



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-103

**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:**

Brain Injury Rights Group, Ltd., attorneys for petitioner, by Zachary Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 the decision of an impartial hearing officer (IHO) which denied in part her request to be reimbursed for her son's transportation costs at the International Institute for the Brain (iBrain) for the 2022-23 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which found that it did not offer the student a free appropriate public education (FAPE) for the 2022-23 school year. The appeal must be dismissed. The cross-appeal must be sustained.

### **II. Overview—Administrative Procedures**

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

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 parties' familiarity with this matter is presumed and, therefore, the detailed facts of the student's educational history and the procedural history of this proceeding and the IHO's decision will not be recited here.<sup>1</sup>

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<sup>1</sup> The student in this matter has been the subject of prior impartial hearings, including administrative appeals,

Pertinent to this appeal, the CSE convened on March 17, 2022, to formulate the student's IEP for the end of the 2021-22 school year and beginning of the 2022-23 school year (see generally Dist. Ex. 1 at pp. 1-60). The IEP indicated that due to medical reasons the student "remained remote" and was "receiving all services via telehealth, with a paraprofessional and 1:1 nurse assisting in the home," although the parent reported that the student was "currently medically stable" (*id.* at pp. 2, 14). The IEP noted that on his return to in-person services the student would undergo re-evaluation to gain accurate information regarding his functioning and ability to use equipment and tolerate positioning (*id.* at pp. 2, 14). The March 2022 CSE found the student eligible for special education and related services as a student with a traumatic brain injury and recommended that he attend a 12:1+(3:1) special class in a district specialized school for 35 periods per week (*id.* at pp. 1, 51).<sup>2</sup> In addition, the March 2022 CSE recommended that the student receive the following related services: three 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, and three 60-minute sessions per week of individual vision education services (*id.* at pp. 51-52). The CSE also recommended full-time individual school nurse services daily and the support of individual daily, full-time health paraprofessional services to assist with the student's feeding, ambulation, and safety (*id.* at p. 52). In addition, the CSE recommended one 60-minute session per month of parent counseling and training in a group (*id.* at p. 51). The CSE further recommended assistive technology described as "switch and mount" and one 60-minute session of individual assistive technology services per week (*id.* at p. 52). Further, the CSE recommended 12-month services, noting that the student would receive the same special education program and services for July and August (*id.* at p. 53).

The parent disagreed with the recommendations contained in the March 2022 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2022-23 school year and, as a result, notified the district of her intent to unilaterally place the student at iBrain and seek public funding (see Dist. Exs. 5 at pp. 1-2; 6 at p. 1; Parent Ex. E).

The student attended iBrain during the 2022-23 school year (see Parent Ex. B).<sup>3</sup>

In a due process complaint notice, dated July 6, 2022, the parent alleged that the district failed to offer the student a FAPE for the 2022-23 school year (see Parent Ex. A at pp. 1-8). The

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related to the 2017-18, 2018-19, 2019-20, 2020-21, and 2021-22 school years (see Application of a Student with a Disability Appeal No. 22-064; Application of the Dep't of Educ., Appeal No. 21-079; Application of the Dep't of Educ., Appeal No. 20-041; Application of a Student with a Disability, Appeal No. 20-038).

<sup>2</sup> The March 2022 IEP specified the student's special class as 12:1+(3:1) in accordance with the State regulation that "[i]n addition to the teacher, the staff/student ratio shall be one staff person to three students" (see Dist. Ex. 1 at p. 51; see also 8 NYCRR 200.6 [h][4][iii]). For purposes of the decision, although the parties at times referred to the class as a 12:1+4 special class, the special class program for the student will be referred to as a 12:1+(3:1) special class.

<sup>3</sup> The hearing record includes duplicate copies of the March 2022 iBrain education plan with different page formatting (compare Parent Ex. B with Dist. Ex. 10). For clarity, citations will be made to the parent's exhibit (Parent Ex. B).

parent raised objections to the evaluative information considered by the March 2022 CSE and the parent's participation in the CSE process (id. at pp. 6-8). More substantively, the parent alleged that the student required a "small, structured classroom offering an educational program delivered via a 1:1 direct instruction model" in addition to a 1:1 paraprofessional, "a 1:1 private duty nurse," and "an intensive regimen of related services" to be delivered in 60-minute sessions (id. at p. 3). The parent disagreed with the 12:1+(3:1) class recommendation and alleged that the 6:1+1 special class with related services offered by iBrain continued to be an appropriate program for the student because it enabled the student to attend class and make progress (id. at pp. 4-6). The parent also objected to the school to which the student was assigned to attend for the 2022-23 school year and to the lack of music therapy as a recommendation in the March 2022 IEP (id. at pp. 4, 6).

An impartial hearing convened on October 11, 2022, and concluded on February 22, 2023 after seven days of proceedings (Tr. pp. 97-349).<sup>4, 5</sup> In a decision dated May 3, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year and found that a 12:1+(3:1) special class placement was not appropriate to meet the student's unique needs and "extremely intens[e]" management needs (IHO Decision at pp. 7-8). The IHO also determined that iBrain was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (id. at pp. 9-12). As relief, the IHO ordered the district to reimburse the parent or directly pay for the costs of the student's tuition at iBrain for the 2022-23 school year, in addition to the cost of "a 1:1 paraprofessional and/or private duty nurse," as well as transportation costs limited to when the student used such transportation during the school year (id. at p. 12).

#### **IV. Appeal for State-Level Review**

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer with cross-appeal is also presumed and, therefore, the specific allegations and arguments raised will not be recited here in detail. The essence of the parties' dispute on appeal is whether IHO erred in determining that the district failed to offer the student a FAPE for the 2022-23 school year solely based on the recommendation for a 12:1+(3:1) special class in the March 2022 IEP. The parent also alleges that the IHO should have found a denial of FAPE for the 2022-23 school year for additional reasons. The following issues presented on appeal must be resolved in order to render a decision in this matter:

1. whether the IHO erred in determining that the 12:1+(3:1) special class recommendation contained in the March 2022 IEP was not appropriate to meet the student's needs;

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<sup>4</sup> The parties also convened for a pre-hearing conference on August 19, 2022 and a status conference on September 16, 2022 (see Tr pp. 1-96). On September 26, 2022, the IHO issued an interim decision regarding pendency finding that the parties agreed as to the student's pendency placement and ordered the district to fund the student's tuition at iBrain, door-to-door special transportation, and related services, including 1:1 paraprofessional services (Sept. 2022 Interim IHO Decision).

<sup>5</sup> On October 12, 2022, the IHO issued an interim decision directing the district to have an audio recording of the March 2022 CSE meeting transcribed (Oct. 2022 Interim IHO Decision; see Parent Ex. I).

2. whether the IHO erred by not determining if the district failed to properly and timely evaluate the student;
3. whether the IHO erred by not determining if the district failed to assign a public school location that could appropriately accommodate the student's food allergies; and
4. whether the IHO erred by determining the district's failure to recommend music therapy did not render the March 2022 IEP deficient.

## 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]).<sup>6</sup>

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

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<sup>6</sup> 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).

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. Scope of Review**

Initially, the district alleges that the parent's argument that the student was denied a FAPE because the March 2022 CSE did not recommend home instruction or placement in a New York State approved non-public school (NPS) must be rejected because the parent did not raise such claims in her July 2022 due process complaint notice.

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]).

Here, a review of the parent's due process complaint notice demonstrates that the parent disagreed with the recommendations contained in the March 2022 IEP and argued that the student required a small, structured classroom offering an educational program delivered via a 1:1 direct instruction model, in addition to full-time 1:1 paraprofessional services and 1:1 nursing services (see generally Parent Ex. A at pp. 3-4). Further, the parent alleged that the 6:1+1 special class together with the direct instruction and related services provided by iBrain was appropriate to meet the student's educational needs (id.). The parent did not indicate that because of the student's medical fragility a home instruction program or placement in an NPS was a required program for the student (id.).

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], appeal dismissed [2d Cir. Aug. 16, 2018]; C.M. v. New York City Dep't of Educ., 2017 WL 607579, 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., 961 F. Supp. 2d at 584-86; 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]).

The hearing record reflects that the district did not elicit testimony related to a home based program or an NPS placement. It was the parent's attorney who raised these issues while cross-examining the district's witness (Tr. pp. 163-166). Therefore, the district did not open the door to these issues (see A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d at 282-84; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at \*9). Accordingly, allegations related to the failure of the March 2022 CSE to consider or recommend a home based program or an NPS placement were not raised in the due process complaint notice and were outside the scope of this impartial hearing (see 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]]").

In addition, some issues were raised in the parent's due process complaint notice but have not been raised on appeal, such as allegations regarding parent participation and predetermination, annual goals, assistive technology services, a request for an independent educational evaluation (IEE), and various allegations related to the assigned public school site (see Req. for Rev. at ¶¶ 12-19; Parent Ex. at pp. 6-8). Accordingly, these issues are deemed abandoned.

Based on the foregoing, the issues that remain and will be discussed below are whether the IHO erred by determining the district did not offer a FAPE to the student; whether the district failed to properly and timely evaluate the student; whether the district failed to assign a public school location that could appropriately accommodate the student's allergies; and whether the district's failure to recommend music therapy did not render the March 2022 IEP deficient.

## **B. March 2022 IEP**

### **1. Evaluative Information**

As an initial matter, the parent argues that the IHO erred by not determining that the district failed to properly and timely evaluate the student. However, review of the IHO's decision shows that the IHO noted the district had not evaluated the student and relied on evaluations done by iBrain over the last three years (IHO Decision at p. 7). The IHO further found that the evaluative information did not support the district's recommendation for placement of the student in a 12:1+(3:1) special class (*id.*). The district appeals from the IHO's determinations and argues that the March 2022 CSE had sufficient evaluative information regarding the student's needs and that the IHO erred in determining that formal updated evaluative information was needed prior to a change in the student's class ratio from the 6:1+1 special class the student attended at iBrain to a district 12:1+(3:1) special class.

It is undisputed that the district had not conducted any recent evaluations of the student at the time of the March 2022 CSE meeting. Pursuant to the IDEA and federal and State regulations,



a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree, and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). Pursuant to State regulation, a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability (see 8 NYCRR 200.4[b][4]). The reevaluation "shall be sufficient to determine the student's individual needs, educational progress and achievement, the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education" (8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; 8 NYCRR 200.4[b]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related service needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The hearing record shows that when developing the student's IEP for the end of the 2021-22 school year and beginning of the 2022-23 school year the CSE considered reports from the student's iBrain providers including assessment results, parent and provider input, and input from the iBrain special education coordinator (see Parent Ex. B; Dist. Exs. 1; 5 at p. 2; 20 at ¶19).

As noted above, the district did not conduct its own evaluations of the student, rather, it relied on the evaluation results and progress reports generated by iBrain to determine the student's needs. The June 2022 prior written notice indicated that the March 2022 CSE considered a March 2022 teacher report and a May 2022 assistive technology evaluation (Dist. Ex. 5 at p. 2).<sup>7</sup>

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<sup>7</sup> The district special education teacher explained that the assistive technology evaluation recommended by the March 2022 CSE was completed in May 2022, "before finalizing the Prior Written Notice memorializing the final IEP recommendations for the 2022-23 school year" (Dist. Ex. 20 at ¶ 9). She further explained that "the IEP team felt that the findings in [the assistive technology] evaluation did not alter the original recommendations made by the IEP team in the March 2022 IEP" and therefore "did not feel it was necessary to reconvene" the CSE (Dist. Ex. 20 at ¶ 9).

However, as discussed in more detail below, the present levels of performance section of the March 2022 district IEP reflected the results of iBrain assessments of the student's cognitive skills and social interaction, functional communication, motor abilities and functional independence, vision, and skills in augmentative and alternative communication (Dist. Ex 1 at pp. 1, -2, 4, 7-8, 9-12, 15, 17-18, 20-24). The IEP included numerical scores as well as a narrative description of the student's performance relative to the administered assessments (*id.*). In addition, the March 2022 IEP included detailed descriptions of the student's abilities provided by the providers who worked with him at iBrain (*id.* at pp. 2-31).

The special education coordinator at iBrain testified that when developing an iBrain IEP document for a student, "the content of which is made by many people who are . . . listed as the authors and contributors," the IEP "really starts with the reassessment of the student" (Tr. p. 298). The coordinator stated that the clinicians and teachers working with the student include in the IEP document their assessments of the student in their respective domains and also their evaluation of the student's progress toward current goals (Tr. p. 298). She also indicated that the providers then discuss the results with the parents so they are aware of recommendations and have "addressed any specific concerns or priorities that the parents might have within those goals" (Tr. pp. 298-99). The iBrain coordinator testified that next the supervisors from each department review their department's information (Tr. p. 299). Lastly, she performs a final review of the IEP document to ensure internal consistency and to ensure that that iBrain staff are presenting an accurate and thorough record of the student's assessment results and current performance (Tr. p. 300). When finalized, the coordinator indicated that the document is sent to the family and discussion occurs and then it is sent to the CSE (Tr. p. 300). The iBrain special education coordinator indicated that iBrain provided the IEP document to the CSE in order to give it as much information as possible and specifically in this case, "for many years, the student [had] not attended a public school program" so "the CSE [had] limited information" regarding the student (Tr. p. 301).

The IHO found that the district had changed the student's placement without evaluating the student and that this resulted in a failure to offer a FAPE to the student (IHO Decision at pp. 7-8). It should be noted, however, that the parent did not challenge or criticize the assessments performed by iBrain and relied on by the CSE, or the annual goals developed from the present levels of performance, and, as stated earlier, the March 2022 iBrain report and plan and the March 2022 IEP were largely similar (compare Parent Ex. B, with Dist. Ex. 1; see Parent Ex. A). Additionally, meeting minutes from the March 2022 CSE meeting reflect that the CSE had read the information iBrain provided concerning the student's functioning in academics, speech-language, assistive technology, OT, PT, vision education, and hearing education and the parent was in agreement with the information provided by iBrain and agreed that the CSE should adopt all of the student's annual goals and management needs from the iBrain report and plan (Dist. Ex. 3 at pp. 2-4). The CSE meeting minutes also indicated that an updated social history was scheduled but the parent was not available; however, the student's "case would be open for a reevaluation for the [a]ssistive [t]echnology" evaluation and it could be conducted at that time (Dist. Ex. 3 at p. 2). The CSE meeting minutes indicated that the parent was asked to make the student available in-person for the assistive technology evaluation and the parent stated that was not possible due to the student's health status (*id.*). Further, the March 2022 IEP stated that the student would be reevaluated once he returned to in-person learning (Dist. Ex. 1 at p. 2) The hearing record indicates

that the March 2022 CSE relied on updated reports from iBrain regarding the student, as well as input from the parent, the iBrain special education coordinator, and the student's providers and teachers, all of which constituted sufficient evaluative information for the CSE to develop the student's March 2022 IEP. Although the district bore the responsibility to reevaluate the student as required and its failure to do so constituted a procedural violation, the violation did not impede the student's right to a FAPE as the CSE was able to consider current evaluative information largely derived from iBrain's assessments and reports to develop the student's IEP for the 2022-23 school year.

## **2. Present Levels of Performance**

Although the student's present levels of performance, including his management needs, are not in dispute, a discussion thereof provides context for the issues to be resolved on appeal. The March 2022 district IEP described the student as "an engaging and hardworking 13-year old boy who [was] non-verbal and no[n]-ambulatory with seizures, spastic quadriplegia, cerebral [p]alsy, intractable epilepsy, microcephaly, asthma, nystagmus, Cortical Vision Impairment and a primary disability classification of Traumatic Brain Injury" (Dist. Ex. 1 at p. 2). The IEP indicated that the student was attending a 6:1+1 special class at iBrain remotely due to medical reasons and received all services via telehealth with a 1:1 paraprofessional and a 1:1 nurse assisting in the student's home (Dist. Ex. 1 at p. 2).

The March 2022 IEP stated that the student received 30 minutes of direct instruction with the teacher, daily, to address his individualized academic goals and was working on a range of academic skills related to color and letter identification, the weather, calendar, sequencing, and seasons (Dist. Ex. 1 at p. 3). According to the March 2022 IEP, the student "most often present[ed] with low arousal" during academic sessions, and "benefit[ed] from a multisensory approach to keep him engaged and maintain functional arousal for participation in tasks" (*id.*). The IEP indicated that the student required maximal verbal and tactile cueing in addition to increased wait time for processing and motor planning to activate his switch (*id.* at p. 4). The March IEP also indicated that the student had demonstrated "slow, steady improvements in sustaining functional arousal with the use of incorporating tactile and proprioceptive input" and with such input, could remain awake for up to 20-minutes (*id.* at p. 4). In addition, the IEP stated that "due to his brain injury, there [were] severe impairments in [the student's] cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem solving, information processing and speech which affect[ed] his learning" (*id.* at p. 5). The IEP noted that, in terms of academic goals, the student was working on identifying objects, increasing his attention span, and displaying a broadened range of reactions in response to social interaction (*id.*).

With regard to the student's speech language development, the March 2022 IEP indicated that the student did not initiate contact or communicate intentionally with others and "required a familiar communication partner to interpret his wants, needs, likes and dislikes based on an interpretation of his gestures, body language, facial expressions and behaviors " (Dist. Ex. 1 at p. 9). The student's primary modes of communication included a switch, accessed via head activation, as well as eye movements, body movements, and facial expressions (*id.* at p. 8). The IEP indicated that the student required "maximal processing time, as well as visual, verbal, tactile and physical cues from his paraprofessional to activate his switch" and that the primary goals of

therapy were to establish the prerequisite skills of joint attention and understanding cause and effect (*id.*). The IEP noted that the student was "beginning to understand familiar routines such as the beginning and ending of therapy sessions" where familiar songs were used to enforce these concepts, but he "[did] not recognize his own name, respond to no" or "understand short sentences about familiar objects or people and one step commands with words that describe people or things" (*id.* at p. 10). Further, with regard to the student's oral motor development the IEP stated that the student presented with "reduced muscle tone as well as limited range of motion in his jaw, lips, tongue, and cheeks" (*id.* at p. 11). The student had difficulty "managing secretions as well as following directions to plan and produce the movements necessary to strengthen and coordinate a swallow" (*id.*). His oral motor goals were not addressed during remote telehealth sessions (*id.* at p. 11). The March 2022 IEP indicated that the student received individual speech-language therapy for five 60-minute sessions per week and suggested that the student would benefit from continuation of the same services to "improve comprehension of cause-and-effect activities with the switch and to independently activate his switch to make requests, answer questions, direct actions, and engage in conversational turn-taking" (*id.* at p. 12).

Turning to the student's social development, the IEP indicated that the student reacted to familiar people within his environment by turning toward them but was not able to show awareness or interest in others or interact with other children (Dist. Ex.1 at pp. 8, 13). The March 2022 IEP also stated that the student benefited from moderate to maximum facilitation of his switch to engage in social interactions (*id.* at p. 8).

In terms of the student's physical development, the March 2022 IEP noted that the student was dependent on others for all aspects of daily living skills, including all self-care skills, sensory regulation, and positional changes (which required two-person transfers) (Dist. Ex. 1 at p. 12). The student used a tilt-in-space manual wheelchair for functional mobility and a hospital bed during OT sessions (*id.* at pp. 15, 16, 25). The IEP indicated that the student's "medical conditions affect[ed] his overall arousal and ability to attend throughout the day" (*id.* at p. 22). With regard to seizures, the IEP indicated that the student's seizure activity varied, by frequency and amount, and he "typically require[ed] breaks and reassurance from his paraprofessional or 1:1 nurse" during some therapy sessions (*id.* at p. 12). The March IEP also indicated that the student had airborne allergies for fish, eggs and sweet peas, and a latex allergy and he was receiving all nutrition and hydration through a gastrojejunostomy (G-J) tube (*id.* at p. 31). Further, the IEP stated that the student required a 1:1 nurse for monitoring of vitals, seizure activity, and medication administration including an EpiPen to be used as needed for exposure to known allergens (*id.* at pp. 30-31).

Turning to the student's gross motor development, the March 2022 IEP indicated that the student had "spastic quadriplegia, leading to significant delays in gross motor skills" (Dist. Ex. 1 at p. 18). The IEP noted that the student was receiving sixty minutes of PT five times a week via telehealth services (*id.* at p. 28). The IEP described a typical PT session for the student which included a five minute discussion with his team to assess his health status, 15-20 minutes of passive stretching of upper and lower extremities followed by activities to activate core musculature and promote head and neck control while working on the student's sitting balance and, lastly, the session concluded with gross motor activities of "sitting at the edge of the bed, working on rolling, and promoting upright posture" (*id.*). The IEP stated that on days of low arousal levels, the student

needed "frequent breaks and multiple sensory, tactile and verbal cues" (*id.*). According to the IEP, the student showed a slow rate of progress "due to severe gross motor delays and intellectual deficits related to his multiple diagnoses, spastic quadriplegia, cerebral palsy and intractable epilepsy" and "his complex respiratory status, and lack of in-person services " (*id.* at pp. 28-29).

Next, the IEP indicated that the student received OT three times per week for 60 minutes via telehealth services and the 60-minute session was necessary as it allowed for "adequate time for transfers, preparatory activities, equipment set up, donning/doffing of orthotics, rest-breaks, sensory breaks, change in positioning, demonstrations, repetition, processing/response time, caregiver education, switch use, and medical intervention as needed" (Dist. Ex. 1 at p. 25). The IEP noted that the student "often require[d] moderate to maximum verbal cues for visual attention and visual fixation on items (i.e., a ball, computer screen, paraprofessional, marker, paper etc.)" and was "working on the ability to make a choice between two choices as evidenced by activating his switch for his desired choice, however, this [was] inconsistent" (*id.* at p. 26). According to the IEP, the student worked on engaging with cause and effect switch activation and required "maximum verbal cues, extended processing time, and depending on the day he [would] also require maximal consistent tactile cues and minimal physical assistance in conjunction with maximum verbal cues to rotate or laterally flex his head to the right side to activate his switch" (*id.*). Further, the IEP indicated that the student's "complex medical status affect[ed] his ability to progress in certain functional skills towards his goals, however he continue[d] to present at his prior level of functioning in various areas and ha[d] not demonstrated any regression, despite displaying limited progress towards his goals" (*id.* at p. 27).

The March 2022 IEP indicated that the student received vision education services three times per week for 60 minutes via telehealth services, had cortical visual impairment, and was prescribed eyeglasses, but did not wear them (Dist. Ex. 1 at pp. 20, 22). According to the IEP, the student made slow, steady but inconsistent progress toward his annual goals due his arousal level and health (*id.* at p. 22). The student demonstrated visual attention to materials best when displays were presented in his upper left central visual field, when materials were enlarged, and presented with a contrasting background (*id.*). The student demonstrated difficulty locating items in his lower visual field and often required extended processing time (*id.* at p. 20). The student attended to visual information presented up to 18 inches centrally and peripherally with varying latency (*id.* at pp. 22, 24).

With regard to assistive technology services, the March 2022 IEP indicated that the student received one 60-minute session per week via telehealth services (Dist. Ex. 1 at p. 6). The student "utilize[d] a voice output switch to provide responses to routine questions regarding the weather, days of the week, seasons, colors, and letters" (*id.*). At the time the IEP was developed, the assistive technology provider reported that the student needed to demonstrate more independence with his switch and that a trial of various switch technology was needed to determine the student's "most efficient access point and modality" (*id.* at p. 7).

Turning to hearing education services, the March 2022 IEP indicated that the student had recently been assessed for sign language support and that his iBrain team had determined he benefited from tactile sign language (Dist. Ex. 1 at p. 25). According to the IEP, the student's

speech-language therapist and paraprofessional indicated that they "saw a noticeable improvement in [the student's] attention and participation when tactile signs were incorporated" (id.).<sup>8</sup>

The March 2022 IEP included annual goals and corresponding objectives/benchmarks related to increasing the student's vocabulary using partner assisted scanning; increasing sustained attention to instruction, increasing social skills demonstrated by switch responses or facial expressions with others; increasing switch activation for cause and effect activities including increasing range of motion of head for switch activation and trials of various switches; increasing receptive language skills as demonstrated by switch activation to simple one-step commands and discrimination between two high frequency words; increasing his expressive language skills in order to request/reject, and answer/ask questions; increasing social interactions as demonstrated by gestures, vocalizations, eye gaze, or switch activation within structured and familiar routines/interactions with therapists and peers; increasing initiation of rolling from supine to side; sitting on the edge of his bed or a bench up to three minutes with moderate support to his trunk; increasing participation in academics and classroom; increasing participation in play and leisure activities; increasing participation in self-care activities; visually fixating on visual stimuli in all four quadrants of his visual field; and visually localizing on high contrast materials (Dist. Ex. 1 at pp. 33-45, 49-50). The IEP also included an annual goal related to parent counseling and training and two annual goals related to the duties of the student's paraprofessional (id. at pp. 46-48).

As noted above, for the 12-month 2022-23 school year, the CSE recommended the student attend a 12:1+ (3+1) special class and receive related services of three 60-minute sessions of individual OT, five 60-minute sessions of individual PT, five 60-minute sessions of individual speech-language therapy, three 60-minute sessions of individual vision education services, 1:1 school nurse services, and one 60-minute group counseling session per month of parent counseling and training (Dist. Ex. 1 at pp. 51-52). The IEP also recommended the student be provided with a 1:1 paraprofessional for health, ambulation, feeding and safety (id. at p. 52). With respect to assistive technology devices and services, the CSE recommended that the student be provided with the support of a switch and position mount throughout the school day and receive one 60-minute session per week of individual assistive technology support (id.).

The IEP also included the following special transportation accommodations/services: transportation from the closest safe curb location to school, adult supervision in the form of 1:1 nursing services, use of oxygen during transport, a lift bus, air conditioning, and limited travel time (Dist. Ex. 1 at pp. 56-57). The IEP also indicated that the student had limited mobility, used a wheelchair and walking aids, and required an accessible school building (id. at p. 59).

### **3. 12:1+(3:1) Special Class**

The district asserts that the IHO erred in finding that, based on the student's management needs, the special class ratio recommended by the district was not suitable for the student and that

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<sup>8</sup> Although the iBrain IEP included a hearing services recommendation and goal (Parent Ex. B at pp. 22-23, 36-37), and was discussed at the March 2022 CSE meeting, hearing education services were not recommended in the district IEP which indicated that those services were recommended for students with documented hearing loss (Dist. Ex. 1 at p. 29).

increasing size of the student's class from the ratio the student was in at iBrain was contrary to meeting the needs of a "medically fragile" student (IHO Decision at pp. 7-9). The district argues that a 12:1+(3:1) special class provides an intense level of adult support designed to address the student's needs. Further, the district argues that the IHO "oversimplified" the argument that the student should be placed in a smaller class due to his highly intensive needs as a medically fragile student and did not consider that the student's multiple severe disabilities required a program consisting of habilitation and treatment, a student to staff ratio of at least one staff to three students, and services from teachers, supplementary school personnel, and related service providers.

As an initial matter, the IHO appears to have made an error in reviewing the special classes available as part of the continuum of services. Of note, in referencing the recommended 12:1+(3:1) special class recommendation, the IHO noted that a class size of 12 students is more appropriate for a student "whose management needs [may] interfere with the instructional process, to the extent that an additional adult is needed within the classroom to assist in the instruction of such students" (IHO Decision at pp. 7-8, citing 8 NYCRR 200.6[h][4][i]). However, the subsection referenced by the IHO described a 12:1 special class; a subsequent subsection describes the recommended 12:1+(3:1) special class (8 NYCRR 200.6[h][4][i], [iii]). In describing a 12:1+(3:1) special class, 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+(3:1) 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]).

The parent asserts that the student required placement in a class of no more than six students as recommended by iBrain staff. State regulation indicates that the maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction (see 8 NYCRR 200.6[h][4][ii][a]). Management needs, in turn, are defined by State regulations as "the nature of and degree to which environmental modifications and human material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social and physical development (8 NYCRR 200.1[ww][3][i][d]).

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

While the IHO was correct in stating that the student's management needs were intensive due to his health, his analysis did not take into account the State regulation describing the actual class recommended by the March 2022 CSE, which states that 12:1+(3:1) special classes are

designed for students "with severe multiple disabilities, whose programs consist primarily of habilitation and treatment." Here, the hearing record shows that the student met the criteria for placement in a 6:1+1 special class due to his highly intensive management needs and requirement for a high degree of individualized attention and intervention. But the student also met the criteria for placement in a 12:1+(3:1) special class given that he had severe multiple disabilities and his educational program consisted primarily of habilitation and treatment. Accordingly, placement in a special class with either student-to-staff ratio could have been appropriate for the student and the mere fact that the district chose a different special class ratio than that favored by iBrain does not render it an inappropriate recommendation.

Moreover, to the extent that, although alleged entirely as an assigned school claim in both the parent's due process complaint notice and on appeal, the parent's claims related to the ability of the assigned school to accommodate the student's medical needs related to his severe allergies can be interpreted as extending to the appropriateness of the 12:1+(3:1) as, in effect, a "substantive attack[] on [the] IEP . . . couched as [a] challenge[] to the adequacy" of the assigned public school site's capacity to implement the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 245 [2d Cir 2015]), such argument must fail. The hearing record supports a finding that the district's recommendations concerning the student's health needs were appropriate and there is no evidence in the record that, to the extent the student was going to be educated in a classroom setting, a 12:1+(1:3) special class, due to the nature of its staffing ratio, was inappropriate, or less appropriate than a 6:1+1 special class, as a placement in which to implement those aspects of the student's IEP which related to his health needs, including his severe allergies.<sup>9</sup>

In the context of the 12:1+(1:3) special class recommendation, to address the student's significant management needs, the March 2022 IEP recommended that the student receive the assistance of a 1:1 paraprofessional; aided language stimulation; modeling of what was being demanded with repetition; repetitive additional processing time; repetition of verbal clues with physical clues to increase comprehension; 1:1 instruction using a direct instructional model; a highly structured classroom or corner room with less stimulus from visual and auditory distractions; direct instruction, multisensory supports, sensory breaks during instruction, and repeated directions; iPad based communications tool; access to an augmentative communication device; incorporation of the student's interests to maximize his interest and make skills relevant to his future; an instructional laptop with resources and software about literacy and math skills; and a single button voice output switch (id. at pp. 29-30).

In addition, the March 2022 CSE recommended the student receive school nurse services for constant monitoring of his vitals; verbal cues, praise and sufficient motivation to remain engaged and interested in activity; close supervision during therapy due his history with seizure and other complex medical diagnosis; frequent rest breaks as needed to maintain energy and stamina; and an adaptive environment to reduce light-gazing and increasing activity participation (Dist. Ex. 1 at p. 30). Further, the March 2022 CSE recommended that the student wear bilateral

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<sup>9</sup> The parent testified that the student had airborne fish and egg allergies, "his immune system [was] constantly compromised " and he "[got] sick easily" and was sensitive to loud noises as they gave him cluster seizures (Tr. pp. 232-35). The parent noted that the student had "nursing 24 hours in-house" (Tr. p. 235) and confirmed that she had "serious concerns about [the student's] health in a school environment" (id.).



AFOs, in addition to bilateral wrist hand orthoses, daily, to avoid further contractures and restore the range of motions and that he use a stander to increase weight bearing (*id.*). With regard to the student's health management needs the March 2022 CSE noted that the student was at risk for impaired gas exchange related to airway inflammation, bronchoconstriction, and excessive mucus production; injury related to seizure activity; physical disability; neuromuscular, perceptual, visual, and cognitive impairment; and aspiration related to physical disability and seizure activity (*id.* at p. 31). The March 2022 CSE also noted the student's food and latex allergies and need for an EpiPen (*id.*).

The March 2022 IEP indicated that the CSE considered special class ratios of 6:1+1, 8:1+1, and 12:1+1 for the student but rejected these programs as they would not have met the student's needs (Dist. Ex. 1 at p. 60). Further, the March 2022 IEP indicated that the CSE considered a State approved nonpublic school day program but rejected that idea because the CSE did not have the required assessments to consider a deferral for a nonpublic school placement (*id.*). The March 2022 IEP also indicated that the CSE discussed a home instruction program for the student but that such program required medical paperwork to be submitted directly to the district (*id.*).

According to the affidavit of the district special education teacher who was a member of the March 2022 CSE, the district did not recommend placement in a 6:1+1 or 8:1+1 special class because they were overly restrictive and would not meet the student's needs at the time (Dist. Ex. 20 ¶ 15).<sup>10</sup> Further, the affidavit of the district special education teacher indicated that the March 2022 CSE rejected the 12:1 special class with a single 1:1 paraprofessional because it would not have met the needs of the student (*id.*). The special education teacher indicated that the district also rejected placement in an approved nonpublic school because it would not have addressed the student's "stated medical vulnerabilities" and that home/hospital instruction was discussed but rejected by the parent because she did not want to submit the necessary paperwork to the designated office (Dist. Ex. 20 at ¶ 15). Additionally, the special education teacher indicated that the district felt that the 12:1+(3:1) special class would have provided the student enough support to be able to access the curriculum and make appropriate progress in all his areas of need (*id.* ¶ 14). The special education teacher testified that in her opinion she felt that the 12:1+(3:1) special class could have met the student's needs (Tr. p. 169).

In finding that the district failed to meet its burden to prove that the 12:1+(3:1) special class was appropriate, the IHO also focused on the district's adoption of the iBrain plan in most other respects (IHO Decision at pp. 7-8). However, the district was not required to replicate the identical setting used in the private school in order to offer a FAPE to the student (*see, e.g., M.C. v. Mamaroneck Union Free Sch. Dist.*, 2018 WL 4997516, at \*28 [S.D.N.Y. Sept. 28, 2018]; *Z.D. v.*

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<sup>10</sup> It is unclear as to why the district special education teacher used the word restrictiveness in describing a difference between special classes. Class size and the level of adult support are, generally speaking, unrelated to the IDEA's least restrictive environment (LRE) requirement (34 CFR 300.114[a][2][i]; 300.116[a][2]; 8 NYCRR 200.6[a][1]; *R.B. v. New York Dep't of Educ.*, 603 Fed App'x 36, 40 [2d Cir. Mar. 19, 2015] [stating that "[t]he requirement that students be educated in the [LRE] applies to the type of classroom setting, not the level of additional support a student receives within a placement"]; *see T.C. v. New York City Dep't of Educ.*, 2016 WL 1261137 at \*13 [S.D.N.Y. Mar. 30, 2016] [stating that "[a] less restrictive environment refers to the ratio of special education to general education students in the same classroom, not the ratio of special education students to teachers"]).

Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at \*6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]). Nor was the district required to adopt all of the recommendations of the iBrain staff (see Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson, 325 F. Supp. 2d 141, 145 [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see also Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisis-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

Based upon the foregoing, the hearing record supports the district's position that the recommended 12:1+(3:1) special class placement was appropriate and reasonably calculated to enable the student to receive educational benefits and afford him the opportunity to make appropriate progress in light of his circumstances for the 2022-23 school year, taking into account his intensive management needs, complex medical needs, multiple diagnoses and an educational program which focused largely on habilitation and treatment.

#### **4. Music Therapy**

Turning to the parent's assertion that the IHO erred in finding that the student did not need music therapy in order to receive a FAPE. The parent argues that music therapy benefitted the student and helped develop his skills across all domains including executive functioning, range of motion, motor planning, emotional identification, self-expression, problem-solving, decision-making, reasoning, and comprehension. The district argues that even though the evidence in the hearing record may support that music therapy was generally beneficial to the student, it is not clear from the hearing record that the student received music therapy as part of his program at iBrain for the 2022-23 school year and, thus, the IHO correctly determined that the March 2022 IEP was not insufficient without it.

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]).

The parent in her closing brief alleged that music therapy was a part of the student's program at iBrain during the 2022-23 school year (Parent Post Hr'g Brief at p. 14). According to iBrain's director of special education, the student received two 60-minute sessions of music therapy per week (Parent Ex. H ¶ 11). However, the March 2022 iBrain report and plan, which the March 2022 CSE relied on in developing the student's March 2022 IEP, did not identify music therapy as a recommended related service for the student (see Parent Ex. B).

According to the March 2022 iBrain report and education plan, the student showed a preference for activities utilizing music (Parent Ex. B at pp. 1-2). The iBrain plan noted that during vision education services, the student would look toward motivating music and sounds (*id.* at p. 13). Further the March 2022 iBrain plan noted that the student enjoyed class activities that involved music and that music motivated the student to communicate (*id.* at pp. 5-6). However, the March 2022 iBrain plan does not contain a recommendation for music therapy as alleged by the parent (*see* Parent Ex. B at pp. 48-52).

During the March 2022 CSE meeting, the student's iBrain vision education services provider indicated that the student responded to multisensory materials but preferred auditory input such as music (Parent Ex. I at p. 8). The student's OT provider at iBrain echoed the vision education services provider's comment about music being a preferred method to stimulate arousal and also noted that the student enjoyed class activities that involved music (*id.* at pp. 11-12). The student's PT provider indicated that the student was more motivated to work and had "better endurance to perform multiple activities with the presence of music" (*id.* at p. 14). There was no mention that the student received music therapy as a service or that the student required music therapy as a service for the upcoming school year.

Even if the student had received music therapy during the 2022-23 school year, comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE; rather it must be determined whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint notice, and whether the IEP developed by its CSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (*Rowley*, 458 U.S. at 189, 206-07; *R.E.*, 694 F.3d at 189-90; *M.H.*, 685 F.3d at 245; *Cerra*, 427 F.3d at 192; *Walczak*, 142 F.3d at 132; *see R.B. v. New York City Dep't. of Educ.*, 2013 WL 5438605 at \*15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], *aff'd*, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; *M.H. v. New York City Dep't. of Educ.*, 2011 WL 609880, at \*11 [S.D.N.Y. Feb. 16, 2011] [finding that "the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent"], quoting *M.B. v. Arlington Cent. Sch. Dist.*, 2002 WL 389151, at \*9 [S.D.N.Y. Mar. 12, 2002]; *see also Angevine v. Smith*, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy comparisons that were made of a public school and unilateral placement]; *B.M. v. Encinitas Union Sch. Dist.*, 2013 WL 593417, at \*8 [S.D. Cal. Feb. 14, 2013] [noting that "[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits"], quoting *D.H. v. Poway Unified Sch. Dist.*, 2011 WL 883003, at \*5 [S.D. Cal. Mar. 14, 2011]).

Based on the information available to the March 2022 CSE, the IEP included multiple references in the student's present levels of performance indicating that he enjoyed listening to music, he was able to make simple requests during preferred tasks such as music, he was able to

use his switch to ask for more music when music is stopped, and he demonstrated increased engagement when presented with preferred sensory input such as music (Dist. Ex. 1 at pp. 3, 4, 6, 11, 12, 22, 27, 28). Additionally, at least one annual goal incorporated the student's use of a switch to request more music (id. at p. 39).

Accordingly, review of the March 2022 IEP reveals that based on the evaluative information available to the CSE, the CSE did not fail to offer the student a FAPE because it did not opt to recommend music therapy as a related service for the student.

### **C. Assigned School Location and Student's Allergy Needs**

Turning now to the parent's argument that the assigned school location was not appropriate for the student due to his severe food allergies, the parent asserts that the student would have been put "in a potentially dangerous position as there [we]re too many students that could potentially cause [the student] to have a serious allergic reaction." The district argues that the assigned school location could have implemented the recommendations in the March 2022 IEP, which included supports and management resources to address the student's severe allergies and ensure his safety.

Some of the health concerns identified in the March 2022 iBrain IEP were noted in detail on the March 2022 IEP (compare Parent Ex. B at pp. 30-32, with Dist. Ex. 1 at pp. 2-17, 30-31). For example, the March 2022 IEP noted in multiple locations that the student had a complex medical history, that the student had a brain injury due to loss of oxygen at birth and had a history of cerebral palsy, cortical blindness, spastic quadriplegia, severe epilepsy, asthma, GERD, chronic hip dislocation, precocious puberty, and aspiration pneumonia (Dist. Ex. 1 at pp. 11, 14, 27, 29-30, 57). The March 2022 IEP noted that the student was non-verbal and non-ambulatory, he received all nutrition and hydration through gastric and jejunal tubes, and he was fully dependent in all areas of self-care, positional changes, sensory regulation, and mobility to navigate his environment (id. at pp. 11-12, 15-16, 18, 22, 27-28, 31, 57). The March 2022 IEP further noted that the student's medical condition affected his overall arousal and ability to attend throughout the day and included an environmental management need that indicated the student needed "[f]requent rest breaks as needed [to] maintain energy and stamina" in addition to a human management need of "[v]erbal cues, praise and sufficient motivation to remain engaged and interested in activity" (id. at pp. 22, 30). Further, the March 2022 IEP identified in two places that the student had food allergies, identified as an airborne allergy to fish, eggs, and sweat peas, and latex allergies and that the student had an EpiPen ordered by his doctor (id. at pp. 14, 31).

Although the March 2022 IEP did not include present levels of performance or management needs directed specifically at asthma monitoring, the IEP did include an annual goal "regarding close monitoring of [the student's] medical needs" (Dist. Ex. 1 at pp. 2-31, 48). The annual goal also included short-term objectives that indicated there would be observation for "aspiration precaution at all times" and for the student to "maintain an upright position as appropriate" (id. at p. 48). Another objective was directed at the use of medications and monitoring administration of anticonvulsive medications including their side effects (id.).

In addition to reflecting the student's significant health management needs, the March 2022 IEP recommended programming specifically to address the student's health related needs including daily full-time 1:1 school nurse services and daily full-time individual health paraprofessional

services for ambulation, feeding, and safety (Dist. Ex. 1 at p. 52). The March 2022 IEP also recommended staff training related to the student's seizures, G/J tubes, and safety awareness (*id.*).

A child who is medically fragile and needs school health services or school nurse services 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] [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"]).<sup>11, 12</sup> With regard to skilled nursing services on a student's IEP, State guidance provides that "[d]ue to the frequency of changes to orders for nursing treatment and/or medications, the specific nursing service and/or medication to be provided should not be detailed in the IEP" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4, Office of Special Educ. Mem. [Jan. 2019], available at <http://www.p12.nysed.gov/specialed/publications/documents/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf>). Instead, the guidance document provides that "[t]he nursing treatment and/or medication orders [should be] documented on an Individualized Health Plan (IHP), which is a nursing care plan developed by an RN [and] maintained in the student's cumulative health record . . . and . . . updated as necessary" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4). However, in another State guidance document, it is acknowledged that an IHP is not required by law but "is strongly recommended for all students with special health needs-particularly those with nurse services as a related service on their individualized education plan (IEP)" ("Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs," at p. 9, Office of Student Support Servs. [Jan. 2019], available at <http://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf>).

On appeal, the parent's assigned school claims appear to be limited to her concerns regarding the student's allergies and the assigned school's alleged inability to implement those aspects of the IEP which addressed his allergy-related health needs.

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

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<sup>11</sup> "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 free appropriate public education as described in the individualized education program of the student" (8 NYCRR 200.1[ss][1]).

<sup>12</sup> "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 free appropriate public education as described in the individualized education program of the student" (8 NYCRR 200.1[ss][2]).

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]).<sup>13</sup>

The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F. 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at \*12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at \*9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at \*25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at \*15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at \*14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at \*13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at \*9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at \*7 [S.D.N.Y. Feb. 11, 2016]).

Addressing the concerns of the parent, the parent coordinator at the assigned public school recalled conducting a tour with the parent and also the parent sharing her concerns regarding the student's allergies, but that she did not respond to specific accommodations the school would put into place for his allergies and that her role was to "give the parents the tour," and "to discuss what our program is about" (Tr. pp. 184-190).

The parent coordinator at the assigned public school recalled conducting the tour with the parent (Tr. p. 184). She testified that the 12:1+(3:1) special classes at the assigned public school were for the most fragile students (Tr. p. 196). She explained that although she showed the parent a 12:1+(3:1) classroom there were four 12:1+(3:1) classrooms for the student's age group and she would not have known which particular class the student would have been assigned to (Tr. p. 196). The parent coordinator testified that she informed the parent that students graduate when they turn 14 but that he would have been there for one year (Tr. p. 195). Lastly, in her testimony, the parent coordinator stated that she would have deferred program questions to the administrator to answer

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

and she did not recollect discussing related services or allergy accommodations with the parent (Tr. pp. 189-192, 196-197).

In addition, the special education coordinator testified that the student would be provided with a 1:1 nurse who would have been always with the student, "wherever the student goes" to help monitor the student for allergic reactions and all staff who would work with him would be informed of the allergies (Tr. p. 130, 135-37, 139). Specifically for the student's fish and egg allergy, the special education coordinator testified that the student would eat lunch in the classroom rather than the cafeteria and that other than the student during lunch, no one would be permitted to eat in the classroom to minimize the risk of an allergic reaction (Tr. pp. 134-135). Further, she testified that the school could have made arrangements to guarantee no one who may have contact with the student's special class ate fish or eggs during the school day (Tr. pp. 135-36).

Accordingly, based on the information in the hearing record the parent's arguments on appeal regarding the assigned school's lack of capacity to implement those aspects of the March 2022 that addressed the student's medical needs related to his allergies are speculative in nature and do not provide a basis for finding a denial of FAPE. Moreover, the district provided evidence during the impartial hearing concerning its capacity to implement the student's IEP at the assigned school site which further supports a finding that the parent's arguments concerning the assigned school site are unavailing.

## **VII. Conclusion**

Having determined that the evidence in the hearing record supports a finding that the district offered the student a FAPE for the 2022-23 school year, the necessary inquiry is at an end and there is no need to reach the issues of whether iBrain was an appropriate unilateral placement or whether equitable considerations weighed in favor of the parents' request for relief. The IHO's decision that the district failed to offer the student a FAPE for the 2022-23 school year is reversed.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the May 3, 2023 IHO decision is modified by reversing that portion which found that the district failed to offer the student a FAPE for the 2022-23 school year and ordered funding for the unilateral placement at iBrain including tuition, a 1:1 paraprofessional, and transportation costs for that school year.

**Dated:** Albany, New York  
August 21, 2023

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**