluative information including a December 2021 psychoeducational evaluation, a February 2023 classroom observation, a "[p]revious" March 2023 IEP, a March 2024 social history update, March

[9] On appeal, the parents have not challenged the IHO's finding that the March 2024 considered sufficient evaluative information (IHO Decision at p. 28). Accordingly, this finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

2024 iBrain teacher reports, and the 2023-24 iBrain progress reports (Dist. Ex. 1 at p. 1).[10] According to that information, during the 2023-24 school year, the student attended iBrain in a 6:1+1 classroom and received 1:1 paraprofessional services and 1:1 nursing services together with in-person PT services "1 to 3 times a week" as well as OT, speech-language therapy, assistive technology, music therapy, academics, and vision services (Dist. Exs. 1 at pp. 2, 22; 4 at p. 4).

The student was described as "a friendly, strong-minded, and engaging eleven-year-old girl who ha[d] severe cognitive and motor limitations" as well as "severe impairments" in language, memory, attention, reasoning, abstract thinking, judgment, problem solving, and information processing and speech skills (Dist. Ex. 1 at pp. 1, 28). According to the March 2024 IEP, the student was "nonverbal and wheelchair dependent, requiring maximal assistance for all activities of daily living" and "relie[d] on a tracheostomy and gastrointestinal tube" (id. at pp. 2, 27). The student communicated using eye movements, an eye gaze device, and facial expressions (id. at p. 2). The IEP noted that the student wore glasses as prescribed in order to support distance viewing (id. at p. 7). The March 2024 IEP indicated that, while the student demonstrated intellectual and cognitive potential to learn and excel, her rate of progress was dictated by her physical health and well-being (id. at p. 28).

In addition to nursing interventions the student required to meet her medical needs, the student required 1:1 paraprofessional services throughout the school day to help her navigate her environment and complete activities of daily living, assist with attention, help the student access assistive technology, complete transfers and positioning, and to monitor safety (Dist. Ex. 1 at pp. 16, 18, 20). To address the student's significant management needs, the March 2024 CSE recommended supports and services including, among other things, modified materials, e.g., high contrast, tactile; continual 1:1 adult support for hand-under-hand and physical prompting for participation and access to educational environments; frequent breaks; repositioning; adjustable lighting; noise reduction; position changes to prevent fatigue; use of 3D objects to support choices; multisensory materials; objects placed against a black background or with minimal complexity; access to assistive technology; verbal cues, praise and sufficient motivation to remain engaged and interested in activity; familiar partners, peer socialization, and motivating activities; suctioning breaks and medical intervention as needed; use of hand splints; finger extension splints; flexible and supportive positioning and mobility devices; flexible "TLSO"; and use of gait trainer, stander, and adaptive bicycle (id. at pp. 25-27).

1. Music Therapy

Turning to the district's recommendations, 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]).

[10] The hearing record does not include the December 2021 psychoeducational evaluation or the February 2023 classroom observation (see Parent Exs. A; AA-AF; B-D; Dist. Exs. 1-9).

The student's March 2024 IEP noted that, at that time, she was receiving two sessions per week of individual music therapy services, which were conducted by a board-certified music therapist (Dist. Ex. 1 at p. 17).[11] The March 2024 IEP noted that the student enjoyed music among other things, and that she used the different symbols on her SGD spontaneously to communicate basic needs and make a variety of requests including "I + want + music" (id. at pp. 3, 10). According to the IEP, the student's favorite activities involved aquatic therapy, music, playing instruments, and movement (id. at p. 25). The IEP further indicated that the student's music therapy sessions at iBrain "consist[ed] of live, interactive, and highly individualized music exercises to help students achieve goals faster and more efficiently" (id. at p. 17). The IEP reflected that the student appeared engaged during music therapy sessions, evidenced by facial affect, and responses like head turning and following instructions (id.). The IEP further noted that the student "benefit[ed] from push-in sessions with academics to help motivate her to participate, organize information for her, and elicit responses with a decreased response time" (id.). The IEP stated that the student had been observed to make progress in her sensorimotor music therapy goal at iBrain of extending extremities to play instruments (id.). For example, the student "especially appear[ed] to have increased use of her lower extremities; when seated in her wheelchair, she lift[ed] her knees to play preferred instruments from below, like the ocean drum" (id.).

According to the March 2024 IEP, the student's iBrain music therapist participated in the March 2024 CSE meeting (Dist. Ex. 1 at pp. 62-63). The IEP reflected that the parents and the iBrain staff expressed during the CSE meeting that music therapy "[wa]s an essential mandate for [the student], as it assist[ed] with promoting best practices of supporting her communication and soci[al]-emotional needs" (id. at p. 61). In addition, according to the IEP, the parents and iBrain staff "explained that the elective of [m]usic was not specialized and a licensed [m]usic therapist was needed to promote th[o]se sessions" (id.).

The district special education teacher who served as the district representative at the March 2024 CSE meeting (district representative) testified that "[t]he [district] did not recommend music therapy" because the district members of the CSE believed that music could be incorporated as an instructional tool to enhance the student's learning and participation in daily lessons with collaboration across all disciplines (Tr. p. 77; Dist. Ex. 9 ¶ 14; see Dist. Ex. 1 at p. 62). The March 2024 IEP indicated that the CSE "discussed that music c[ould] be used an instructional tool to support with engagement throughout the school day" (Dist. Ex. 1 at pp. 17-18; see Tr. pp. 88-89). The district representative further testified that, based on what the CSE heard during the meeting regarding how music was being used as part of the student's program at iBrain, and from her observations of how music had been used in the school, the CSE thought that "this would be a specially-design[ed] instruction, that c[ould] be incorporated in all disciplines, as well as in the related services" (Tr. pp. 88-89). The IEP noted that the iBrain school team expressed concern

[11] An October 2023 iBrain progress report reflected the student demonstrated inconsistent progress toward her music therapy cognition annual goal to increase decision making, planning, and creative problem solving by participating in music executive function training and using her augmentative alternative communication (AAC) device (Dist. Ex. 7 at pp. 1, 8). The progress report noted the student demonstrated inconsistent progress toward the first benchmark for a music therapy communication annual goal to participate in developmental speech and language through music, which included live and individualized music performance and improvisation exercises, to increase vocabulary and self-expression (id. at p. 9). Thereafter, the benchmark designations reflected that particular goal would be "addressed next quarter pending attainment of prior goal" (id.).

about the lack of music therapy as a mandated service, noting that they felt that the student would not appropriately progress toward the identified goals without the service being provided by a certified music therapist (Dist. Ex. 1 at p. 18). However, the district representative opined that a music therapist was not required for the student to benefit from the use of music, and that, instead, a music instructor could sit down and design how they could incorporate the music within all the disciplines (Tr. pp. 88-89). For example, the district representative testified that she would use the music "as a driving force" for students' communication or participation needs (Tr. pp. 89-90). According to the district representative, based on the data presented, the CSE did not recommend music therapy as a related service on the student's IEP (Dist. Ex. 9 ¶ 14). The district representative testified that the student's deficits addressed by music therapy could be met by specially designed instruction (id.).

Regarding the CSE's determination to not recommend music therapy, the March 2024 IEP documented the considerations noted by the district representatives as well as the concerns of the parents and iBrain staff (Dist. Ex. 1 at pp. 17-18).

To address the student's needs similar to those addressed during iBrain music therapy sessions, the March 2024 IEP included an OT goal to increase participation in play and leisure activities (Dist. Ex. 1 at p. 45). For example, the goal reflected a short-term instructional objective for the student to actively participate in music activities by activating instruments, e.g., shake bells, hit a drum, no less than 12 times during a 20-minute music activity given minimal verbal and tactile cues to initiate movements in all opportunities (id.). Another short-term instructional objective stated the student would increase participation in play activities by independently activating icons on computer-based activities, e.g., play button on music (id.). Finally, the last short-term instructional objective for the goal targeted the student's ability to demonstrate increased awareness of her body, environment, and non-familiar stimuli by demonstrating a consistent response to stimuli, e.g., head turn, eyes open, extremity movement, smile, etc., presented via various sensory channels (id.).

As the IHO noted, the parents' witness, the iBrain deputy director, conceded that there was crossover between the music therapy goals in the iBrain education plan and other disciplines, citing OT as an example (IHO Decision at pp. 25, 30; Tr. pp. 211-212, 250-251). Accordingly, although iBrain recommended music therapy goals to address the student's identified needs, the March 2024 CSE recommended annual goals which addressed the same underlying areas of needs (compare Dist. Ex. 1 at pp. 36, 45, with Dist. Ex. 6 at pp. 64-66).

Based on the foregoing, evidence in the hearing record shows that music therapy at iBrain offered a different approach for addressing the student's needs, and that the March 2024 CSE identified the student's needs and addressed them through related services annual goals, and as such, the lack of a recommendation for music therapy as a related service by the March 2024 CSE did not result in a denial of a FAPE in this instance (Cruz v. Banks, 2025 WL 1108101, at *3 [2d Cir. Apr. 15, 2025] [holding that a recommendation for music therapy was not necessary to offer the student a FAPE, when the goals of music therapy were sufficiently accomplished through other services recommended in the IEP]). In addition, the district was not required to replicate the exact same services that the parents preferred for the student in the private school. Therefore, there is no reason to disturb the IHO's finding that the student did not require music therapy to receive a FAPE (see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 592-93 [S.D.N.Y. 2013]

[finding that, although the evidence may have supported that music therapy was beneficial for the student, it did not support the conclusion that the student could not receive a FAPE without it]).

2. 1:1 Nursing Services

Turning to the March 2024 CSE's recommendation for 1:1 nursing services, the student's need for a 1:1 nurse is not in dispute, rather, the parents appear to argue that the use of the term "school nurse" rendered the CSE's recommendation inappropriate and that, instead, the student required a "1:1 full-time skilled nurse."

Generally, a student who needs school health services[12] or school nurse services[13] 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 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"]).[14] A school nurse must be a registered professional nurse legally qualified to practice nursing in the State (see Educ. Law § 902[2][b]; 8 NYCRR 200.1[ss][2]).

Here, the March 2024 CSE recommended that the student receive daily, full time, 1:1 individual school nurse services "[t]hroughout the school building" (Dist. Ex. 1 at p. 51). The CSE also recommended special transportation services that included among other things, "Adult Supervision — 1:1 Nursing Services" along with 1:1 paraprofessional services, air conditioning, door-to-door accommodations, and limited travel time (id. at p. 57). In addition, the IEP provided for supports for school personnel on behalf of the student including, among other things, seizure safety training and training for tracheostomy care and precautions (id. at pp. 52-53). The IEP included a specific annual goal providing, among other things, that the student's 1:1 paraprofessional and 1:1 nurse would monitor the student's medical needs, including monitoring for seizures (see id. at pp. 49-50).

The March 2024 IEP reflected the parents' concerns that a district "1:1 skilled nurse for during the school day and transport w[ould] not suffice as their daughter require[d] a 1:1 nurse practitioner on a daily basis during and after school hours to sustain her health and welfare" (Dist.

[12] "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]).

[13] "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]).

[14] However, a school district is not required to furnish medical services under the IDEA except for diagnostic and evaluation purposes (20 U.S.C. § 1401[26][A]; see 34 CFR 300.34[a], [c][5]; 8 NYCRR 200.1[ee], [qq]; Cedar Rapids, 526 US at 73; Irving Independent Sch. Dist. v. Tatro, 468 US 883, 889-90 [1984]).

Ex. 1 at p. 61). In addition, according to the IEP, the parents "explain[ed] that they secured a nurse with their insurance and [we]re very pleased with them at current" (id. at p. 61).

When asked if the March 2024 IEP provided for full time 1:1 school nurse services, the parent testified that nursing services that were only relevant in school did not actually help the student, further noting that the student was entitled to "24/7" nursing services provided by Medicaid due to the student's tracheostomy (Tr. pp. 129-30, 134-36).[15] Specifically, when asked to review the March 2024 IEP in relation to the parents' allegation that the district failed to recommend a 1:1 nurse, the parent testified "[j]ust because the [district] document says . . . nurse, they [do not] provide it. [The student] g[ot] a nurse through her Medicaid insurance" (Tr. pp. 136-37).

While it is clear that the parents prefer that the student continue to receive care from the nurse provided through Medicaid, that does not render the CSE's recommendation for a 1:1 nurse inappropriate. The parents point to no evidence in support of their allegation on appeal that a 1:1 school nurse could not care for the student "in an appropriate manner" or "keep[] the Student safe in health emergencies such as seizures."[16] Further, consistent with the document, the district representative testified that the March 2024 IEP provided for full-time, individual, 1:1 school nursing services throughout the school day (Tr. p. 91; Dist. Exs. 1 at p. 51; 9 ¶ 12). The district representative testified it "would be incorrect" for the parents to assert that the student would not receive 1:1 nursing services (Tr. pp. 91-92).

Based on the foregoing, the CSE appropriately recommended full time 1:1 nursing services for the student for the 12-month 2024-25 school year (Dist. Ex. 1 at p. 51), and there is no basis to disturb the IHO's finding that the March 2024 IEP was reasonably calculated to provide the student with educational benefit during the 2024-25 school year.

3. Extended School Day

As a final matter, on appeal, the parents claim that the March 2024 IEP was inappropriate for the student because it did not include a recommendation for an extended school day.

Whether the parents' claim in this regard relates to the design of the IEP or its implementation (discussed further below), it is without merit (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]).

[15] The parent testified that Medicaid paid for the student's nurse when she was at iBrain (Tr. p. 148).

[16] Care such as feeding, suctioning, care of the student's tracheostomy, and administration of oxygen (see Dist. Ex. 5 at p. 1) could be performed by a registered professional nurse (see "Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs," at p. 14, Office of Student Support Servs. [Jan. 2019], available at https://www.nysed.gov/sites/default/files/programs/student-support-services/nursing-one-to-one-nsgqa.pdf).

Here, the March 2024 IEP provided for 35 periods per week of a 6:1+1 special class placement for all core subjects, as well as three periods per week of adapted physical education and a total of 18 hours per week of related services for the student (Dist. Ex. 1 at pp. 51-52). A review of the allegations reveals that the parents do not argue that the IEP included service and program recommendations at an inadequate frequency or duration. Instead, the parents claim the services recommended in the IEP could not be implemented during a "standard school day." However, according to the March 2024 IEP, the student's related service providers had flexibility in where the student's related services would be provided including in a separate location, e.g., provider's office, or in the student's special education classroom (see id.). On appeal, the parents do not appeal that the IEP was deficient for recommending the services be delivered in a flexible manner, including as push-in services. The iBrain deputy director testified that he was familiar with the concept of when related service providers "push-in" to a class, meaning the student would receive the related services concurrently with the lesson being taught (see Tr. pp. 243, 269-70). The iBrain deputy director acknowledged that students could benefit from both the instruction in the classroom and the related services they were receiving at the same time "if they were working on similar goals" (Tr. pp. 269-71).

Based on the foregoing, the CSE's programming and related services recommendations were reasonably calculated to enable the student to receive educational benefit during a school day and there is no basis for a finding that the student required an extended school day in order to receive a FAPE.

C. Assigned Public School

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. 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]).[17] The Second Circuit has held that claims regarding an assigned

[17] To the extent the parent argues that the IHO applied an incorrect legal standard, the disputed statement of the IHO related to a claim of implementation (see IHO Decision at p. 8). As the IHO noted, it has been held that, with regard to the implementation of a student's IEP, a denial of a FAPE occurs if there was more than a de minimis failure to implement all elements of the IEP, and instead, the school district failed to implement substantial or significant provisions of the IEP (Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 349 [5th

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. 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]).

The parents' position regarding the assigned public site has shifted and created confusion during the impartial hearing process.[18] In the due process complaint notice, the parents alleged they did not receive notice of the assigned school from the district (see Parent Ex. A at p. 5). However, during the impartial hearing, the parents instead attempted to present evidence regarding their visit to the assigned school, which contradicted their earlier claim that they had not received notice of the assigned public school site; however, the IHO ruled that claims arising from

Cir. 2000]; see also Fisher v. Stafford Township Bd. of Educ., 289 Fed. App'x 520, 524 [3d Cir. Aug. 14, 2008]; Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 [10th Cir. 2008]; Neosho R-V Sch. Dist. v. Clark, 315 F.3d 1022, 1027 n.3 [8th Cir. 2003]). Similarly, court in the Second Circuit have premised a failure to implement upon a finding of a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). Accordingly, I do not find that the IHO committed reversible error in stating the legal standards in this matter. Moreover, as the student did not attend the district's recommended programming, the parents' claims were premised upon the district's capacity to implement the program, as discussed herein.

[18] Additional confusion arises from the use of the term "placement" to refer to the assigned public school location, whereas, the term "educational placement" has been found to refer to the "general educational program-such as the classes, individualized attention and additional services a child will receive-rather than the 'bricks and mortar' of the specific school" (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014], quoting T.Y., 584 F.3d at 419).

information purportedly gained from the parents visiting the assigned school were outside the scope of the impartial hearing (see Tr. pp. 105-20, 171-72; IHO Ex. VII).

On appeal, the parents contend that the IHO erred in preventing them from testifying about the assigned public school and erred in finding that they received a timely school location letter.

With respect to notice to the parents of the assigned school, the hearing record includes a school location letter dated May 3, 2024, addressed to the mother (Dist. Ex. 3 at pp. 9-10). While on appeal the parents contend that the district failed to demonstrate the letter was sent to the parents prior to the start of the school year, the parents' attorney conceded this point during the impartial hearing (Tr. pp. 106-07, 114, 118-19; see also Dist. Ex. 3 at p. 9).[19] The parents cannot now, on review, take back this admission. Further, as the IHO noted, the parents' June 2024 10-day notice, which set forth the parents' disagreement with, among other things, the "school placement" and "proposed school location" including the "physical structure and facility of the proposed school location" (Parent Ex. A-A), further supports the conclusion that the parents were aware of the assigned school location prior to the beginning of the 2024-25 school year. Thus, I find no reason to disturb the IHO's finding that the district offered a timely school location letter to the parents (IHO Decision at p. 18).

Regarding the parents' allegations about their visit to the assigned school, generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]). With respect to relief (versus alleged violations), the due process complaint notice must state a "proposed resolution of the problem to the extent known and available to the party at the time" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]).

When a matter arises that did not appear in a due process complaint notice, the next inquiry focuses on whether the district, through the questioning of its witnesses, "open[ed] the door" to the issue under the holding of M.H. v. New York City Department of Education (685 F.3d at 250-51; see also Bd. of Educ. of Mamaroneck Union Free Sch. Dist. v. A.D., 739 Fed. App'x 79, 80 [2d Cir. Oct. 12, 2018]; B.M., 569 Fed. App'x at 59; J.G. v. Brewster Cent. Sch. Dist., 2018 WL 749010, at *10 [S.D.N.Y. Feb. 7, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579,

[19] Further, the parents did not object to the district offering the school location letter into evidence during the impartial hearing (Tr. pp. 55-56, 63-64).

at *14 [S.D.N.Y. Feb. 14, 2017]; D.B. v. New York City Dep't of Educ., 966 F. Supp. 2d 315, 327-28 [S.D.N.Y. 2013]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584-86 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, *9 [S.D.N.Y. Aug. 5, 2013]).

Here, the IHO properly declined to allow the parents to testify about their visit to the assigned public school because they did not raise allegations regarding the appropriateness of the assigned school in the due process complaint notice and did not seek to amend their due process complaint notice to add such allegations (see IHO Ex. VII; Parent Ex. A). As noted, the parents' ten-day notice dated June 17, 2024 asserted that the district's assigned public school could not implement the student's IEP and listed the parents' concerns about the assigned school, including concerns about the physical structure and facility (Parent Ex. A-A). However, an independent reading of the July 2, 2024 due process complaint notice indicates, like the IHO determined, that the parents asserted in plain language that they did not receive a school location letter and that they therefore were unable to visit the assigned school (see Parent Ex. A at p. 4). The parents' due process complaint notice failed to specifically identify any claim regarding the appropriateness of the assigned public school and did not contain any of the concerns about the assigned school that they listed in their previous June 17, 2024 ten-day notice to the district (see Parent Ex. A). Thus, I concur with the IHO that the district had no notice that it would be called upon to defend the capacity of the assigned school to implement the IEP and that it would be improper and unfair to allow the parents to testify about their visit to the assigned school after the district presented and rested its direct case (IHO Ex. VII). Moreover, the district did not open the door to allowing the parents to assert allegations regarding the assigned school; rather, the district asserted that such issues were outside the scope of the parents' due process complaint notice and the district objected to the parents testifying about their visit to the assigned school. I further find that the IHO acted properly throughout the course of the impartial hearing, making reasoned decisions after deliberating both parties' arguments. I decline to find that the IHO's decision to preclude the parent's testimony about her visit to the assigned school denied her of due process.

Accordingly, the appropriateness of the assigned school was not properly raised within the due process complaint notice and, as such, I find no reason to overturn the IHO's decision that it was beyond the scope of the impartial hearing (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]; see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]).

As a final matter the parents' claims regarding an "extended school day" are discussed above as an IEP design claim, but to the extent they relate 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 parents' claims regarding the capacity of the assigned public school to implement the March 2024 IEP were within the scope of the impartial hearing, the allegations specific to the extended school day would fail because the IEP did not offer the student an extended school day, yet, as discussed above, it was substantively appropriate; moreover, it was possible for recommended programming to be delivered within a school day with

push-in sessions of related services (see Dist. Ex. 1 at pp. 51-52). Accordingly, the district could not be found to err in assigning to the student to attend a public school that did not offer an extended school day.

VII. Conclusion

Having found that the IHO properly conducted the impartial hearing and properly found that the district offered the student a FAPE for the 2024-25 school year, the necessary inquiry is at an end and there is no need to address whether iBrain was an appropriate unilateral placement or whether equitable considerations favor the parents.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 29, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER