The University of the State of New York

The State Education Department
State Review Officer
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No. 23-105

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

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Brian J. Reimels, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondent, by Angelo A. Lagman, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of the impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter for the 2009-10 through 2021-22 school years and ordered it to fund the costs of the student's tuition, related services, transportation, and fees for the student's attendance at the International Institute for the Brain (iBrain) for the 2020-21 and 2021-22 school years and provide the student extended eligibility through the age of 25. The appeal must be sustained in part.

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 and history of the case will not be recited here. Briefly, the student has been found eligible for special education as a student with multiple disabilities and, after moving to the district, attended a 12:1+(3:1) special class in district specialized schools for the 2009-10 through 2019-20 school years and received occupational therapy (OT), physical therapy (PT), speech-language therapy, and special transportation (see Parent Exs. A at pp. 3-4; EE at pp. 15-16; KK at pp. 16-17; MM at pp. 17-18; UU at pp. 17-18; AAA at pp. 20-21; EEE at pp. 20-21; LLL at pp. 20-21; RRR at pp.

18-19; AAAA at pp. 17-18).[1] In March 2020, schools closed due to the COVID-19 pandemic, and the district provided the student with a remote learning plan dated June 10, 2020 (Dist. Ex. 2).

On June 24, 2020, the parent executed a contract with iBrain for the 2020-21 school year (Parent Ex. F). The parent disagreed with the recommendations contained in the student's 2020 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2020-21 school year and, as a result, in a letter dated July 10, 2020, the parent notified the district of her intent to unilaterally place the student at iBrain (see Parent Ex. G). In a due process complaint notice dated July 28, 2020, the parent alleged that the district failed to offer or provide the student a free appropriate public education (FAPE) for the 2009-10 through 2020-21 school years (Parent Ex. A).

According to a January 28, 2021 prior written notice, a CSE convened on January 14, 2021 and again recommended that the student attend a 12:1+(3:1) special class in a district specialized school and receive related services (Parent Ex. K at p. 1).[2] In a school location letter also dated January 28, 2021, the district notified the parent that the student was assigned to attend the same public school site that she already had been attending for high school (compare Parent Ex. K at p. 5, with Parent Ex. YY at p. 1). On April 8, 2021, a CSE convened and developed an IEP with a projected implementation date of April 23, 2021 (Parent Ex. N). The April 2021 CSE recommended that the student attend an 8:1+1 special class in a specialized school and receive the following related services on a weekly basis to be delivered either in a separate location or in the special class: four 60-minute sessions of individual speech-language therapy, one 60-minute session of group (3:1) speech-language therapy, five 60-minute sessions of individual OT, and five 60-minute sessions per week of individual PT (Parent Ex. N at pp. 30, 37). The CSE also recommended one 60-minute session per month of parent counseling and training, full time 1:1 paraprofessional services, assistive technology and one 60-minute session per week of assistive technology services, 12-month services, and supports for school personnel on behalf of the student (id. at pp. 30-31). For special transportation, the April 2021 CSE recommended a 1:1 paraprofessional, limited travel time (no more than 60 minutes), and a lift bus with air conditioning that would accommodate a regular size wheelchair (id. at p. 36). In a school location letter dated June 14, 2021, the district identified the particular public school site to which it assigned the student to attend for the 2021-22 school year (Parent Ex. P at p. 5).

The parent disagreed with the recommendations for the 2021-22 school, as well as with the assigned public school site, and, as a result, in a letter dated June 23, 2021, the parent notified the district of her intent to unilaterally place the student at iBrain (see Parent Ex. Q). On June 26,

[1] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. In addition, while exhibits were entered into evidence during the merits phase of the impartial hearing using exhibit designations that overlapped with those used during the hearing date devoted to addressing the student's pendency placement, all citations to exhibits in this decision are to those exhibits entered during the substantive portion of the impartial hearing. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] A copy of a January 2021 IEP was not included in the hearing record. According to the prior written notice the parent did not participate in the CSE meeting (Parent Ex. K at p. 2).

2021, the parent executed a contract with iBrain for the 2021-22 school year (Parent Ex. R). In a due process complaint notice dated July 8, 2021, the parent alleged that the district failed to offer or provide the student a free appropriate public education (FAPE) for the 2021-22 school year (Parent Ex. B).

A. Due Process Complaint Notices

As noted above, the parent's July 2020 and July 2021 due process complaint notices alleged a denial of a FAPE for the 2009-10 through 2021-22 school years (Parent Exs. A; B). With respect to the 2009-10 through 2020-21 school years, the parent asserted that the student "languished in inappropriate [district] placements" and "ha[d] been unable to make meaningful educational progress" (Parent Ex. A at p. 4). Specifically, the parent argued that for all of the school years at issue, the CSE failed to recommend related services in the frequency and duration that would allow the student to make progress and that the CSE failed to recommend a non-public school with students with similar educational needs, instead placing the student in a 12:1+4 special class in a district specialized school with related services of OT, PT, and speech-language therapy (id. at pp. 3-4). The parent alleged that the district improperly found the student eligible for special education as a student with multiple disabilities instead of as a student with a traumatic brain injury (id. at p. 6). The parent argued that the CSE failed to develop appropriate annual goals; failed to timely conduct appropriate and comprehensive evaluations; denied the parent meaningful participation in the educational planning for the student; failed to recommend and provide appropriate related services; failed to address the student's highly intensive management needs; failed to address the student's academic needs; failed to create appropriate present levels of performance on the student's IEPs; and failed to recommend an appropriate educational placement for the student from the 2009-10 school year through the 2020-21 school year (id. at pp. 6-7).

With respect to the 2021-22 school year specifically, the parent contended that the April 2021 CSE failed to: appropriately classify the student; recommend appropriate and measurable goals; recommend the related services necessary to prevent regression or confer a meaningful benefit to the student; recommend individual parent counseling; and that the district failed to recommend an appropriate school location for the student (Parent Ex. B at pp. 3-4). Of note, the parent argued that the student exhibited characteristics of cortical visual impairment (CVI) and that the district's failure to recommend vision education services (VES) constituted a denial of a FAPE for the student (id. at p. 4). The parent also alleged that the student needed music therapy and that the IEP failed to recommend it (id.).

Regarding the assigned public school site, the parent claimed that the school to which the district assigned the student to attend for the 2021-22 school year could not meet the student's academic, social, physical, or intensive management needs (Parent Ex. B at pp. 4-5). The parent argued that the proposed 8:1+1 special class placed the student in danger as she was visually impaired and had difficulties ambulating, the recommended class would expose her to students with "intense behavioral and communication needs based on the classification of autism" and would also present a health hazard for her (id. at p. 5). The parent asserted that the assigned public school did not offer an extended school day and was unable to provide the student with all of her IEP-mandated services because there would not be enough hours in the school day to do so (id.).

The parent asserted that iBrain was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of her requested relief (Parent Exs. A at p. 5; B at pp. 2-3, 5-6). For relief, the parent requested a finding that the district failed to offer the student a FAPE for the 2009-10 through 2021-22 school years; an order directing the district to provide the parents with related service records for the 2017-18, 2018-19 and 2019-20 school years; an order directing the district to conduct evaluations including assistive technology, OT, PT, speech-language, and neuropsychological evaluations; a finding that iBrain was an appropriate unilateral placement for the student for the 2020-21 and 2021-22 school years; a finding that the equitable considerations supported the parent's requested relief; an order directing the district to immediately fund or reimburse iBrain tuition for the 2020-21 and 2021-22 school years; an order directing the district to immediately fund or reimburse the student's transportation to and from iBrain; an order directing the district to fund a bank of compensatory education services equal to eleven years of tuition and related services at iBrain; a determination that the student has extended eligibility for special education services until the age of 25; an order directing the CSE to reconvene to amend the student's IEP to reflect the components of the student's iBrain educational programs; and an order directing the district to fund the provision of a 1:1 paraprofessional and/or nurse at iBrain for the 2021-22 school year (Parent Exs. A at pp. 8-9; B at p. 6).

B. Impartial Hearing Officer Decision

On September 21, 2020 and October 6, 2020, the parties appeared before an IHO who was initially assigned to the matter and addressed the student's pendency placement (IHO I) (see Tr. pp. 1-37). In an interim decision on pendency dated October 26, 2020, IHO I noted that the student's last agreed upon placement was the January 2020 IEP, which placed the student in a 12:1+(3:1) special class, but that, as of March 13, 2020, all public schools were closed as per order of the governor for the remainder of the school year due to the COVID-19 pandemic; nevertheless, IHO I determined that the January 2020 IEP established pendency, not the student's new placement at iBrain (Oct. 26, 2020 Interim IHO Decision at p. 3).[3]

Thereafter, on May 21, 2021, the IHO who presided over the remaining hearing dates and issued the decision which is the subject of this appeal (the IHO) was assigned (see Nov. 1, 2021 Interim IHO Decision at pp. 1, 2). Two prehearing conferences and eight status conferences were held between June 2, 2021 and March 24, 2022 (see Tr. pp. 38-244; Aug. 19, 2021 Tr. pp. 1-8). In an interim decision, dated November 1, 2021, the IHO consolidated the July 28, 2020 and July 8, 2021 due process complaint notices (see Nov. 1, 2021 Interim IHO Decision). The IHO also issued an interim decision dated December 23, 2021 that ordered the district to fund the full cost of a neuropsychological IEE of the student and the full cost of an assistive technology IEE of the student (Dec. 23, 2021 IHO Interim Decision at p. 5). The parties proceeded to the substantive portion of the impartial hearing beginning on May 10, 2022, which concluded on June 30, 2022, after six days of proceedings (see Tr. pp. 245-838).

In a final decision dated May 4, 2023, the IHO found that the district failed to offer the student a FAPE for the 2009-10 through 2021-22 school years (IHO Decision at p. 54). The IHO

[3] The interim decision on pendency issued by IHO I was appealed and upheld by the SRO in Application of a Student with a Disability, Appeal No. 20-184.

held that the parent's claims related to the years before the 2018-19 school year were barred by the statute of limitations but agreed with the parent's argument that the IDEA did "not preclude the potential for an award granting compensatory education and/or related services, where or if the facts and/or evidence demonstrate[d] a denial of FAPE during the period(s) in question; specifically, the 2009/2010 through 2021/2022 school years" (id. at p. 22).

The IHO determined that the IEPs did not reflect that the district obtained or integrated sufficient evaluative data relative to the student, which impeded the parent's ability to meaningfully participate in the decision making process and prevented the district from being able to offer the student an appropriate placement that would confer an educational benefit in light of the student's unique needs (IHO Decision at pp. 25, 27, 32-34). In particular, the IHO found that the district failed to evaluate the student's needs related to "her exhibitions of CVI," which she held to be an issue that the district should have identified as far back as 2009, and that the district's failure to evaluate the student's vision needs or recommend vision education services constituted a gross violation of the IDEA (id. at p. 28).

In regard to program recommendations, the IHO found that from the 2012-13 through 2019-20 school years, while the student attended the district program, she "exhibited stagnant growth" and there was a lack of evidence of measurable progress such that the CSEs' recommendations for a program consisting of a 12:1+(3:1) special class with related services of OT, PT, speech-language therapy, parent counseling and training, and assistive technology that "remained largely unchanged for at least eight (8) years" were not appropriate (IHO Decision at pp. 29, 34). The IHO noted testimony that 30-minute sessions did not afford enough time for the delivery of the related services given the student's needs (id. at p. 29). Thus, the IHO held that the district's IEPs from the 2012-13 through 2020-21 school years failed to mandate an adequate amount and frequency of OT, PT, and speech-language services, thereby substantively denying the student a FAPE for those school years (id. at p. 30). The IHO also held that the hearing record demonstrated that the district neglected the student's severe delays in receptive and expressive language skills, cognition, communication and social skills, that iBrain's music therapy program aided the student in progressing in all of those areas, and that the district's failure to recommend music therapy for the student from the 2018-19 through the 2020-21 school years thereby denied the student a FAPE (id.). Regarding special transportation, the IHO found that the hearing record established that the student required a mobility paraprofessional as far back as the 2013-14 school year, but that the district failed to recommend a mobility professional in the student's IEPs from the 2013-14 through the 2020-21 school years, thereby denying the student a FAPE (id. at p. 37).

Finally, regarding the assigned public school site, the IHO found that "the operating hours of the school were not coterminous with the [extended school day] program mandated by the [April] 2021 IEP" and that, therefore, the school did not have the capacity to implement the IEP for the 2021-22 school year (IHO Decision at p. 34).

Turning to the relief sought by the parent, the IHO determined that the parent met her burden to prove that iBrain constituted an appropriate unilateral placement for the student and met the student's unique needs for the 2020-21 and 2021-22 school years (IHO Decision at pp. 40-42). As to equitable considerations, the IHO reviewed the parent's ten-day notices for the 2020-21 school year and the 2021-22 school years and found them to be timely and sufficient to afford the district the opportunity to resolve the parent's concerns before the parent enrolled the student in

iBrain (id. at pp. 43-45). As such, the IHO determined that the district should provide full funding for the costs of the student's tuition, related services, and transportation at iBrain for the 2020-21 and 2021-22 school years (id. at pp. 45-46, 54-55).

In regard to the parent's request for compensatory education relief, the IHO found that the district's "failure to timely and appropriately evaluate the student, failure to identify the Student's vision needs, and failure to recommend or provide appropriate educational programs and placement for the Student, amounted to gross violations of the IDEA" (IHO Decision at p. 50). Thus, the IHO determined that the hearing record and the equities supported an order providing the student with four years of extended eligibility of special education services until she reached the age of 25 (id. at 50-52). Furthermore, as part of the extended eligibility, the IHO ordered the district to continue to fund the student's attendance at iBrain, or another private school of the parent's choosing if iBrain were to become unavailable (id. at p. 55).

Finally, the IHO ordered the CSE to reconvene within 20 days from the date of the decision to develop an amended IEP that addressed the student's unique needs, fully considered all evaluative data regarding the student, incorporated meaningful and measurable goals and objections in order to provide the student with an appropriate educational placement (IHO Decision at pp. 37, 55-56). The IHO denied the parent's request for any additional claims or relief asserted in the due process complaint (id. at 56).

IV. Appeal for State-Level Review

The district appeals the IHO's findings that it did not offer the student a FAPE for the 2009-10 through 2021-22 school years, arguing that the IHO was barred by the statute of limitations from finding a denial of a FAPE or considering any school years prior to the 2018-19 school year in her computation of compensatory education, that the IHO erred in holding that the lack of VES in the student's IEPs resulted in a gross deprivation of a FAPE, and that the IHO erred in her determinations as to the appropriateness of IEPs developed for the student for the 2018-19 through 2021-22 school years. In particular, the district argues that the CSEs considered sufficient evaluative information about the student, made recommendations that addressed the student's vision needs (citing review and practice of concepts and skills, breaks, use of assistive technology, visual prompts, and a muti-sensory approach to learning) and needs underlying music therapy (citing supports for social interactions and communication skills), and recommended appropriate related services. The district asserts that the appropriateness of the recommended programs was demonstrated by the student's progress. The district alleges that the record lacks any indication that the student required a transportation paraprofessional during the 2018-19 or 2019-20 school years. The district argues that any allegations regarding the district being unable to implement the recommended placement for the student's 2021-22 school year was pure speculation and should be annulled.

In an answer, the parent responds to the allegations raised in the request for review and requests that the IHO's decision be upheld in its entirety.

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]).[4]

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).

[4] 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).

VI. Discussion

A. Scope of Review

The IHO found that the parent's claims pertaining to the 2009-10 through 2017-18 school years were barred by the statute of limitations and that no exceptions to the timeline to request an impartial hearing applied (IHO Decision at pp. 20-22). The parent has not appealed this determination and, accordingly, it 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]).[5] Thus, the discussion on appeal will be limited to a review of the IHO's determinations regarding the district's offer of FAPE for the 2018-19 through 2021-22 school year and his award of relief including tuition reimbursement for the 2020-21 and 2021-22 school years and extended eligibility. In particular, taking into account the IHO's final and binding analysis about the accrual date for the parent's claims, which the IHO found was based on the parent's longstanding knowledge of the student's needs, attendance at CSE meetings, and receipt of IEPs (IHO Decision at p. 22), only allegations pertaining to the January 2019, January 2020, and April 2021 CSEs and resultant IEPs are within the statute of limitations. To the extent the IHO found that the district denied the student a FAPE for periods of time deemed barred by the statute of limitations, such a finding was improper and is reversed. The IHO's consideration of such prior school years in calculating relief, is discussed further below.

B. FAPE

1. Sufficiency of Evaluative Information

The district challenges the IHO's determinations that the CSEs lacked sufficient evaluative information, with the most recent psychological evaluation having occurred in 2015, and failed to assess the student's needs related to her diagnosis of CVI (IHO Decision at pp. 26-28).[6] Taking

[5] The IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ. of City of N.Y., 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]). New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). Exceptions to the timeline to request an impartial hearing apply if a parent was 1) prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice; or 2) the district withheld information from the parent that it was required to provide (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i] R.B., 2011 WL 4375694, at *6).

[6] As the IHO's determination that the district impeded the parent's ability to participate in the educational planning for the student relied entirely on his determination that the evaluative information was insufficient, the issue of

into account the statute of limitations, the issue is specific to the sufficiency of the district's evaluations of the student leading up to the January 2019 and January 2020 CSE meetings. The parent did not challenge the overall adequacy of information before the April 2021 CSE but continued to allege that the district failed to recommend vision services at that time.

Pursuant to the IDEA, 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 services 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]).

a. January 2018 CSE

During the 2017-18 school year (tenth grade), a CSE convened on January 30, 2018 to determine the student's continued eligibility for special education services and to develop a program to meet the student's individual needs (Parent Ex. LLL at p. 27). Although the January 2018 CSE and resultant IEP are not at issue on appeal as the parent's claims pertaining thereto fall outside the statute of limitations, a discussion of the January 2018 CSE offers context for the subsequent CSEs that took place within the actionable timeframe.

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the parent's participation will not be separately considered.

According to the evaluation results section of the January 2018 IEP, the student participated in the New York State Alternate Assessment (NYSAA) for high school students during the 2015-16 school year and received a "1" in math and a "2" in English language arts (ELA) (Parent Ex. LLL at p. 1). The January 2018 IEP indicated that the student was assessed in September 2017 using the Student Annual Needs Determination Inventory (SANDI), which looked at the student's reading, math, communication, socio–emotional skills, transitional educational/employment needs, transition community needs, and adaptive/daily living skills (id. at pp. 1-2). The "Fast[] assessment," conducted in fall 2017 yielded scores of 21/32 in ELA and 23/32 in math, but no interpretive information was provided (id. at p. 2). The IEP indicated that other methods of evaluation included teacher observation, level one vocational assessments, classroom observation, and the IEP and progress reports from the 2014-15 school year (id.). In addition, information regarding the student's speech-language abilities was gathered by way of "informal assessment, therapist observations, and collection of information from the Citywide Speech Services Communication Profile" (id.).

According to the January 2018 IEP, the results from the September 2017 SANDI assessment informed the CSE that on the reading subtest the student was able to show interest in an object or person for one minute but unable to make five speech sounds that imitated rhythms and tone and on the writing subtest she was able to activate a familiar toy or adaptive device but was unable to draw a representational form and identify it as self (Parent Ex. LLL at p. 1). The SANDI assessment results indicated that on the math subtest the student could ask for more when shown preferred items, but she was not able to indicate the set with more when given sets of the same items in different quantities (id.). With respect to communication subtest, the student was reported to lead an adult to a desired object but was not able to communicate the need for toileting and on the socio-emotional subtest the student allowed adults to be in close proximity during instruction in five activities, but she was not able to request help from a familiar adult during the school day (id.). On the transitional education/employment subtest, the SANDI assessment results indicated that the student demonstrated the ability to activate a switch for cause and effect but she was not able to sort 20 pictures of objects by categories and on the transition to community subtest she demonstrated the ability to carry an identification card but she was not able to show the identification card to familiar people on request (id.). The SANDI assessment also looked at the student's adaptive/daily living skills where the student's performance demonstrated that she could interact with an adult socially, but she was not able to maintain a toileting/habit schedule (id.).

The present levels of performance which described the student's academic achievement, functional performance, and learning characteristics were developed from information considered by the CSE (Parent Ex. LLL at p. 2). With respect to activities of daily living, the IEP noted that the student required assistance in all areas including, hygiene, dressing, and toileting (id.). According to the IEP, she used a manual wheelchair for mobility and transportation, with assistance for propelling, but was able to walk with a walker or 1:1 assistance and was working toward using the stairs (id.). Although the student was nonverbal, she had an assistive technology device and supplemented her communication by way of gestures and body language, using facial gestures and head movement to gain the staff's attention, moving her head to indicate yes or no, and using her device when asked a question (id.). According to the January 2018 IEP, the student was able to follow simple directions, and independently switch screens on her device when the device was set up for her by the staff (id.). The IEP reported that the student appeared to enjoy being at school as she smiled and made connections with the staff and peers (id.). The results of

the level one vocational assessment, reflected in the IEP, noted the student's interest in "hanging out with mom," watching television and movies, playing on her iPad, and walking to the park or on the boardwalk (id. at p.3).

With respect to the student's intellectual functioning, the January 2018 IEP indicated that according to the SANDI the student was functioning at a pre-kindergarten level for both reading and math (Parent Ex. LLL at p. 3). The student was able to use her communication device to communicate her wants and the staff were working on helping the student to communicate her needs (id.). The IEP indicated that the student would also be working on matching objects to pictures and picture symbols to develop her communication skills (id.). The January 2018 IEP noted that the student had "really progressed with her communication device" and she had acquired "much knowledge in using" the device (id. at pp. 3-4). The January 2018 IEP stated that based on the student's level of cognitive ability she would need consistent repetition, reinforcement and multiple opportunities to demonstrate acquired skills (id. at p. 3). Regarding the student's learning style, the January 2018 IEP noted that the student learned best in a structured small group with gestural supports, and she was a concrete/visual learner who benefited from routines and hands-on learning accompanied with verbal and physical prompts (id. at p. 3).

With respect to the student's speech and communication, the January 2018 IEP indicated that the student used her IEP driven dynamic display communication device with a voice generating application to communicate every day (Parent Ex. LLL at pp. 4-5). The IEP explained that the student navigated through the device to find needed vocabulary, used it to greet staff, and made her wants and needs known by pointing to single words on the device, but she needed prompting to combine words to make a sentence (id. at p. 4). The student required prompting to use her device while completing functional tasks, as well as prompts to use her device to interact with peers (id.). In addition to using her device, the IEP stated that the student used vocalization, facial expressions, body language, and reaching to communicate, along with head nods for yes/no responses (id.). The student took turns when prompted and was more likely to interact with adults than her peers (id.). Receptively, the student was able to follow some simple one-step commands when provided with verbal and visual prompts (id.).

The January 2018 IEP included transition information that indicated the student would remain living at home after high school, attend a day habilitation program, and seek work where she could be social and around adults (Parent Ex. LLL at p. 4). The IEP indicated that the parent would like the student to continue to bring home homework and she would like to see a decrease in the student's behavior regarding banging her head (id.).

Turning to the student's social emotional development, the IEP indicated that the student benefited from a routine and structured environment with clearly defined expectations, and she enjoyed one-on-one attention as well as working in a small group during classroom activities (Parent Ex. LLL at p. 5). The IEP stated that the parent was happy with the student's social ability and expressed that the student should continue to work on using her communication to express her needs not just her wants (id.).

For the student's physical development, the January 2018 IEP noted that the student's medical needs, including nebulizer treatments, allergies, and tube feedings, were addressed by skilled nurse services throughout the school day (Parent Ex. LLL at p. 5). The IEP indicated that

the student received physical therapy "to improve her sensory/motor/motor planning skills to navigate her physical/educational needs "in and out of the school environment (id.). It noted that the student had "an alignment impairment due to her muscle tone and strength impairment," and noted that the student's leg position that impacted her ambulation and stature (id.). According to the IEP, the student had orthotics, used a posterior walker for walking (90 feet with one rest break) and required constant prompts and "fast" support for safety (id.). The student used a scooter and therapeutic bike for motor planning skills and flexibility that helped to improve her tolerance for keeping her legs in the proper position to correct her body/head alignment (id.). The IEP stated that the physical therapist had initiated stair training with the student that included ascending a few steps in a step-to pattern with manual assistance provided at the lower extremities for proper placement and the student was reported to hold the railing independently (id.).

The January 2018 IEP included a description of the student's motor status with respect to OT (Parent Ex. LLL at p. 6). The IEP indicated that the student presented with delays in upper body strength, coordination, endurance and sensory processing skills which impacted her ability to sustain a proper sitting posture and body alignment and to be an active participant during classroom instruction and functional mobility (id.). The IEP reported that the student's unconventional postures could limit her engagement in activities as well as performance of fine motor and gross motor tasks and also noted that the student engaged in self-stimulatory behaviors (id.). The January 2018 IEP indicated that the student needed to improve the proper position of her legs to improve her body alignment and improve her sensory regulation skills as well as upper body strength, endurance and coordination skills (id.).

b. January 2019 CSE

Turning to the actionable timeframe, a CSE convened on January 24, 2019 to determine the student's continued eligibility for special education services and to recommend a program to address the student's individual needs (Parent Ex. RRR at p. 25). The CSE considered the results of an October 2018 administration of the SANDI, teacher observation, and a level one vocational assessment (id. at p. 2). The October 2019 administration of the SANDI yielded scores similar to the scores attained on the September 2018 administration of the assessment and the resultant narrative was relatively unchanged from the previous IEP (compare Parent Ex. LLL at p. 1, with Parent Ex. RRR at p. 2). The present levels of performance on the January 2019 IEP frequently referenced teacher observation and the level one vocational assessment as the source of the description of the student's performance (Parent Ex. RRR at pp. 2-6). The present levels of performance were mostly similar to those in the previous IEP (January 2018)—albeit somewhat less detailed—with a few nuanced exceptions (compare Parent Ex. LLL at pp. 2-6, with Parent Ex. RRR at pp. 2-6).

The student continued to present as a student who enjoyed school, but who was nonverbal and used a communication device as well as vocalizations and gestures to communicate with others (Parent Ex. RRR at p. 3). The January 2019 IEP documented the student's progress in her use of her communication device, noting that the student was able to convey her message by pointing to one to two symbols on her device and that she was making eye contact with and attending to communication partners (id. at p. 4). The IEP added that the student used her communication device to request items, request actions, and ask for help and noted that she was able to anticipate the next step in a familiar routine (id.). The IEP added that, although the student could navigate

through her device, she had difficulty finding a specific page in order to respond to a question and select an on-topic response and doing so would be a focus of speech-language therapy in the coming year (id.). The IEP noted that the student continued to function at a pre-kindergarten level in reading and math (id. at p. 3).

According to the January 2019 IEP the student required consistent repetition and multiple opportunities to demonstrate acquired skills and she learned best in a structured environment with gestural support, hands-on learning with verbal and physical prompts, and when directions were presented calmly, with physical and verbal prompts (Parent Ex. RRR at p. 3). The January 2019 IEP indicated that the student needed to use her communication device to relay her needs in addition to her wants and that, as with the previous IEP, the parent was "very happy" with the student's social ability and wanted her to continue to work on using her communication to express her wants and needs (id. at p. 5).

The January 2019 IEP reported on the student's motor skills noting her needs for sensory-motor planning, her generalized muscle weakness with limited endurance, low muscle tone, reduced static and dynamic balance, and lack of body coordination (Parent Ex. RRR at p. 5). The IEP noted the student's abnormal gait pattern and mobility when standing and walking with an assistive device as well as poor posture in sitting and standing (id. at pp. 5-6). The IEP also noted that the student was able to walk with a gait trainer for 2-3 rounds with a short rest for two repetitions (approximately 15-20 minutes) (id. at p. 6). The January 2019 IEP also detailed the student's deficits in upper body strength, motor coordination, and sensory skills which affected her ability to be an active participant during classroom instruction and during home and community based activities (id. at p. 5). As in the previous IEP, the occupational therapist described how the student's delays impacted her performance and described her self-stimulatory behaviors (id.). Regarding transitions to post secondary life, the January 2019 IEP indicated that the student would continue to live at home while exploring options in the future (id. at p. 3).

c. January 2020 CSE

A CSE again met on January 16, 2020, to determine the student's continued eligibility for special education services and to develop a program to meet the student's individual needs (Parent Ex. AAAA at p. 24). The district IEP coordinator (district coordinator) for the CSE meeting testified that the committee considered the student's performance on the SANDI (October 2019), which she explained tested students in the areas of reading, writing, math, communication, transition, and activities of daily living (ADL) and was completed twice a year (Tr. pp. 353-54; Parent Ex. AAAA at p. 2).[7] The district coordinator testified that the SANDI was designed to test students in particular areas using a number scoring system with four indicating the student had mastered a skill and scores rated as one or two indicating the skill area where there was the most need (Tr. pp. 354-55). She reported that the student's IEP goals were based on the results of the SANDI assessment (Tr. p. 355). According to the January 2020 IEP, in reading, the student demonstrated a slight increase in her SANDI score and increased her ability to show interest in an

[7] In addition to the SANDI, the CSE considered the speech provider's Citywide Speech Services Communication Profile, a level one vocational assessment to determine the student's preferred activities, a teacher observation checklist to determine time on task, and a classroom activity to gauge the student's participation and ability to follow directions (Tr. p. 354; Parent Ex. AAAA at p. 2).

object or person from one minute to three minutes (compare Parent Ex. RRR at p. 2, with Parent Ex. AAAA at p. 2). The student's SANDI score of 47 in math represented a 17 point increase from the previous year and indicated that the student could now ask for more when shown preferred items but still was unable to indicate the set with more when given sets of the same items in different quantities (compare Parent Ex. RRR at p. 2, with Parent Ex. AAAA at p. 2). The student's writing, communication, transition-education, transition-community, ADL and social/emotional performance remained the same as that noted in her January 2019 IEP (compare Parent Ex. RRR at p. 2, with Parent Ex. AAAA at p. 2).

Based on the information considered by the CSE, the present levels of performance on the January 2020 IEP noted the student's use of a dynamic display voice output device, facial expressions, gestures, eye gaze, head nods for yes and no, and vocalizations as her means of communication and indicated that the student was able to directly select symbols, request "more" of desired items or activity and respond to questions given a choice of two answers using her device (Parent Ex. AAA at p. 2, 3). The IEP also noted the student used her dynamic display voice output device to participate in lessons and she enjoyed small group lessons (id. at p. 4). Regarding activities of daily living, the student's abilities were described as being similar to the prior school year and consistent with the January 2019 IEP (compare Parent Ex. LLL at p. 3, with Parent Ex. AAAA at p. 3). The student's level of intellectual functioning as noted in the January 2020 IEP was likewise similar to the previous year with the student performing at the pre-kindergarten level in math and ELA; however, she had progressed from matching picture symbols to objects to matching picture symbols to picture symbols (compare Parent Ex. LLL at p. 3, with Parent Ex. AAAA at p. 3). The student's learning style, expected rate of progress, and transition statement remained the same as previous years (compare Parent Ex. LLL at p. 3, with Parent Ex. AAAA at p. 3). Regarding the student's academic needs, the January 2020 IEP indicated that the parent wanted the student to use her device while engaging in an activity and also indicated that the student required prompting to interact with peers, and to answer questions when using her communication device (id. at p. 4). The IEP also noted that the student needed to work on maintaining a topic of conversation for 2-3 turns using her communication device (id. at pp. 4, 10). The parent was again noted to have been happy with the student's social ability and wanted her to work on using her communication to express her wants and needs (compare Parent Ex. RRR at p. 5, with Parent Ex. AAAA at p. 4).

With respect to physical development, the January 2020 IEP stated that the student was dependent for her self-care tasks, communicated by way of gestures and her communication device, and followed simple directions (Parent Ex. AAAA at p. 5). Although the IEP indicated that the student could sit and stand for short periods of time, she continued to have deficits in muscle strength, coordination, and endurance, which impaired her ability to fully participate in classroom and she required frequent breaks during physical activities (id.). Similar to the January 2019 IEP, the January 2020 IEP stated that the student presented with limited endurance, low muscle tone, reduced static and dynamic balance, and lack of body coordination and described how those challenges impacted the student's motor skills and performance (Parent Ex. RRR at pp. 5-6, with Parent Ex. AAAA at p. 5). The January 2020 IEP indicated that the student had demonstrated progress in relation to her strength and endurance over the past year and the IEP

noted that the parent expressed her interest in having the student continue to walk with assistance from the therapist and to ride an adaptive tricycle when appropriate (Parent Ex. AAAA at pp. 5-6).

It is unexplained in the hearing record as to why the district had not conducted a psychoeducational evaluation since 2015 as part the process to determine the student's needs. While this may reflect a procedural error, the above review demonstrates that for each of these years the CSEs used information gleaned from teachers, physical therapists, occupational therapists, and speech-language pathologists as well as the parent to describe the student's abilities and needs as they related to the student's educational performance. The January 2019 and January 2020 IEPs reflected information from the SANDI assessment, the City Wide Speech Services Communication Profile, and Level One Vocational Assessments. The information from the SANDI assessment specifically addressed the student's abilities in reading, writing, math, communication, transition, and ADLs, which was supplemented by information from the student's teachers and providers in speech-language, OT, and PT and which demonstrated that the information was obtained from various sources and was sufficiently comprehensive to identify the student's special education needs in the areas of communication, cognition, social/emotional skills, and motor development. It is important to note that students with multiple challenges, as is the case for this student, often have difficulty performing on standardized assessments and the student's functional performance as demonstrated in the classroom environment is vital information needed to hone in on a student's true abilities and needs. However, as I will address separately, a concern remains regarding the lack of evidence in the hearing record that the district adequately assessed the student's vision.

d. Evaluation of Vision Needs

The IHO indicated that the addition of recommendations related to the student's CVI in an IEP developed in March 2022 demonstrated the inadequacy of the IEPs developed in the years prior (IHO Decision at p. 28). However, the IHO erred in relying on information included in the March 2022 IEP to invalidate the prior IEPs (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; see J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]; F.O. v New York City Dep't of Educ., 976 F.Supp.2d 499, 513 [S.D.N.Y. 2013] [refusing to consider subsequent year's IEP as additional evidence because it was not in existence at time IEP in question was developed]). Nevertheless, there is other non-retrospective evidence in the hearing record that supports the IHO's determination that the district failed to sufficiently evaluate the student's vision needs or offer vision services.

Although the hearing record does not definitively establish that the student has CVI, there is ample evidence in the hearing record that the district knew, or should have known, of the student's visual impairments as far back as 2016 yet failed to recommend VES or that the student's vision be evaluated during the timeframe at issue (Parent Exs. B. at p. 4; J at p. 12; S at p. 12; Y at p. 15; AAA at pp. 3, 8, 20-21).[8] Specifically, the February 9, 2016 IEP reported that the student

[8] Notably, the language in the parent's amended due process complaint notice states that the student "exhibits

was a visual learner who "require[d] . . . vision services . . . to address [her] needs," yet failed to recommend VES in her IEP (Parent Ex. AAA at pp. 3, 8, 20-21). Similarly, the student's February 2, 2017 IEP reflected that the student "require[d] . . . supports of related services such as . . . vision and speech services" but again failed to recommend VES in the student's IEP (Parent Ex. EEE at pp. 3, 20-21). Moreover, the January 30, 2018 IEP also stated that the student required vision services but failed to recommend VES in the student's IEP or recommend a vision evaluation (Parent Ex. LLL at pp. 3-4, 20-21). There is no explanation in the hearing record as to why the subsequent IEPs did not carry over the statement that the student required vision services, yet there is no dispute that the district did not evaluate the student's vision needs leading up to the January 2019 CSE, January 2020 CSE, or April 2021 CSE meetings and did not include recommendations for vision services in the resultant IEPs.

The district failed to evaluate the student's vision until November 2, 2021, after the student was unilaterally placed at iBrain where she was provided with VES (Parent Ex. J at p. 6) and after the development of the last IEP which is at issue in this appeal (i.e., the April 8, 2021 IEP). In November 2021 the student was seen for a visual examination by an ophthalmologist who diagnosed the student as having amblyopia in the left eye, exotropia in the left eye, posterior lenticonus, and blindness in both eyes (Dist. Exs. 17, 18). The ophthalmologist indicated that "the [student] should be considered blind and receive full vision services" (Dist. Exs. 17; 18).[9] On February 4, 2022, the district conducted a functional vision assessment of the student, which recommended the student receive vision services twice a week for 30 minutes by a teacher of the visually impaired and be afforded school accommodations related to her vision (Parent Ex. X at p. 5).

Overall, the hearing record supports the IHO's determination that the district knew, or should have known, of the student's visual needs leading up to the January 2019, January 2020, and April 2021 CSE meetings and that the district failed to properly evaluate the student for vision or provide her with VES during the school years at issue. As such, the IHO's determination that the district denied the student a FAPE by failing to recommend VES for the student and for failing to properly evaluate the student's vision needs must be upheld. However, the degree to which the IHO found that the district's failure in this regard constituted a gross violation of FAPE warranting compensatory education in the form of extended eligibility for special education will be discussed further below.

2. 12:1+(3:1) Special Class in a Specialized School with Related Services

Turning to the disputed recommendations of the CSEs during the actionable timeframe, the January 2019 and January 2020 IEPs each include recommendations that the student attend a 12:1+(3:1) special class for all academic subjects (ELA, math, social studies, science) (Parent Exs.

characteristics of Cortical Visual Impairment" and multiple iBrain reports state that the student demonstrates "characteristics of Cortical Visual Impairment"; however, there is no indication that the student has been found to meet the criteria for a diagnosis of CVI (Parent Exs. B at p. 4; J at pp. 6, 12; S at pp. 12, 19).

[9] In his clinical notes the ophthalmologist's "Assessment & Plan" indicated that the student had "[s]table visual behavior" and that she was "able to complete her normal tasks per mom" (Dist. Ex. 18 at pp. 2-3).

RRR at pp. 18; AAAA at pp. 17-18).[10, 11] In addition to the 12:1+(3:1) classroom recommendation, the January 2019 and January 2020 CSEs recommended related services consisting of: two 30-minute sessions per week of individual OT; two 30-minute sessions per week of individual PT in the special education classroom; three 30-minute sessions per week of individual PT in a separate location/therapy room; four 30-minute sessions per week of group (2:1) speech-language therapy; individual school nurse services daily; and four 60-minute workshops per year of parent counseling and training (Parent Exs. RRR at p. 19; AAAA at p.18).

The district coordinator who participated in the January 2019 and January 2020 CSE meetings testified that the recommendation for the student to attend a 12:1+(3:1) special class was based on the student's medical alerts, her cognitive level, and the amount of support she required to complete daily activities (Tr. pp. 357-58). More specifically, the district coordinator testified that the student needed the high staff ratio because she needed hands-on support for her basic daily care needs related to toileting, feeding, other daily living skills, and medical issues that may come into play (Tr. p. 379). She also stated that the 3:1 student to paraprofessional ratio also allowed the team to break up into smaller groups with the paraprofessionals providing hands-on support that the student required to fully engage in the lessons (Tr. pp. 357-58).

With respect to the related services, the district coordinator testified that, based on the student's prior IEP, as well as reports from the student's then-current therapists and teacher, the district felt that the services that were being offered met the student's needs (Tr. p. 374). She opined that additional services were not recommended because the student was making steady progress and that what was offered was what was best for the student (id.). She also stated that the recommendation that the student receive related services in a group was intended, in part, to address the parent's expressed concern for the student to have social opportunities (Tr. pp. 369-70). The district coordinator testified that to address the student's speech-language goal to engage in two to three exchanges per conversation, group therapy was recommended to facilitate the exchange between the student and a peer (Tr. p. 360). The district coordinator explained that the student's IEP called for PT to be provided in the special education classroom so that the physical therapist could help the student engage in lessons and access the activities that were designed in coordination with the teacher (Tr. pp. 360-61).

a. Appropriateness of Similar Recommendations

The district alleges that the IHO erred in finding that the student's progress had stagnated and that the district failed to acknowledge or provide the student with an appropriate level and frequency of supportive services in that, from the 2012-13 through the 2021-22 school year, the

[10] For the April 2021 IEP, the parent did not challenge the appropriateness of the recommended 8:1+1 special class and related services, with the exception of the lack of VES and music therapy (see Parent Ex. N at p. 30; see generally Parent Ex. B).

[11] State regulation provides that the maximum class size for those students whose programs consist primarily of habilitation and treatment, shall not exceed 12 students (see 8 NYCRR 200.6[h][4][iii]). In addition to the teacher, the staff/student ratio shall be one staff person to three students (id.). The additional staff may be teachers, supplementary school personnel, and/or related service providers (id.). The Second Circuit has recently observed that "[i]n the continuum of classroom options, the 12:1:4 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]).

CSEs recommended a similar program consisting of a 12:1+(3:1) special class in a specialized school with the same level and frequency of OT, PT, speech-language therapy, and parent counseling and training (IHO Decision at pp. 29, 34; Req. for Rev. ¶¶ 18-23).

A student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2–J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at *10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *12 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year courts have been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]; N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at *9 [D.D.C. July 30, 2021]; James D. v. Bd. of Educ. of Aptakisic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

With respect to the annual goals, the January 2018 IEP indicated that the student made progress on seven out of nine goals including identifying familiar survival signs and symbols; combining picture symbols to make a sentence; giving one item to each in a group; communicating daily needs; using her communication device during structured activities to respond, request, and comment; and walking 50 feet using posterior walker; and she met a goal to stand for 15 minutes in a stander (Parent Ex. LLL at pp. 10 -19).

The January 2019 IEP reflected the student's progress most directly in relation to her use of her assistive technology device noting the student's ability to point to one to two symbols and use her device to request items and actions, and to ask for help as opposed to pointing to single words (compare Parent Ex. LLL at p. 4, with Parent Ex. RRR at p. 4). In addition, according to the January 2019 IEP the student made progress in six of the seven annual goals developed to address her needs (Parent Ex. RRR at pp. 9-17). The IEP indicated that the student made progress in identifying survival signs and symbols, combining picture symbols to form a sentence, and adding one more object by reaching and releasing an object (id. at pp. 9-12). The IEP also documented that the student made progress communicating her daily needs and responding, requesting, or commenting by using her assistive technology device and ambulating 800 feet using a gait trainer (id. at pp. 13-16).

The IEP coordinator testified that over the course of the student's IEPs she made minimal progress (Tr. p. 363). She stated that there were a handful of goals that actually said "goal met" (Tr. p. 363). The IEP coordinator noted that the student made steady progress on most of her goals, but also noted "nothing necessarily majorly significant" (Tr. p. 363). She added that given the student's cognitive delays she felt the student had made steady progress based on her abilities especially in the area of speech (Tr. pp. 362-63). The IEP coordinator also testified that the district moved the student from a static to a dynamic communication device and the student moved from using core vocabulary to conversational skills which she considered a "huge accomplishment" for the student (Tr. p. 366). She also indicated that the student was considered an early learner based on the SANDI and that "based on her cognitive development, . . . she might have hit her plateau" but there was no regression which indicated she was remaining consistent with her skills (Tr. p. 364). Further she stated that the recommended programs for the years at issue provided all the support that the student needed and that the district "gave her a great recommendation for related services and support based on the needs that she was exhibiting while she was a student in our school" (Tr. pp. 363-64). She stated that she believed that the district offered the student "a full, strong, individualized education plan" (Tr. p. 365).

Based on a review of the above, the hearing record contains sufficient information to show that the January 2019 and January 2020 CSEs had information available to make a determination that the student was having some success in her 12:1+(3:1) special class with related services and assistive technology such that the continued recommendation of the placement was reasonably calculated to enable the student to continue to make progress in light of her circumstances. While neither the goal progress reports or the testimony of the IEP coordinator reflects enormous progress, the evidence does not show that the student regressed or was unable to make progress towards annual goals in light of her needs and abilities. Although the student may not have made the progress the parent desired, the evidence in the hearing record does not support the IHO's view that the January 2019 and January 2020 CSEs' recommendations for a 12:1+(3:1) special class were inappropriate on the ground that the student did not demonstrate sufficient progress in a similar placement.

b. Duration of Related Services Sessions

The January 2019 and January 2020 IEPs included recommendations for related services with session durations of 30-minutes (Parent Exs. RRR at p. 19; AAAA at p. 18). Specifically, as summarized above, the IEPs mandates the following related services on a weekly basis: two sessions of individual OT in a separate location, two sessions of individual PT in the classroom, three sessions of individual PT in a separate location, four sessions of group (2:1) speech-language therapy in a separate location, as well as daily individual school nurse services (Parent Exs. RRR at p. 19; AAAA at p. 18).

During the impartial hearing, the student's physical therapist from iBrain testified as to her view that the student required 60-minute sessions of related services (see Tr. pp. 536-37). The physical therapist opined that 30-minute sessions were insufficient because the student did not get enough time to practice a task given her need for breaks and time to regulate (see Tr. pp. 541-42). The school psychologist who participated in the April 2021 CSE meeting, at which the student's mandate was changed to 60-minutes (see Parent Ex. N at pp. 30, 40), testified that "[e]ach CSE team views [the question of appropriate duration of related services] different" and that, generally,

it was "understood that you do not count transition time to and from a session within whatever time allotment you afford for related service" (Tr. p. 476). However, she testified that it was her "preference" to recommend 60-minute sessions for students with complex needs to allow for transferring, preparation and set up, and allowance for breaks and attention needs (id.).

The district coordinator who participated in the January 2020 CSE meeting testified about why the CSE had recommended the intensity (i.e., group versus individual) and location of some of the recommended related services, but she did not articulate the CSE's rationale for the duration of the recommend sessions (see Tr. pp. 360-61). She testified that the recommendations for the related services, including the durations, "came from the related services providers and what they fe[lt] the student need[ed] at that time, and that's what was recommended" (Tr. pp. 375-76). She indicated that the CSEs could have recommended longer sessions depending on the needs of the student (Tr. pp. 376-77). The related services providers who purportedly recommended the 30-minute sessions did not testify and the hearing record does not include related services reports.

Thus, while the iBrain physical therapist and the district school psychologist who participated in the April 2021 CSE meeting did not participate in the January 2019 and January 2020 CSEs and, therefore, their views and preferences were not shared with those committees, the district did not offer a witness or documentary evidence to explain the January 2019 and January 2020 CSEs' rationales for the recommendations for 30-minute related services sessions. Moreover, on appeal, while the district has broadly asserted that the related services recommended by the CSEs were appropriate, it has not specifically articulated a basis for reversing the IHO's finding that the recommendations for 30-minute sessions of related services were inappropriate. Accordingly, there is insufficient basis to reverse the IHO's determination that the district failed to meet its burden to prove that the January 2019 and January 2020 CSEs recommended related services in appropriate durations.

c. Music Therapy

The district argues that the student did not need music therapy in order to receive a FAPE. The district asserts that the hearing record demonstrates that the student's classroom instruction and recommended related services addressed the same needs as iBrain did through its provision of music therapy.

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 student's iBrain music therapy teacher (iBrain music therapist) testified that neurologic music therapy uses specific techniques to work on specific goals and "can address motor skills, it can address cognition, and communication skills" (Tr. p. 554). She reported that since starting music therapy the student required fewer breaks during therapy sessions and had improved her cognition, comprehension skills, and attention (Tr. pp. 554-56). The music therapist also reported

that music therapy helped regulate the student (Tr. pp. 552, 558, 562). She opined that student had the potential to further develop her expressive and receptive language skills as well as attention (Tr. pp. 556-57). The iBrain music therapist testified that the student "[had] great communication skills" and that "looking at some of the other students at iBrain, she [was] definitely one of the more advanced students" (Tr. pp. 558-59). She opined that had the student received music therapy earlier her communication skills would be "a little more advanced" in that she would be able to communicate more independently (Tr. pp. 557, 558-59, 565, 568-73). The iBrain music therapist testified that the "unique nature of music and the multisensory approach of music" provided a different way to address the student's goals but agreed that it was "not the only way to work on these skills" (Tr. p. 563). She opined, however, that music therapy allowed students to progress faster (Tr. pp. 563-64). The iBrain music therapist testified that she participated in a March 2022 CSE meeting and was informed music was incorporated in the district classroom in other ways and that the district "could not recommend music therapy" (Tr. pp. 566-67; see Tr. p. 563).

The district coordinator testified that "[e]ssentially, music therapy isn't the actual goals. The goals for music therapy for [the student] were to increase her expression or her communication as well as her interpersonal interactions" (Tr. p. 458). For these reasons the district "determined that her needs in the area of music therapy . . . could be met in other ways without actually providing specific music therapy" (id.). The district coordinator referred to the April 2021 music therapy goals proposed by iBrain that addressed the student's expressive language and pragmatic language skills and testified that the district felt that iBrain's music therapy goals could be met via the management needs and district IEP goals (Tr. pp. 459-461; compare Dist. Ex. 3 at pp. 23, 30-32, with Dist. Ex. 6 at p. 42).

Consistent with the coordinator's testimony, for example, a review of the student's January 2020 IEP reveals that the district addressed the student's sensorimotor skills by setting the following goals for the student: "will maintain upright posture in seated position in her chair while supporting herself with one hand and reaching/moving objects with another hand," "will ride an adaptive bike for 20 minutes with minimal assistance to improve her strength, coordination, balance, motor planning and gross motor skills," "will navigate 200 feet around her classroom," and "will learn to add . . . by reaching and releasing an object into a cup or container with initial prompt" (Parent Ex. AAAA at pp. 9, 11, 12, 15). The same IEP addressed the student's cognition and speech-language needs through the following goals: "will maintain a topic of conversation using her communication device for 2-3 conversational turns," "will identify 5 familiar signs and symbols with initial prompt and minimal assistance," "will combined picture symbols to form sentence in order to make a request with minimal assistance," "will communicate her daily needs by pointing toward her communication device indicating her need or request with initial prompt" (id. at pp. 10, 13, 14, 16).

Although it is undisputed that iBrain recommended that the student receive music therapy during the 2021-22 school year and that the January 2019, January 2020, and April 2021 IEPs did not include a recommendation for music therapy services (compare Parent Ex. S at p. 14, with Parent Exs. RRR at pp. 18-19; AAAA at pp. 17-19; N at pp. 30-31), 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 foregoing, review of the January 2019, January 2020, and April 2021 IEPs reveals that they provided related services—albeit in a different manner than those the parent may have preferred—and supports to address the student's needs that iBrain addressed through music therapy (see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 592-93 [S.D.N.Y. 2013] [finding that, although the evidence may have supported that music therapy was beneficial for the student, it did not support the conclusion that the student could not receive a FAPE without it]). While the student may have benefited from music therapy at iBrain to meet areas of need, the CSEs' decisions to address the goals through other services amounts, at most, to a modest pedagogical difference in approach among professionals and does not, without more, support a finding that district denied the student a FAPE.

3. Transportation and Transportation Paraprofessional

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]).

Here, it is undisputed that the student requires special transportation. The January 2019 and January 2020 IEPs recommended special transportation accommodations consisting of door-to-door service and limited travel time (not more than 60-minutes) on a lift mini bus sufficient to accommodate a wheelchair (regular size) with air conditioning (Parent Exs. RRR at p. 25; AAAA at p. 24). As of the April 2021 IEP, the CSE added 1:1 paraprofessional support as a transportation accommodation/service (Parent Ex. N at p. 36). The IHO found that the earlier IEPs were

inadequate due to the lack of a recommendation for a 1:1 transportation paraprofessional given the student's need for assistance in daily living, use of a wheelchair, and tendency to fall to the floor including during transfer and transport (IHO Decision at p. 37). However, the evidence is devoid of information that was available to the January 2019 and January 2020 CSEs that the student was unable to access her education due to inadequate transportation support or that any difficulties had arisen in the area of transportation. While the student may have had a tendency to fall during transfers, there is no indication that she was transferring on the bus given the accommodation for the wheelchair. Accordingly, the evidence in the hearing record does not support the IHO's determination that the lack of a 1:1 transportation paraprofessional denied the student a FAPE.

C. 2021-22 School Year--Assigned Public School Site

Turning to the district's appeal of the IHO's finding that the assigned public school site did not have the capacity to implement the student's April 2021 IEP, generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (id. at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).[12] However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5-6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. Dec. 30, 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F. 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see M.E. v. New York City Dep't of Educ., 2018 WL 582601, at *12 [S.D.N.Y. Jan. 26, 2018]; Z.C. v. New York City Dep't of Educ., 2016 WL

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

7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

Here, the IHO found that the assigned public school could not implement the entirety of the student's schedule within the school day hours of 7:40 am to 2:30 pm (IHO Decision at p. 34). The April 2021 IEP included the CSE's recommendation that the student attend an 8:1+1 special class for 35 periods per week (Parent Ex. N at p. 30). According to the district coordinator a period was 50 minutes long (Tr. p. 384), and, therefore, 35 periods would amount to approximately 5.8 hours per day. In addition, the IEP mandated 16 60-minute sessions per week of related services (including PT, OT, speech-language therapy, and assistive technology services) to the delivered at the providers discretion in either a separate location or within the special class (id. at pp. 31-32). Given that the IEP allowed for the services to be delivered in the classroom, the IEP on its face is not written in such a way that it would be impossible to deliver in the course of a school day.

With respect to the IEP specifically denoting that the 8:1+1 special class would be for 35 periods per week, the district coordinator testified that "we don't typically list our IEPs this way" and "we were told to stop writing IEPs this way because it can't be implemented, because there's not, obviously, enough periods in a day" (Tr. p. 382). She added, "I don't know who conducted this IEP but my training from the state has been that we're not supposed to list IEPs that way anymore" (Tr. p. 382). However, when asked specifically at the impartial hearing if the assigned public school location had the ability to implement the related services and education program set forth in the April 2021 IEP, the district coordinator testified "I know that we could have met the service" explaining that the district "would have had a physical therapist who could pick up [the mandate of five hours of PT a week]" (Tr. pp. 382-83). The district coordinator testified that the district would have been able to implement five hours a week of PT, five hours a week of OT and five hours a week of speech-language therapy (Tr. pp. 383-84).

Recently, a district court reviewing a similar challenge characterized it as "precisely the kind of speculative challenge that is prohibited" (Thomason v. Porter, 2023 WL 1966207, at *17 [S.D.N.Y. Feb. 13, 2023]). The court described that, "[s]tripped of its non-speculative rhetoric, the [p]arents' argument boil[ed] down to a purely speculative one: the school would not implement the IEP's recommendation of [60]-minute speech therapy sessions, even though it had the ability to accommodate the sessions" (Thomason, 2023 WL 1966207, at *17). Although the district in Thomason had offered some testimony that it was capable of implementing the 60-minute related services sessions—which the district in the present appeal also provided—the court reached its conclusion even assuming that the testimony presented demonstrated the school's hesitancy about implementing the sessions (id.). The court distinguished a school's capacity to implement services from the school's willingness to do so (id., citing N.M. v. New York City Dep't of Educ., 2016 WL 796857, at *8 [S.D.N.Y. Feb. 24, 2016] [finding that, "[b]y its terms, however, a claim based on what a school 'would not have' done—as opposed to a claim based on what the school could not do—is speculative and barred under R.E. and M.O."] [emphasis in original]).

Thus, as a legal matter, the IHO should not have considered the parents' speculation as to the school's ability to implement IEP because, as noted above, the Second Circuit has held that speculation that the school district will not adhere to the IEP is not an appropriate basis for a unilateral placement (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 2015 WL 2146092, at *3 [2d Cir. May 8, 2015]). Nonetheless, factually, the district coordinator's testimony, in combination with the manner in which the related services were recommended to be delivered in either a separate location or in the classroom, provides sufficient evidence that the assigned school had the capacity to implement the student's IEP as written. Accordingly, the IHO erred in finding that the district denied the student a FAPE by not proving that it could have implemented the April 2021 IEP.

D. Relief

1. Tuition Funding for the 2020-21 and 2021-22 School Years

Based on the foregoing, the IHO did not err in finding a denial of a FAPE based on the January 2019, January 2020, and April 2021 CSEs failure to assess the student's vision needs or recommend visions services. In addition, the district failed to meet its burden to demonstrate the appropriateness of the 30-minute duration of related services recommended in the January 2019 and January 2020 IEPs. Turning to relief, the district has not appealed the IHO's determinations that iBrain was an appropriate unilateral placement or that equitable considerations supported the parents' request for tuition funding. Accordingly, the IHO's determinations regarding the appropriateness of the unilateral placement and equitable considerations are final and binding (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z., 2013 WL 1314992, at *6-*7, *10) and there is no basis to disturb the IHO's order for district funding for the costs of the student's tuition at iBrain for the 2020-21 and 2021-22 school year, along with the costs of special transportation.

2. Compensatory Education—Extended Eligibility

The remaining issue to be addressed is the IHO's award of four years of extended eligibility of special education and related services based upon the district's "procedural, substantive and gross violations of the IDEA" (IHO Decision at pp. 50, 52).

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. Nov. 3, 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom., Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Upon review of relevant authority, a distinction is apparent between an equitable award of compensatory education in the form of educational programs or services, which a student may receive after his or her eligibility for special education has expired at a district's expense, and an award of extended eligibility, which extends the district's statutory obligations to a student, including the obligation to conduct a CSE meeting and develop an IEP for the student on an annual basis (Ferren C. v. Sch. Dist. of Phila., 595 F. Supp. 2d 566, 576 [E.D. Pa. 2009] [acknowledging the distinction between the expiration of the statutory right, including the right to an IEP, and the access to equitable relief], aff'd, 612 F.3d 712 [3d Cir. 2010]; Burr, 863 F.2d at 1078 [same]; Letter to Riffel, 34 IDELR 292 [OSEP 2000] [noting that a right to compensatory education as an equitable remedy to address a denial of FAPE is independent from the right to FAPE generally, which latter right terminates upon certain occurrences]). There are various considerations relevant to relief in the form of extended eligibility, and limits on the degree to which the extension also extends the procedural due process entitlements set forth in the IDEA, including pendency (see Application of a Student with a Disability, Appeal No. 19-038; Application of a Student with a Disability, Appeal No. 17-021; see Cosgrove, 175 F Supp 2d at 389). Where an extension of eligibility has been awarded, the components of such relief may include: the district's obligations to evaluate the student and convene CSE at least annually to develop IEPs for the student (Ferren C., 595 F. Supp. 2d at 581; Millay v. Surry Sch. Dep't, 2011 WL 1122132, at *16 [D. Me. Mar. 24, 2011], adopted at, 2011 WL 1989923 [D. Me. May 23, 2011]); and/or to provide access to credit-bearing instruction and a chance to earn a diploma (M.W. v. New York City Dep't of Educ., 2015 WL 5025368, at *5 [S.D.N.Y. Aug. 25, 2015]).

However, here, the IHO erred by awarding four years of extended eligibility in addition to district funding of the student's tuition for the 2020-21 and 2021-22 school years as relief for its denial of FAPE to the student arising from the January 2019, January 2020, and April 2021 IEPs. First, the student will not turn 21 until the 2023-24 school year and, therefore, had at least two or more years remaining beyond the 2020-21 and 2021-22 school years for which the IHO awarded tuition at iBrain before her eligibility for special education would expire (see 20 U.S.C. § 1412[a][1][A]; A.R. v. Connecticut State Bd. of Educ., 5 F.4th 155 [2d Cir. 2021]). As such, this matter is distinguishable from cases where a student has already exceeded the age of eligibliity (see M.W., 2015 WL 5025368, at *3; see Application of a Student with a Disability, Appeal No. 09-044). Thus, given the tuition funding awarded for the 2020-21 and 2021-22 school years and the two plus years remaining during which the district would have the opportunity to convene a CSE and recommend an appropriate program for the student (which the parent could challenge if she disagreed and obtain additional relief if the district's recommendations were inappropriate), the student is presently well equipped to achieve the progress guaranteed by the IDEA—that is, the progress which is appropriate in light of the circumstances of her disability (see Endrew F., 137 S. Ct. at 998-1001)—within the time remaining before she becomes ineligible for special education.

Specifically, as discussed above, despite the deprivation of a FAPE over multiple school years, the hearing record demonstrates that the student made gradual progress in the district program during the school years at issue and is making additional progress in the unilateral placement. Regarding the student's vision needs—which the IHO particularly relied upon as a rationale for the extended eligibility award, the hearing record shows that, although the district failed to evaluate the student and provide vision services, the student was able to make progress and access her education. The student's January 2019 IEP indicated that the student was able to communicate by "pointing to one or two symbols on her communication device" (Parent Ex. RRR at p. 4). The January 2020 CSE reported that the student was "able to directly select symbols" on her dynamic display voice output device (Parent Ex. AAAA at p. 2). As recently as 2021, the student's mother indicated that she knew that the student struggled with vision in her left eye but did not have any specific concerns about the student's vision beyond how to best support the student's functional use of vision throughout her day (Tr. pp. 756-58; Parent Ex. S at p. 13).

The student began receiving VES at iBrain during her 2020-21 school year and been steadily progressing in almost all of her iBrain goals, achieving two of her vision goals, one of her cognitive goals, five of her PT goals and one of her speech-language therapy goals by the final undated iBrain progress report in the hearing record (Parent Exs. J at pp. 6-7; O; V; GGGG; Dist. Exs. 7; 11). The July 1, 2021 iBrain report document that the student was using her functional vision to make academic gains, noting that the student "demonstrate[d] the ability to use her vision with function and purpose" and that the student "[wa]s able to track motivating visual materials using her head to localize, both left, right and horizontally" and that the student "ha[d] the ability to use her distance vision to localize large objects and people" (Parent Ex. S at pp. 12-13). During a February 16, 2022 classroom observation, the observer reported that the student "was using her [tablet] device to identify different colors" and "[wa]s able to identify circles, and triangles by pressing her device" (Dist. Ex. 16 at p. 1). In a report dated March 28, 2022, iBrain stated that the student "[wa]s able to use her near vision and intermediate viewing range to access material," that the student was receiving iBrain vision services and "continue[d] to progress using her functional

vision throughout the day," and that the student "demonstrate[d] high accuracy in identifying shapes, colors, and numbers" (Parent Ex. Y at pp. 13-14, 16).

Generally, a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated" (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014], adopted at, 2015 WL 1137588 [D.R.I. Mar. 12, 2015] see Somberg v Utica Community Schs., 2017 WL 242840, at *4 [E.D. Mich Jan. 20, 2017] [declining to award full-time tutoring for years during which student was denied a FAPE, since the student "did make some advancement over the course of his time in high school, even though he was not presented with what he was due under IDEA"], aff'd, 908 F.3d 162 [6th Cir. 2018]; Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]).

Accordingly, while evidence in the hearing record supports a finding that the district denied a FAPE to the student for several school years based on its failure to evaluate her vision needs and recommend appropriate vision services for her, it does not similarly support that the denial of FAPE at issue reached the level as found by the IHO such that it would warrant four years of extended eligibility on top of two years of tuition reimbursement. Rather, the hearing record supports a finding that, while the student was denied a FAPE during the years in question based on the district's inappropriate response to her vision needs, she was nonetheless able to access certain aspects of her educational programming and function in the classroom during her years in the district (2018-19 and 2019-20) and received vision assessments and services while attending iBrain for the 2020-21 and 2021-22 school years. Thus, the award of tuition reimbursement at iBrain, represents a proportionate and appropriate remedy for the district's denial of FAPE to the student based on its failure to evaluate the student's vision needs and provide appropriate vision services.

Further, the IHO based her finding of a gross violation of FAPE warranting extended eligibility as a compensatory education remedy on a finding of a denial of a FAPE for the 2008-09 through 2021-22 school years, inclusive of the time period the IHO ruled was outside the statute of limitations. I am not aware of any authority from the Second Circuit Court of Appeals that would support the broad premise that relief could be awarded to remedy some portion of violations that occurred in school years that were barred by the statute of limitations (but see G.L. v. Ligonier Valley School District Authority, 802 F.3d at 601, 616 [3d Cir. 2015] [finding that the statute of limitations period is not "a cap on a child's remedy for timely-filed claims that happen to date back more than two years before the complaint is filed"]). In any event, here the IHO failed to explain why the student's district-funded attendance at iBrain, which provided the student with specially designed instruction and related services, including vision education services, was not adequate to remedy the FAPE denial, and, therefore, the IHO's award was inappropriate on equitable grounds.

As a final matter, additionally problematic are the parameters of the IHO's extended eligibility award. Rather than merely extending eligibility for special education services to the student, the IHO stated, without further elaboration, that the student should remain at iBrain, or an alternative nonpublic school chosen by the parent if iBrain became unavailable, for the duration of the extended eligibility period. Accordingly, the IHO's grant of extended eligibility potentially also raises an issue with the propriety of a prospective placement at iBrain for four years as relief,

which, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

In this instance, the student still has school years of remaining eligibility for special education even before the IHO's award of four additional years would come about. Thereafter, when the IHO's award would then became effective, despite requiring the district to convene a CSE and develop an IEP for the student each year, the IHO gave prospective relief in the form of tuition funding for each of those years, thus disregarding any alternative program potentially developed by the CSE which the parent has not yet disputed (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

Overall, while an IHO has broad discretion to fashion appropriate equitable relief in IDEA matters, the IHO's award of four years of extended eligibility for special education services to the student which also contemplated that the student would attend iBrain during the extended eligibility period, or alternatively an as-of-yet unknown nonpublic school of the parent's choosing if iBrain became unavailable, exceeded an appropriate remedy for the district's denial of FAPE to the student for the school years still at issue.

VII. Conclusion

The evidence in the hearing record supports the IHO's conclusions that the district failed to establish the appropriateness of the programming recommended in the January 2019, January 2020, and April 2021 IEPs in that the district failed to demonstrate that it properly evaluated the student in the area of vision services or that its related services recommendations were appropriate. As the district did not appeal the IHO's findings about the unilateral placement or equitable considerations, the IHO's ordering awarding district funding for the costs of the student's attendance at iBrain for the 2020-21 and 2021-22 school years, including special transportation costs, is undisturbed. However, the IHO erred in awarding relief in the form of four years of extended eligibility of special education services until the age of twenty-five.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated May 4, 2023, is modified to vacate that portion which determined that the district denied the student a FAPE prior to January 2019; and

IT IS FURTHER ORDERED that the IHO's decision, dated May 4, 2023, is modified to vacate the award of four years of extended eligibility for special education.

Dated: **Albany, New York**
July 26, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER