



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-215

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 Ezra Zonana, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondent, by Edward Lent, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which held that the district denied the student a free appropriate public education (FAPE) during the period of June 11, 2021 through September 13, 2021 and directed the district to reimburse the respondent (the parent) for tuition at the International Institute for the Brain (iBrain) for that time period including costs of related services, a 1:1 paraprofessional and transportation. The parent cross-appeals, alleging that the IHO erred in finding that the district provided the student with a FAPE for the period of May 10, 2021 through June 10, 2021. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

This appeal arises from an IHO's decision related to a remand by an SRO to determine whether the district offered the student a FAPE for the period of May 10, 2021 through September 13, 2021 (see Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248). The student has also been the subject of prior State-level administrative appeals (see Application of a

Student with a Disability, Appeal No. 23-043; Application of a Student with a Disability, Appeal No. 22-136; Application of a Student with a Disability, Appeal No. 20-199). In addition, the student has been the subject of federal (R.A. and D.A. v. New York City Dep't of Educ., No. 22-cv-05516 [S.D.N.Y. filed Jun. 28, 2022]; Araujo v. New York City Dep't of Educ., 2020 WL 5701828 [S.D.N.Y. Sept. 24, 2020]) and State-level (R.A. and D.A. v. Rosa, [Sup. Ct., Albany County, July 1, 2022, Walsh, J., Index No. 910331-21]) appeals from State-level administrative determinations. While the parties' familiarity with the student's educational history is presumed, this matter has a lengthy procedural history due to multiple consolidations and appeals, as well as the current pending remand, and therefore the procedural history of this matter as well as the student's educational history, as relevant to the instant appeal, is recounted below.

Initially, because the district only seeks relief from June 11, 2021 through September 13, 2021 and the parent only seeks relief from May 10, 2021 through June 9, 2021 it is not necessary to repeat the student's educational history prior to the 2020-21 school year.

Briefly, the CSE convened on June 9, 2020 and created an IEP for the student with a projected implementation date of June 24, 2020 (Parent Ex. C; Dist. Ex. 16). In developing the IEP, the June 2020 CSE reviewed the following evaluations and assessments: a social history update dated January 3, 2020; an OT progress report dated June 7, 2020; a PT progress report dated June 7, 2020; a speech-language progress report dated June 7, 2020; a teacher report dated June 7, 2020 and an assistive technology report dated June 7, 2020 (Parent Ex. C at pp. 2-11; Dist. Ex. 29 at p. 2).¹ The June 2020 CSE's recommendations are discussed in further detail below.

The hearing record includes a contract for the student's enrollment at iBrain for the 2020-21 school year, dated June 24, 2020 (Parent Ex. J). Following the June 2020 CSE, the district provided the parent with a prior written notice, dated July 7, 2020, and a school location letter also dated July 7, 2020 (see Dist. Ex. 29). The school location letter identified the assigned public school the student would have attended for the 2020-21 school year (id. at p. 5).

Thereafter, the district sent the parent a prior written notice dated January 4, 2021, in which the district notified the parent that it determined the student was not a resident of the district as of March 26, 2020 and was therefore "not eligible or entitled to attend [district] schools" (Dist. Ex. 24). The district notified the parent that the student would "not be allowed to attend [district schools] during the 2020-21 school year... effective March 26, 2020" and that the district was "required to educate only those students whose parents reside within its boundaries" (id.).

The hearing record reflects that the student returned to the district in April 2021 and began in-person instruction at iBrain on May 1, 2021 (June 30, 2021 Tr. p. 306; Dist. Ex. 38 at pp. 1-2).²

¹ The June 2020 IEP stated that the student "would highly benefit from an A[ssistive] T[echnology] evaluation" (Parent Ex. C at p. 6). As such, although the July 7, 2020 prior written notice indicated that the June 2020 CSE reviewed an assistive technology report, it appears as though that report was an iBrain assistive technology report and that the student had not undergone a district assistive technology evaluation before the June 2020 CSE convened (see Reply ¶ 7).

² Case number 193417 and case number 210820 were consolidated into case number 193417 on April 20, 2022 (April 20, 2022 Interim Order). Prior to this consolidation, an impartial hearing was conducted for case number

On May 27, 2021, the CSE convened to create an IEP with a projected implementation date of June 11, 2021 (Parent Ex. AA).³ Via documentation dated June 14, 2021, the district sent the parent a prior written notice and school location letter summarizing the May 2021 CSE's recommendations and notifying the parent of the public school to which the district assigned the student to attend (Parent Ex. DD). Disagreeing with the May 2021 IEP, the parent sent the district a notice dated June 23, 2021 rejecting the district's proposed program and placement for the 2021-22 school year (see Parent Ex. CC). The hearing record includes a contract for the student's attendance at iBrain for the 2021-22 school year (Parent Ex. BB).

A. Due Process Complaint Notices

This matter was originally three separate proceedings encompassing the 2019-20, 2020-21, and 2021-22 school years. Specifically, case number 193417 originated from a due process complaint filed on or about March 24, 2022 regarding the 2019-20 extended school year; case number 196227 involved a due process complaint filed on or about July 6, 2020 regarding the 2020-21 extended school year and was consolidated into case number 193417; and case number 210820 originated from a due process complaint filed on or about July 7, 2021 concerning the 2021-22 extended school year (IHO Decision at p. 3; see Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248). As part of a prior appeal, the undersigned determined that from on or around December 2019 until March 25, 2020 the district did not deny the student a FAPE (Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248). The undersigned further determined that from March 25, 2020 onward, the student was not eligible to attend the schools of the district based on an unappealed residency determination, except for the period of time when the stay issued by the Commissioner of Education was in effect, namely May 10, 2021 through September 13, 2021 (*id.*). As part of that appeal, the matter was remanded in order for an IHO to take additional evidence and render a determination as to whether the district offered the student a FAPE between May 10, 2021 through September 13, 2021 (IHO Decision at p. 3; Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248).

B. Impartial Hearing Officer Decision After Remand and Subsequent Events

Upon remand the parties reconvened for status conferences on May 13, 2022, June 8, 2022, August 1, 2022, September 20, 2022, November 9, 2022, December 14, 2022, January 10, 2023,

193417, resulting in the following transcripts: September 11, 2020 Tr. pp. 1-5; September 23, 2020 Tr. pp. 6-10; October 19, 2020 Tr. pp. 11-38; December 2, 2020 Tr. pp. 39-47; January 22, 2021 Tr. pp. 48-52; March 17, 2021 Tr. pp. 53-63; April 28, 2021 Tr. pp. 64-69; June 1, 2021 Tr. pp. 70-76; June 18, 2021 Tr. pp. 77-167; June 24, 2021 Tr. pp. 168-231; June 30, 2021 Tr. pp. 232-313; July 15, 2021 Tr. pp. 314-332; and August 9, 2021 Tr. pp. 333-420. References to these transcripts in this decision will include their date and page number (September 11, 2020 Tr. – August 9, 2021 Tr. pp. 1-420). References to the later independent hearing conducted for the consolidated case number 193417 occurring between May 13, 2022 and April 15, 2024 will be referenced in this decision without the dates (Tr. pp. 1-407).

³ Parent Exs. R and AA are duplicates, and the parents' attorney requested that Parent Ex. AA be used when referencing the May 2021 IEP (Tr. pp. 353; compare Parent Ex. R, with Parent Ex. AA).

February 2, 2023, and March 6, 2023 (Tr. pp. 1-97).⁴ An impartial hearing convened on April 3, 2023 and concluded on April 15, 2024 after 13 days of proceedings (Tr. pp. 98-407). In a decision dated April 24, 2024, the IHO determined that the district offered the student a FAPE for the period of May 10, 2021 through June 10, 2021, but failed to offer the student a FAPE for the period of June 11, 2021 through September 13, 2021 (IHO Decision at p. 34). The IHO held that the parent met her burden of proving that iBrain was an appropriate unilateral placement for the student (*id.* at p. 31). The IHO noted that the parent failed to appear at the impartial hearing after a subpoena was issued for her appearance and the IHO drew a negative inference regarding the parent's financial obligations to iBrain in balancing equitable considerations (*id.* at p. 32). However, the IHO held that the balancing of equities did not favor reducing tuition for the period of June 11, 2021 through September 13, 2021 (*id.* at p. 33). As relief, the IHO ordered the district to directly pay the iBrain tuition associated with the period of time from June 11, 2021 through September 13, 2021 along with the costs of related services, a 1:1 paraprofessional, and special education transportation for the same time period (*id.* at pp. 34-35).

IV. Appeal for State-Level Review

The district appeals, alleging that the IHO erred in finding that the district denied the student a FAPE for the period of June 11, 2021 through September 13, 2021. The district further argues that the IHO erred in determining that equitable considerations favor the parent and asserts that the parent's failure to testify at the impartial hearing denied the district the opportunity to fully defend itself. As relief, the district requests that the Office of State Review reverse the IHO's finding that the district denied the student a FAPE from June 11, 2021 through September 13, 2021 and to annul the IHO's awarded relief.

The parent cross-appeals, arguing that the IHO erred in finding that the district provided the student a FAPE for the period of May 10, 2021 through June 10, 2021. The parent argues that district's July 7, 2020 school location letter was untimely, thus denying the student a FAPE. The parent further argues that the IHO erred in finding that the scope of the hearing was limited to the period of May 10, 2021 through September 13, 2021 and the parent alleges that the June 2020 IEP denied the student a FAPE because it did not recommend assistive technology services and services despite the student having a need for assistive technology.

The district submitted an Answer to Cross-Appeal. Regarding the July 2020 school location letter, the district contends that the parent's arguments are misplaced as the hearing was limited to the period from May 10, 2021 through September 13, 2021 and the letter identified a program well in advance of May 10, 2021.⁵

⁴ The IHO denied the parents' request to revisit prior pendency determinations in an interim order dated February 1, 2023 (*see* February 1, 2023 Interim Decision).

⁵ The parent submits a reply to the district's Answer to Cross-Appeal. The reply contained an allegation that the district's assigned public school recommended in the July 7, 2020 school location letter "[wa]s not open or otherwise available during the summer" and attached a proposed exhibit for the purpose of establishing that the district's assigned public school would have been unable to implement the June 2020 IEP's extended school year recommendation. The district submits a letter in response to the parents' reply objecting to the inclusion of

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]).

additional evidence. State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the parent's reply raises new allegations that could have been addressed in the parents' prior pleadings and does not appear to address any of the issues permitted in a reply; accordingly, the parent's reply and the district's letter in response will be disregarded.

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]).⁶

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).

⁶ 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 and Additional Evidence

The parent argues that the IHO erroneously limited the scope of the hearing to May 10, 2021 through September 13, 2021 and that the IHO should have included the time period of July 2020 through April 2021 in her review.

As determined in the prior appeal remanding this matter to the IHO, "the student was entitled to attend the schools of the district as a resident student from approximately early January 2020 (shortly after the student moved to the district) through March 26, 2020 (the date on which the district retroactively determined the student was not a resident of the district), as well as from May 10, 2021 (the date of the stay order) through September 13, 2021 (the date of the Commissioner of Education's decision dismissing the parent's petition) (Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248 at pp. 15-16). The matter was then remanded for a determination as to the period of time between May 10, 2021 and September 13, 2021 (*id.* at pp. 18, 19).

Accordingly, the only period of time relevant to this appeal is the period of time after May 10, 2021 through September 13, 2021.⁷ As noted in the prior appeal, on May 10, 2021 the Commissioner of Education granted the parent a stay of the district's residency determination and directed the district to admit the student to the schools of the district and offer and provide her a FAPE until the Commissioner issued a decision (Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248 at p. 15). The Commissioner then issued a decision denying the parent's petition on September 13, 2021 (Appeal of R.A. and D.A., 61 Ed. Dep't Rep., Decision No. 18,047).

Throughout this proceeding, the parent's attorneys have indicated that the parent challenged the decision of the Commissioner of Education in State court, including an appeal to the Appellate Division, Third Department (*see* Tr. pp. 2-4, 15-18, 23-24, 32-33, 56-57). On January 4, 2024, the Third Department affirmed a supreme court decision dismissing the parent's appeal of the Commissioner's decision regarding the student's residency (Ambrister o/b/o R.D. v. Rosa, 233 AD3d 969 [3d Dept. 2024]). There is no indication in the hearing record that the parent is still challenging the district's residency determination for the period of time at issue in this proceeding. Additionally, as noted in my prior decision in this proceeding, even if there is a pending appeal, such an appeal does not deprive a challenged judgment of its res judicata effect (*see, e.g., Petrella v. Siegel*, 843 F.2d 87, 90 [2d Cir. 1988]; Antonious v. Muhammad, 873 F. Supp. 817, 824 [S.D.N.Y. 1995], *aff'd*, 8 Fed. App'x 78 [2d Cir. May 1, 2001]).

Therefore, based on the above, the IHO correctly limited the scope of the hearing to the May 10, 2021 through September 13, 2021 time frame (IHO Decision at p. 7).

⁷ The prior appeal addressed the period of time the student was a resident of the district during the 2019-20 school year (Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248 at pp. 16-18).

B. FAPE

1. June 2020 IEP

On remand, the IHO was tasked with determining whether the district provided the student with a FAPE from May 10, 2021 through September 13, 2021. The IHO determined that the June 2020 IEP was the operative IEP for the period of May 10, 2021 through June 9, 2021 and that the June 2020 IEP offered the student a FAPE for that time period (IHO Decision at pp. 13-20). The IHO held that the June 2020 IEP complied with the procedures set forth under the IDEA, specifically, that the parent was fully involved in the IEP process and that the CSE team was duly constituted (*id.* at p. 14). The IHO further determined that the student was not entitled to a FAPE from March 26, 2020 through May 10, 2021 pursuant to the decision issued by the Commissioner of Education and therefore the district's July 7, 2020 school location letter was timely with respect to the period of May 10, 2021 through June 9, 2021 (*id.* at pp. 14-14). In her decision, the IHO found that although the district conducted the June 2020 IEP meeting during the time period in which the Commissioner of Education held that the student was not entitled to a FAPE, the district's "attempt to mitigate any potential claims resulting from an allegation of denial of FAPE should not be held against them" (*id.* at p. 15). The IHO held that that the district's recommended program and assigned public school was available for the period of May 10, 2021 through June 9, 2021 and that the extended 2020-21 school year, July 2020 and August 2020, was outside the scope of the hearing (*id.* at pp. 15-16). The IHO found that the June 2020 IEP recommended a sufficient placement, as well as supports and related services, for the period of May 10, 2021 through June 9, 2021 (*id.* at p. 16). The IHO noted that the June 2020 IEP was nearly identical to the student's iBrain's IEP and that the parent and iBrain staff participating in the June 2020 CSE agreed with the June 2020 IEP's recommendations (*id.*). The IHO specifically addressed the June 2020 IEP's recommended 6:1+1 class size, occupational therapy (OT), physical therapy (PT), speech-language therapy, and parent counseling and training recommendations (*id.* at pp. 18-19). The IHO further held that the hearing record established that the iBrain CSE participants and parents agreed with the annual goals contained in the June 2020 IEP (*id.* at p. 19). The IHO further rejected the parent's arguments related to assistive technology, determining that the June 2020 IEP's management needs section sufficiently recommended appropriate access to assistive technology devices and services (*id.*).

The parent's appeal of the IHO's detailed findings related to the June 2020 IEP and the May 10, 2021 through June 9, 2021 portion of the school year focuses on two issues. First, the parent asserts that the district failed to notify the parent of the school the student was assigned to attend by the start of the 2020-21 school year. However, as determined by the IHO, the district sent the parent a school location letter in July 2020 and although it was sent after the start of the school year, the student was not eligible to attend district schools as of the start of the school year (see Application of a Student with a Disability, Appeal Nos. 21-247 & 21-248). When the Commissioner of Education issued a stay of the district's residency determination on May 10, 2021, the parent had already been provided with the July 2020 prior written notice identifying the school the student was assigned to attend (see Parent Ex. N; Dist. Ex. 19 at pp. 5-6).

Second, the parent asserts that the June 2020 IEP did not include sufficient supports for the student. More specifically, the parent contends that the June 2020 IEP did not include a

recommendation for assistive technology devices and services despite noting that the student required the use of assistive technology devices and services.⁸ As the parent's arguments as to the sufficiency of the recommended program goes to the substance of the CSE's recommendations, a discussion of the student's needs will proceed a discussion of the district's recommended program.

a. Student's Needs

Although the student's needs are not in dispute, a description thereof provides context to determine whether the district recommended programs within the June 2020 and May 2021 IEPs were appropriate.⁹

The June 2020 CSE found the student eligible for special education as a student with a traumatic brain injury (TBI) and, taking information from a June 7, 2020 iBrain education plan, the June 2020 IEP described the student as non-verbal, with an extensive seizure history (Parent Ex. C at p. 1). The IEP noted that the student was able to ambulate with assistance for safety in case of seizures and to promote safety awareness of her environment (*id.* at pp. 1-2). The IEP reported that the student's reading and math skills were at the pre-kindergarten level and that she benefited from a 1:1 paraprofessional to support social engagement, communication, and completion of activities of daily living (ADL) skills throughout the day (*id.* at pp. 2, 3). With regard to academics, the IEP indicated that the student demonstrated emerging progress related to identifying the letters in her name from a field of two and matching pictures to objects, both when provided with maximal verbal, physical, and tactile prompting (*id.* at p. 3). With regard to social skills, the IEP indicated that the student demonstrated emerging progress engaging in a group activity, participating in games with peers that required turn taking, and requesting/giving an object when provided with moderate to maximum assistance with prompting using a multi-modal form of communication (*id.*). The IEP stated that according to an education report from the IEP meeting, the student's sleeping and seizure activity hindered her activities, and she needed maximum prompting during instruction as she was easily distracted by stimuli (*id.*). The IEP reported the student worked best in corners or away from visual and auditory distractions (*id.*).

In the area of speech and language development, the June 2020 IEP stated that, on a good day, the student attended to structured language tasks for five minutes and, although she demonstrated a limited interest in objects and activities introduced in therapy, she showed a preference for balls, a slinky, and light-up toys (Parent Ex. C at p. 4). According to the IEP, the student was alerted to auditory/tactile stimuli as evidenced by head-turn, eye gaze, and vocalizations; however, she "appear[ed] to display limited understanding that symbols (i.e., words) represent[ed] ideas" (*id.*). During therapy, receptive language tasks focused on having the student identify highly preferred items from a field of two by reaching (*id.*). The IEP noted that the student

⁸ The parent also asserts without elaboration that the district failed to recommend the support of a 1:1 paraprofessional. However, the June 2020 IEP recommended the support of full-time individual paraprofessional services for the student (Parent Ex. C at p. 22).

⁹ The hearing record contains duplicative IEPs for June 2020 and May 2021 (compare Parent Ex. C, with Dist. Ex. 26; and Parent Exs. R and AA, with Dist. Ex. 35). For purposes of this decision, only the parents June 2020 and May 2021 IEP exhibits will be cited to herein.

benefitted from a multi-sensory approach to instruction, in which objects were paired with a verbal label, to increase comprehension (*id.*). The IEP further noted that the student benefited from maximal cues to follow simple one-step directions, although it also stated the student currently followed one-step commands inconsistently and remained largely self-directed (*id.*). As related to expressive language skills, the IEP indicated that the student used facial expression and body language and reached for desired items such as a cause-effect toy (*id.* at p. 5). The IEP noted the student demonstrated limited success in using the sign "give me" to request items, and recent sessions had focused on having the student use a modified form of the picture exchange communication system (PECS) by having her "exchange a simple picture card in order to receive a desired object" (*id.*). The IEP indicated the student learned to request preferred items such as her favorite ball and snack; however, she continued to require maximal tactile and gestural prompts, clinician model to do so, and "[wa]s beginning to show a mild improvement in accuracy to request when using PECS" (*id.*). In the area of feeding, the June 2020 IEP stated that the student tolerated a regular consistency diet with thin liquids, provided that foods were cut into bite size pieces, and that she required assistance with self-feeding, and monitoring for unexpected seizures (*id.* at p. 5, 6).

The June 2020 IEP included information from a January 2020 social history update that reported the student had been diagnosed with cerebral palsy and epilepsy since the age of eight months, and stated the student enjoyed walking, music, playing drums, and eating (Parent C at p. 6). The IEP indicated that, during the CSE meeting, it was reported that "[the student] only receiv[ed] remote learning from her classroom teacher as the related service providers were uncertain whether they could provide services in the Bahamas" (*id.*; *see* Dist. Ex. 16 at p. 3).¹⁰

According to the IEP, when the student was not interested in something she slumped in her chair, flailed her arms, rocked in her chair, screamed or shouted, banged, or spit (Parent Ex. C at p. 7). The IEP stated that "although the student [wa]s easily distracted, she [wa]s easily redirected (*id.*).

As related to physical development, the June 2020 IEP stated that the student's hearing and vision were within normal limits (Parent Ex. C at p. 7). Based on the June 2020 OT report, the IEP indicated that the student ambulated in the school building with contact guard assistance and benefited from close supervision for safety due to sensory seeking behaviors and balance deficits (*id.* at p. 8). The student benefitted from frequent sensory breaks, as well as increased sensory input prior to functional tasks, which enabled her to sit at a table with decreased environmental stimuli as she was easily distracted (*id.* at p. 8). The IEP indicated the student showed interest in play with peers; however, she could get frustrated and group settings could negatively impact her engagement (*id.*). The student grasped and released objects with counting cues and demonstrated inconsistent use of a switch when provided cues during therapy sessions (*id.*). In the area of self-care, the student worked on standing at the sink for hand washing and dressing her upper body

¹⁰ Although the iBrain director of special education testified that iBrain provided the student with special education and related services during the 2019-20 and 2020-21 school years (August 9, 2021 Tr. pp. 383-86, 371; Parent Exs. V ¶¶ 12, 14, 16, 18; GG ¶¶ 15, 17, 20, 22), the June 2020 CSE meeting minutes indicated that iBrain did not provide the student with OT and PT services when she resided outside the country (Dist. Ex. 16 at p. 3; *see* Parent Ex. C at p. 6).

when provided cues (*id.*). As related to PT, the June 2020 IEP reported the student ambulated for 200 feet, ascended and descended stairs with assistance, with sessions additionally addressing stretching, and deep pressure, or proprioceptive input (*id.* at pp. 8-9). The IEP reported the student worked on sit to stand transitions, reaching for objects overhead, bouncing a large ball while seated, ambulating, and stepping over/around obstacles (*id.* at p. 9). The student required assistance for self-care skills including dressing, managing fasteners, toileting, grooming, and feeding (*id.* at pp. 9-10). The June 2020 IEP reported that the student needed supervision with mobility due to seizures and she transitioned up and down stairs on the elevator with a wheelchair as it was not safe for her to use stairs (*id.* at p. 10).

The June 2020 IEP identified resources to address the student's human management needs that included: a one-to-one paraprofessional to support participation in the educational setting, and to monitor safety while ambulating; aided language stimulation; models with repetition; repetitive additional processing time; repetition of verbal cues with physical cues to increase comprehension; direct instruction; modeling with peers and adults; direct instruction and transfer of skills to social settings; and redirection when the student was frustrated (Parent Ex. C at p. 13). The June 2020 IEP provided for the student's environmental management needs by recommending one-to-one instruction using a direct instructional model; a highly structured classroom or corner room with less stimulus from visual and auditory distraction; multisensory supports, and sensory breaks during instruction, and repeated directions; a small class setting; limited distractions; a contained environment; a safe and accessible environment; adapted materials as needed; and frequent movement breaks (*id.*). Additional strategies for addressing the student's material management needs included access to a dynamic display speech generating communications tool; access to augmentative and alternative communication (AAC); the student's interests incorporated into the school day; access to an instructional laptop with resources and software related to literacy and math skills; access to various means of communication such as pointing, and photographs; appropriate seating options throughout the school building; and use of a visual reward chart for maintaining on task behavior offering the student a preferred reward such as being out of her chair or preferred objects (*id.*).¹¹

To address the student's identified needs, the June 2020 CSE recommended a 12-month program in a 6:1+1 special class with the support of full-time individual paraprofessional services for health, ADL skills, feeding, and safety/seizures throughout the day (Parent Ex. C at pp. 21-23). In addition, the CSE recommended related services that consisted of five 60-minute individual sessions per week of OT, three 45-minute individual sessions per week of PT, four 60-minute individual sessions per week of speech-language therapy, and one 60-minute session per month of parent counseling and training in a group (*id.* at p. 22). To further support the student's identified needs, the June 2020 CSE recommended transportation accommodations, and approximately 13

¹¹ As related to the effects of the student's needs on involvement in the general education curriculum, the June 2020 IEP indicated the student had "significant impairments in cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psycho-social behavior; physical functions; information processing; and speech, she require[d] a high-level degree of individuation of her curriculum" (Parent Ex. C at p. 14). The IEP stated that due to the severity of the student's impairments she required "highly intensive interventions, specifically designed instruction, modifications and adaptations to have access to the general curriculum in a way that is relevant and appropriate for her" (*id.*).

annual goals and corresponding short-term objectives targeting the student's needs as identified (id. at pp. 15-21, 28)

b. Assistive Technology

In the due process complaint notice, the parent asserted that the district inappropriately denied the student assistive technology devices and services as part of the June 2020 IEP, contending that the district did not recommend devices or services to the student and "unjustifiably indicated the [district] would not actually provide any recommended devices or services to [the student] . . . even if new [assistive technology] evaluations were to be completed" (Parent Ex. K at p. 4). In their appeal of the IHO's decision, the parents argue that the IHO properly recognized that the June 2020 IEP did not identify a specific assistive technology device or service in the recommendations section of the IEP but erred in finding that this did not result in a denial of FAPE.

One of the special factors that a CSE must consider is whether the student "requires assistive technology devices and services, including whether the use of school-purchased assistive technology devices is required to be used in the student's home or in other settings in order for the student to receive a [FAPE]" (8 NYCRR 200.4[d][3][v]; see 20 U.S.C. § 1414[d][3][B][v]; 34 CFR 300.324[a][2][v]; see also Educ. Law § 4401[2][a]). The failure to recommend specific assistive technology devices and services rises to the level of a denial of a FAPE only if such devices and services are required for the student to access the student's educational program (see, e.g., Application of the Bd. of Educ., Appeal No. 13-214; Application of a Student with a Disability, Appeal No. 11-121). More recent guidance from the United States Department of Education appears to require that each time a CSE meets to develop, revise, or amend an IEP the CSE "must consider whether the child requires [assistive technology] devices and services" (see "Myths and Facts Surrounding Assistive Technology Devices and Services," January 2024, at p. 1 available at: <https://sites.ed.gov/idea/files/Myths-and-Facts-Surrounding-Assistive-Technology-Devices-01-22-2024.pdf>). Although this guidance seems to place the burden on the district to consider assistive technology at every CSE meeting, that does not mean that CSEs are obligated to provide for assistive technology in every disabled student's IEP and, as further described below, the parent's claim in this case relates to the absence of assistive technology services/devices on the recommended special education program and services page which were already considered as part of the special factors and addressed by the goals and management needs.

As described above, the June 2020 IEP, within the management needs section, provided that the student have access to AAC, as well as access to a dynamic display speech generating communication tool, and other means of communication (pointing, photographs) (Parent Ex. C at p. 13). The IEP also provided that the student have access to an instructional laptop and software (id.). Additionally, within the special factors section, the June 2020 IEP indicated that the student needed a particular device or service to address her communication needs, and that the student needed an assistive technology device and/or service (id. at p. 14).¹²

¹² Within this section, the IEP did not indicate a particular device or service to address the student's communication needs (see Parent Ex. C at p. 14).

Within the annual goals section, the June 2020 IEP identified multiple goals that provided for assistive technology (Parent Ex. C at pp. 15-21). The IEP included a goal that the student would increase her visual memory and discrimination skills through the use of books, assistive technology, and multi-sensory materials; a goal that the student would increase math skills in areas of identifying numbers and shapes with use of books, assistive technology, and multisensory materials; a goal that addressed the student's increased attention and work behavior with a corresponding objective of sharing materials by requesting an object using multi-modal forms of communication such as a "switch, communication device, vocalizations or pointing"; and a goal that the student would increase her expressive language skills by demonstrating understanding of cause and effect toys and activities with corresponding objectives that the student would request a desired item/activity "by exchanging the appropriate picture symbol card for the item/activity" (id. at pp. 15-18). An additional academic goal addressed increased participation in academic and classroom activities at school, with the corresponding objective that the student would use a "switch (or best access method)" (id. at p. 19).

The parents contend that since the June 2020 IEP did not specify the assistive technology device and/or services on the recommended services page, the IHO should have found a denial of FAPE (see Parent Ex. C at p. 22). During the impartial hearing, the district school psychologist, who participated as the CSE representative at the June 2020 CSE meeting (district school psychologist), testified that the student had not spent a lot of time at iBrain prior to the creation of the IEP and the CSE agreed that providing the student speech and language services four times a week would provide a better understanding of the student as a communicator and the best way for the student to access her communication whether through means such as assistive technology, picture cards, switches, or gestures, and provided for a total communication approach (June 24, 2021 Tr. p. 177-78). The district school psychologist testified that the CSE team agreed "the school and the DOE w[ere] working to understand [the student's] assistive technology needs, and how she best communicate[d]. So what we all agreed upon was that she [] need[ed] assistive technology" (June 24, 2021 Tr. p. 182; see Parent Ex. C at p. 14). The district school psychologist testified that various assistive technology was included within the management needs to trial and explore with the student such as dynamic display speech generating communication tools, different laptops, switches, and picture cards (June 24, 2021 Tr. p. 182, 184-85). The district school psychologist testified that all of these technologies would be available to the student in the district; however, at the time of the June 2020 CSE meeting, the student was not in the district (June 24, 2021 Tr. pp. 184-85). Further, she testified that the June 2020 IEP specified goals with assistive technology and that the student would have access to devices as needed (June 24, 2021 Tr. pp. 190-91; see Parent Ex. C at pp. 15-19).¹³

Moreover, the June 2020 IEP made the determination "that [the student] [wa]s in need of an [a]ssistive [t]echnology [e]valuation. The information obtained is intended to help her to communicate more effectively and also help decrease her frustration" (Parent Ex. C at p. 7; see

¹³ The district school psychologist testified that at the time of the CSE meeting there was a pandemic and therefore the specific device or assistive technology the student needed was not known; as a result, the IEP was written in a way that "[the student] would have access to anything anybody in the meeting thought she might need, and we certainly included that in the management needs" (June 24, 2021 Tr. p. 191).

Dist. Ex. 16 at p. 7). As such, I find that the IHO did not error in finding that the CSE did not deny the student access to assistive technology devices and services.

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached the conclusion that the district offered the student a FAPE under the June 2020 IEP (IHO Decision at pp. 13-20). The IHO accurately recounted the facts of the case (*id.* at pp. 3-10), identified the issues to be resolved (*id.* at pp. 4-7), set forth the proper legal standard to determine whether the district offered the student a FAPE (*id.* at pp. 10-13) and applied that standard to the facts at hand (*id.* at pp. 13-20). The decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that she weighed the evidence and properly supported her conclusions. Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is not a sufficient basis presented on appeal to modify the determinations of the IHO with regard to the IHO's finding that the June 2020 IEP provided the student with a FAPE (*see* 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]).

2. May 2021 IEP

The IHO held that the May 2021 IEP failed to address the unique needs of the student by recommending a 12:1+(3:1) class size for the student (IHO Decision at p. 20). The district appealed this finding, arguing that the hearing record demonstrated that the 12:1+(3:1) class size recommendation was appropriate for the student. The district asserted the hearing record established that the student "was prone to elopement" and the May 2021 CSE recommended "a class containing a maximum of twelve students, one special education teacher, and one paraprofessional for every three students, not including the [s]tudent's 1:1 full time health paraprofessional," because the district school psychologist, became aware of the student's recent elopement from home while performing a social history update (Req. for Rev. ¶ 10).¹⁴ The parent argues that the 12:1+(3:1) class size was not appropriate for the student and the IHO's finding should be upheld. The parent asserts that the May 2021 IEP failed to mandate an appropriate class size, contending that the student required a 6:1+:1 special class in order to address her highly intensive management needs.

Turning to the May 2021 IEP's description of the student, the May 2021 IEP provided much of the same information as the June 2020 IEP; the student continued to be classified as a student

¹⁴ The parent argues that the May 2021 IEP recommended a group service paraprofessional, not an individual paraprofessional as under the IEP's recommended special education programs and services section the student was recommended for paraprofessional group services (Parent Ex. AA at p. 31). The district school psychologist testified that the district knew that the student needed a 1:1 paraprofessional and recommended she receive one during the May 2021 CSE meeting and by recommending a 1:1 paraprofessional in the May 2021 IEP's management needs section (Tr. p. 136; Parent Ex. AA at p. 15). The IHO credited the district school psychologist's testimony that the May 2021 IEP's recommendation for a group services paraprofessional was a "glitch" in SESIS and held that "the result of a computer error" did not deny the student a FAPE (IHO Decision at pp. 26-27). The parent has not challenged this finding on appeal and accordingly it is final and binding on the parties and will not be further addressed (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]).

with a traumatic brain injury, and the May 2021 IEP continued to describe the student as having instructional/functional levels in reading and math at the pre-k level (compare Parent Ex. C at p. 1, with Parent Ex. AA at p. 1). The May 2021 IEP provided updated evaluation results that included a social history update, vocational assessment, and teacher and related service reports (Parent Ex. AA at p. 1). The May 2021 IEP indicated that the student "ha[d] recently returned to in person services after receiving services via telehealth during the pandemic" (id. at p. 4).¹⁵ The IEP reported the student required assistance and cues in all self-care skills (id. at pp. 1-2).¹⁶

In the area of telehealth sessions related to academics, the IEP reported the student needed assistance, as she was easily distracted by auditory and visual stimuli (Parent Ex. AA at p. 3). The IEP stated the student benefited from a modified environment such as an isolated room, corners, or cubicles, and "still need[ed] maximum verbal and physical prompting to respond" (id.). In areas of visual discrimination, the student "ha[d] inconsistent progress when presented with books, [assistive technology], and multi-sensory materials to identify and match the color, shapes or designs with maximum to minimum prompting" and inconsistent performance with the same level of prompting and supports to identify and match letter patterns (id. at p. 4). In math, the IEP reported inconsistent progress in identifying and copying number patterns (id.). The IEP reported inconsistent progress in sharing materials, requesting an object, or giving an object when requested when provided with maximum to minimal assistance and prompting using multi-modal communication such as a switch, communication device, vocalizations, or pointing (id.). Further, the IEP stated the student continued to struggle with impulse control, and when frustrated due to not getting what she wanted, the student "react[ed] with shouting, hitting or sometimes spitting" (id.). As related to class participation, the IEP indicated the student enjoyed working with peers, and benefited from peer modeling and a small class size (id.).

In the area of speech-language development, the May 2021 IEP reported the student's recent return to in person services and stated that, during teletherapy sessions, the student displayed fluctuating levels of attention and the inability to attend to a computer screen, as well as tasks presented in person, for short periods of time (Parent Ex. AA at p. 4). The IEP reported that, in relation to receptive language tasks, the student currently "inconsistently follow[ed] one-step commands and remain[ed] largely self-directed" (id.). The May 2021 IEP noted that the student "continue[d] to benefit from maximal verbal, tactile, and visual prompts, along with a clinician model, in order to follow simple one-step commands" as well as to reach for a desired cause-effect toy provided two choices (id. at p. 4, 5). As reported in the June 2020 IEP, the May 2021 IEP repeated that the student required maximal prompts and clinician model to request desired items, and "[wa]s beginning to show a mild improvement in accuracy to request when using PECS"

¹⁵ The March 2021 iBrain education plan stated that due to the COVID-19 pandemic the student received services via telehealth only and reported "speech sessions have been conducted observationally during remote push-in sessions with academics" (Parent Ex. Z at p. 2). The April 15, 2021 iBrain quarterly progress report, stated in the speech-language therapy section that the student returned to in person services May 3, 2021 (Dist. Ex. 33 at pp. 7-9). The OT section of the iBrain progress report stated "[s]tudent has just started at the school. Below describes baseline performance of goal (progress not yet expected)" (id. at pp. 3-4). The PT section of the iBrain progress report did not state when the student started services (id. 33 at p. 7).

¹⁶ The May 2021 IEP reported scores on the Pediatric Evaluation of Disability (PEDI) of 19/73 improved from 17/73 in Spring 2020 (Parent Ex. AA at p. 2).

(compare Parent Ex. C at p. 5, with Parent Ex. AA at p. 5). The May 2021 IEP stated that the student attended to structured language tasks for two minutes and demonstrated limited interest in objects/activities introduced in therapy (Parent Ex. AA at p. 5). The IEP further described the student as "highly distractible" and noted that she "require[d] frequent visual and verbal redirections back to structured tasks" (*id.*). The IEP reported that the student demonstrated "slow and inconsistent progress towards meeting her goals" possibly due to extensive remote services and missed teletherapy sessions related to poor connectivity, and/or seizure activity resulting in fluctuating levels of arousal/alertness, in addition to the student's level of attention and motivation during a session (*id.*). The May 2021 IEP reported the student "alert[ed] (as evidence by head-turn, eye, gaze, vocalizations) to auditory/tactile stimuli, however, appear[ed] to display limited understanding that symbols (i.e., words) represent ideas" and stated that pictures did not yet appear to help increase the student's understanding and expression (compare Parent Ex. C at p. 4, with Parent Ex. AA at p. 5).¹⁷

As related to assistive technology, the May 2021 IEP reported that the student did not currently receive assistive technology services, had difficulty understanding the concept of cause and effect needed for switch use, had adequate functioning to reach for picture symbols; however, she needed foundational skills that pictures represented real objects, as she "reached" for objects rather than picture symbols" (Parent Ex. AA at p. 7). The IEP reported the student's behaviors at times made switch use a challenge as she used alternating hands to activate a pre-recorded voice output switch to make a simple request such as "more;" however, more often the student pushed or threw the switch away or off the table (*id.*). The IEP stated that staff received monthly consultations regarding the use of assistive technology with the student and re-iterated that the student used switches with pre-recorded messages and she "d[id] not understand picture symbols to date" (*id.* at p. 9). The student's parents reported interest in how various assistive technology tools could support the student's communication more effectively; the parents reported the student used gestures, facial expressions, and held a person's hand to take them to what she wanted (*id.* at p. 14).

In the area of social development, the May 2021 IEP reported the student could be social when in a good mood and made good eye contact and smiled (Parent Ex. AA at p. 10). The IEP reported the student was impulsive, with a limited attention span, and easily overstimulated, although not aggressive, and stated she may elope (*id.*). The May 2021 CSE discussed the need for the student to have a functional behavior assessment and possibly develop a behavior intervention plan, as discrimination was still needed between behaviors that were "potentially troublesome" and those due to the student acclimating to a new school following spending a year outside of the country (*id.*). The IEP reported that the parent did not have concerns for the student's behavior at home, and stated the student learned to navigate her new living space (*id.*).

The May 2021 IEP reported that with regard to physical development, the student required extended time to ambulate to therapy areas, frequent sensory breaks, and close supervision for safety due to sensory seeking behaviors and balance and coordination deficits (Parent Ex. AA at

¹⁷ The May 2021 IEP carried over information from the June 2020 IEP related to receptive and expressive language skills as assessed using the Dynamic AAC Goal Grid (DAGG-2), oral motor, and feeding skills referencing prior speech-language reports (compare Parent Ex. C at pp. 4-5, with Parent Ex. AA at pp. 5-6).

p. 11). The IEP reported the student used an immature grasp, and needed hand over hand assistance and supports to initiate drawing or writing (id.). The IEP reported the student was not able to sort two objects into different containers after a demonstration (id.).

The May 2021 IEP further indicated that the student negotiated one flight of stairs provided contact guard assistance to ascend and hand-held assistance to descend (Parent Ex. AA at p. 11). The IEP reported the student required close supervision on a typical day to ambulate longer distances, navigate stairs, negotiate obstacles, and maneuver unstable surfaces (id. at p. 12).

The May 2021 IEP, per vocational assessment, reported that the student was "very mobile, and her safety [wa]s a concern as [she] c[ould] be impulsive" (Parent Ex. AA at p. 14). The IEP reported that the student's parents "ke[pt] the door locked at home as [the student] [wa]s able to open doors by herself" and stated the student "require[d] close supervision for her safety" (id.). In the area of self-care, the IEP reported that the student had delays in all areas of ADL skills, and her parents reported the student needed continued support with toileting skills, brushing her hair and with self-feeding (id.).

To address the student's above identified needs, the May 2021 CSE included approximately 15 annual goals with short-term objectives targeting the student's needs in the following areas: improved attention span and participation during literacy activities; improved ability to follow one-step directions to complete academic tasks provided maximal physical, verbal supports; improved social skills by using a switch device or picture card to request a break; improved social interaction by greeting a familiar adult/peer using a total communication approach, and participating in a turn-taking game provided maximal adult support; improved receptive language by reaching for objects provided moderate to maximal supports, and following simple commands such as sit, stand, stop provided maximal cues; improved understanding of cause and effect by activating toys, requesting a preferred object activity provided two options and exchanging picture symbol for items, provided maximal visual, verbal, and tactile cues; improved pragmatic language skills by demonstrating maintained attention for one to two minutes, joint attention, and functional play for over one minute provided maximal cues; as well as a goal that addressed skills worked on by the paraprofessional and a goal to provide carryover of skills by the student's family (Parent Ex. AA at pp. 17-25). Additional goals addressed gross motor skills of navigating obstacles and ambulation; fine motor skills that addressed pre-writing skills, tolerance for being seated, engaging in table-top activities with increased attending, sorting of objects, in addition to improved participation in play activities by picking up game pieces and catching and pushing a ball; and improved self-care skills (id. at pp. 26-30).

The May 2021 IEP identified strategies for addressing the student's management needs that provided for human, environmental and material resources to support the student including one-to-one paraprofessional support, use of the one-on-one direct instructional model, repetition, frequent verbal cueing, and a highly structured classroom or corner room with less stimulus from visual and auditory distractions, as well as a contained environment (Parent Ex. AA at p. 15).

a. 12:1+(3:1) Special Class Recommendation

In the due process complaint notice, the parent argued that the student required placement in a 6:1+1 special class because she had highly intensive management needs (Parent Ex. Y at p.

4). In reviewing the recommended class placement, the IHO noted that the 12:1+(3:1) special class recommendation was "drastically different from the recommendations of all prior school years in evidence in this matter" (IHO Decision at p. 20). The IHO then reviewed evaluative information obtained since the June 2020 CSE meeting and found that it did not support the change in placement from a 6:1+1 special class to a 12:1+(3:1) special class (id. at pp. 20-22). Finally, after reviewing the testimony of the district school psychologist and the iBrain director of special education and noting that the student had what the iBrain director of special education described as "highly intensive management needs," the IHO determined that the 12:1+(3:1) special class recommendation did not offer the student a FAPE (id. at pp. 22-24).

Initially, it is worth noting that State regulation indicates that the maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction (8 NYCRR 200.6[h][4][ii][a]).¹⁸ In contrast, according to State regulation, "[t]he maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students. In addition to the teacher, the staff/student ratio shall be one staff person to three students. The additional staff may be teachers, supplementary school personnel and/or related service providers." (8 NYCRR 200.6[h][4][iii]).

With regard to the student's instructional and functional levels, the May 2021 CSE considered the student's needs as discussed above, in detail, reviewing the student's academic needs which were at the pre-kindergarten level in the areas of reading and mathematics, and her self-care and ADL skills in which the student needed assistance for sequencing, initiation of activity, and completion of all tasks with assistance for safety (Parent Ex. AA at pp. 1, 2). The May 2021 CSE considered academic and related service information as related to the student's attention and distractibility needs, as well as the student's needs for maximal verbal, visual and tactile cues to support following a one-step command, or to request a desired item from a choice of two, as well as the student's need for a familiar communication partner to assist in interpreting gestures, body language and encouraging communication and appropriate behavior (id. at p. 3, 4, 5). In addition, the May 2021 CSE considered the student's need for close supervision due to sensory seeking behaviors, balance and coordination deficits, and when ambulating longer distances, around obstacles, in addition to the parent's concerns about the student's safety when mobile at home and in the community (id. at pp. 11, 12, 13, 14).

Based on the student's identified needs, the May 2021 CSE ultimately recommended the student attend a district 12:1+(3:1) special class and receive related services of five 60-minute sessions of individual OT per week, four 60-minute sessions of individual speech-language therapy per week, three 45-minute sessions of individual PT per week, and one 60-minute session per month of parent counseling and training in a group (Parent Ex. AA at pp. 30-31). The May 2021

¹⁸ Management needs are defined by State regulations as "the nature of and degree to which environmental modifications and human or material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic achievement, functional performance and learning characteristics, and social and physical development (8 NYCRR 200.1[ww][3][i][d]).

IEP further recommended a health paraprofessional for feeding, ambulation, and safety; along with assistive technology consisting of switches to be used individually and throughout the school day, as well as assistive technology consultation services provided to staff for one 60-minute session per month within a group (id. at p. 31).¹⁹

To further support the student within a 12:1+(3:1) special class, the May 2021 CSE identified and included strategies within the May 2021 IEP that included human, environmental, and material resources to address the student's management needs (Parent Ex. AA at p. 15). As related to human management needs, the May 2021 IEP identified, as noted above, the students' need for a one-to-one paraprofessional and specified the one-to-one paraprofessional would support the student's participation in an educational setting and monitor her safety while ambulating (id.). The May 2021 CSE identified the student's need for aided language stimulation; models with repetition; repetitive additional processing time; repetition of verbal clues with physical clues to increase comprehension; direct instruction; modeling with peers and adults; direct instruction and transfer of skills to social settings; and frequent verbal cueing for the processing of functional tasks and safety (id.). In the area of environmental management needs, the May 2021 CSE included one-on-one instruction using a direct instructional model; highly structured classroom or corner room with less stimulus from visual and auditory distractions; multisensory supports, sensory breaks during instruction and repeated directions; consistent, and predictable daily schedule of activities; a small class setting; limited distractions; and a contained environment (id.). As related to material management needs, the May 2021 CSE recommended voice output switches; incorporation of the student's interests within the school day; instructional laptop with resources and software about literacy and math skills; as well as access to various means of communication such as pointing, photographs and picture cards (id.).

The district considered recommending the student for attendance in 6:1+1, 8:1+1, and 12:1+1 special classes in a specialized school but rejected those options as not sufficient, noting the student needed a more intensive adult to student ratio, and reported the student needed more intensive specialized instruction to address her educational needs (Parent Ex. AA at p. 38).

The May 2021 IEP identified that the parents' expressed concern that the recommended 12:1+(3:1) class was too large to meet the student's needs and stated the student would receive more attention in a smaller class (Parent Ex. AA at p. 38). The IEP reported that, at iBrain, the student was initially placed in an 8:1+1 special class and then moved to a 6:1+1 special class due to her becoming more dysregulated in the former class (Parent Ex. AA at p. 38; see Dist. Ex. 39 at

¹⁹ As noted above, the May 2021 IEP listed the paraprofessional as a group service daily in contrast to the management needs section that identified the student needed a one-on-one paraprofessional (Parent Ex. AA at pp. 15, 31). However, the IHO determined that the recommendation for a group services paraprofessional was a "glitch" and as the parent has not challenged this finding it is final and binding on the parties and the recommendation for paraprofessional services will not be further addressed. In addition, it is worth noting that the IHO found that the management needs, transition needs, post-secondary goals, related services, assistive technology devices and services, and recommended assigned public school were all appropriate and neither party has appealed from those determinations; accordingly, they are also final and binding on the parties and will not be further addressed in this decision other than to the extent that they relate to the 12:1+(3:1) special class placement (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z., 2013 WL 1314992, at *6-*7, *10).

p. 6).²⁰ The director of special education at iBrain (director) testified that the district recommended class size of 12:1+(3:1) was too large to meet the student's needs and, at iBrain, the student attended a 6:1+1 special class and received direct and small group instruction in addition to related services on a weekly basis (Parent Ex. GG ¶¶ 23, 25). The iBrain director testified that due to her seizure disorder, the student remained highly distractible, with highly intensive management needs that could be addressed in a small class with extensive support (id. ¶ 24).

The CSE considered and included information on the student's distractibility throughout the May 2021 IEP, specifically that the student was easily distracted by auditory and visual stimuli and required a variety of environmental modifications and accommodations (Parent Ex. AA at pp. 3, 5). Likewise, as described above, the May 2021 CSE recommended resources to address the student's difficulty attending, including providing her with a "[h]ighly structured classroom or corner room with less stimulus from visual and auditory distractions," in addition to providing for a contained environment and limited distractions (id. at p. 15).²¹

The district school psychologist testified that, following the May 2021 social history update, she learned from the parent that the student eloped from her new apartment and, based on that, the school psychologist determined that a 12:1+(3:1) would provide more safety for the student in terms of more "sets of eyes on her," and that the student's physical, academic, and social needs could be met within a 12:1+(3:1) program (Tr. p. 145).²² According to the district school psychologist, the CSE determined, due to the student's elopement and the numerous seizures she had, and with the transition of coming back into the district, the 12:1+(3:1) would be more appropriate for the student and provide more support than the 6:1+1 special class setting (Tr. p. 146). The district school psychologist summarized:

[The student] ha[d] needs academically, socially, and physically. And again, she's at a high risk for elopement. And so the IEP, with the goals that were developed, with the management needs, with the one-to-one paraprofessional, the [assistive technology] consult, the seizure safety training, working with her feeding protocol, the 12:1+(3:1) program [wa]s appropriate not only to keep her safe, but

²⁰ According to the hearing record, the student attended iBrain in person for a period of time between February 2020 through March 2020; and returned to in-person attendance at iBrain at some point between April and May of 2021 (June 30, 2021 Tr. p. 306; Parent Ex. V ¶¶ 9, 18; Parent Ex. GG ¶¶ 9, 22; Dist. Ex. 33 at pp. 1, 7-9).

²¹ The May 2021 IEP identified the student as having "significant impairment in cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psycho-social behavior; physical functions; information processing; and speech, she require[d] a high-level degree of individualization of her curriculum" as well as highly intensive interventions, specifically designed instructions, and modifications and adaptations to access curriculum in a way that was relevant and appropriate to her (Parent Ex. AA at pp. 15, 38).

²² As noted by the IHO, the May 2021 social history does not include any reference to the student eloping (IHO Decision at p. 22; see Dist. Ex. 38). However, contrary to the IHO's finding, the hearing record does include at least one other instance where the parent had indicated the student may elope (Parent Ex. L at p. 1). Additionally, although not necessary to my determination, the student's February 2022 IEP describes the student's elopement behaviors in greater detail (see Parent Ex. FF at pp. 15-20).

to have her in a program that will afford educational benefit.(Tr. p. 152).

Based on the above, while the parents' preference for a 6:1+1 special class ratio, matching the district's prior recommendation and the class size that the student was attending at iBrain, is understandable, the hearing record reflects that the 12:1+(3:1) special class recommended by the May 2021 CSE was reasonably calculated to address the student's medical, physical, academic, and attending needs. As indicated above, the May 2021 CSE recommended a special education program and resources to address the student's intensive management needs. Moreover, the May 2021 CSE recommended a special education program that was reasonably calculated to provide the student with an educational benefit.

Turning to the assertion that because the student had highly intensive management needs, the CSE needed to recommend placement in a 6:1+1 special class, as states above, State regulation does provide that "[t]he maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][ii][a]). However, the adult-to-student ratio required in a 6:1+1 special class and a 12:1+(3:1) special class is similar; with the 12:1+(3:1) special class ratio providing slightly more adults in the classroom per student and, additionally, providing for more variety in the type of school personnel working with the student. Accordingly, generally, while the student may exhibit highly intensive management needs and require a high or significant degree of individualized attention and intervention (see 8 NYCRR 200.6[h][4][ii][a]-[b]), the IHO and the parent's strict adherence to the language in State regulation guiding 6:1+1 special class placements to the exclusion of other appropriate placement options is reductive and overlooks the evidence in the hearing record showing that the student's highly intensive needs are due to her "significant impairments in cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psycho-social behavior; physical functions; information processing; and speech" (Parent Ex. AA at p. 15). Review of the student's needs shows that although a 6:1+1 special class placement was an appropriate placement for the student, as determined with the June 2020 IEP, she may have also been appropriately placed in a program meeting the definition a 12:1+(3:1) consisting of habilitation and treatment (see 8 NYCRR 200.6[h][4][iii]). Accordingly, the May 2021 CSE's determination to place the student in a 12:1+(3:1) special class, along with the other recommended management needs and supports, as well as related services, was reasonably calculated to afford the student an educational benefit.

VII. Conclusion

Based on the foregoing, I find that the hearing record supports the IHO's finding that the June 2020 IEP was reasonably calculated to enable the student to receive educational benefit in light of her unique circumstances. Furthermore, I find that the hearing record supports finding that the May 2021 CSE's recommendation for placement of the student in a 12:1+(3:1) special class was appropriately tailored to address the student's individualized needs. Having found that the district offered the student a FAPE for the school years at issue, I need not reach the issue of

whether iBrain was an appropriate placement for the student or whether equitable considerations support the parent's request for relief and the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated April 24, 2024, is modified by reversing those portions which determined that the district failed to offer the student a FAPE during the period of June 11, 2021 through September 13, 2021 and ordered funding for the parent's unilateral placement of the student at iBrain during that period of time;

IT IS FURTHER ORDERED that the IHO's decision, dated April 24, 2024, is modified by reversing those portions which ordered the district to provide special education transportation for the student, with appropriate accommodations in order for the student to be transported safely to and from iBrain; and

IT IS FURTHER ORDERED that the IHO's decision, dated April 24, 2024, is modified by reversing those portions which ordered the district to directly pay iBrain the costs of related services and a 1:1 paraprofessional during the period of June 11, 2021 through September 13, 2021.

Dated: **Albany, New York**
 July 3, 2024

STEVEN KROLAK
STATE REVIEW OFFICER