The University of the State of New York

The State Education Department
State Review Officer
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No. 24-258

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Richa Raghute, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Jay St. George, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's tuition at the International Academy for the Brain School (iBrain) for the 2023-24 school year.[1] The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

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

III. Facts and Procedural History

The student began attending iBrain in September 2022 (Parent Ex. A at p. 4; Dist. Ex. 3 at pp. 1, 2, 3, 5, 6, 7, 8, 9).[2] A CSE convened on June 6, 2023 to develop an IEP for the student with an implementation date of June 12, 2023 (Dist. Ex. 8 at pp. 1, 56-58). The June 2023 CSE

[2] An October 7, 2022 quarterly progress report from iBrain stated that the student began receiving services on September 30, 2022 (Dist. Ex. 3 at pp. 1, 2, 3, 5, 6, 7, 8, 9) and began receiving physical therapy services on September 21, 2022 (id. at pp. 13, 14).

continued to find the student eligible for special education and related services as a student with multiple disabilities (id. at pp. 1, 63). The June 2023 CSE recommended 12-month services consisting of a 12:1+(3:1) special class in a specialized school and the related services of three periods per week of adapted physical education, five 60-minute sessions per week of individual occupational therapy (OT), five 60-minute sessions per week of individual physical therapy (PT), four 60-minute sessions per week of individual speech-language therapy, one 60-minute session per week of speech-language therapy in a group of two, two 60-minute sessions per week of individual vision education services, one 60-minute session per month of parent counseling and training in a group, and daily, full time 1:1 school nurse services (id. at pp. 56-57, 58, 64). The June 2023 CSE further recommended daily, full time, individual paraprofessional services for health, ambulation, safety and feeding, as well as individual daily service of a speech generating device (SGD) and one 60-minute session per week of assistive technology services (id. at pp. 57-58, 64). The June 2023 CSE also recommended that the student receive special transportation services from the closest safe curb location to school along with 1:1 nursing services, lift bus to accommodate a wheelchair, limited travel time, a route with fewer students, and climate control (id. at pp. 62, 64-65).

By letter dated June 20, 2023, the parent provided the district with 10-day written notice of her intention to remove the student from public school "because of the [district]'s failure to offer or provide the [s]tudent with" a FAPE (Parent Ex. C at p. 1). The parent further advised that she intended to unilaterally enroll the student at iBrain and seek public funding for the placement (id.). The parent further indicated that she "ha[d] not received a [district]-recommended program and placement" for the 2023-24 extended school year from the CSE following the June 6, 2023 CSE meeting (id.). The parent's letter further stated that although the district had failed to timely notify the parent of the assigned school site, if the district recommended the same site as last year, the parent had previously rejected it (id. at p. 2).

By prior written notice dated June 26, 2023, the district summarized the recommendations of the June 6, 2023 CSE (Dist. Ex. 12 at pp. 1-3). In a school location letter dated June 26, 2023, the district identified the public school site to which the student had been assigned (id. at p. 5).

On June 26, 2023, the parent signed an enrollment contract with iBrain for the 2023-24 school year, which was countersigned on July 1, 2023 (Parent Ex. D at pp. 1, 6). The parent also electronically signed a school transportation service agreement on July 25, 2023, and electronically signed an annual nursing service agreement on June 30, 2023 (Parent Exs. E at p. 7; F at p. 9).

A. Due Process Complaint Notice

In a due process complaint notice dated March 1, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 extended school year (Parent Ex. A at p. 1). The parent invoked pendency and requested an immediate pendency hearing and interim order on pendency (id. at pp. 1-2). The parent next alleged that the district failed to timely provide the parent with prior written notice and a school location letter, failed to recommend an appropriate class size, failed to recommend an appropriate public school site, failed to recommend appropriate related services and supports, failed to conduct necessary evaluations, and failed to recommend appropriate special transportation services (id. at pp. 5-7). The parent also asserted that iBrain was an appropriate unilateral placement and that equitable considerations

warranted full funding for the cost of the student's attendance at iBrain for the 2023-24 school year (id. at p. 8). As relief, the parent requested direct funding for the cost of full tuition, direct funding for the cost of a 1:1 nurse and a 1:1 transportation nurse, direct funding for the cost of the student's private transportation services consisting of a 1:1 transportation nurse, air conditioning, a lift bus, a regular-sized wheelchair, oxygen, a ventilator, and limited travel time of 90 minutes (id. at p. 9). The parent further requested a CSE meeting, an order compelling the district to reevaluate the student and to provide assistive technology services and devices, as well as an augmentative and alternative communication (AAC) device, and funding for "an independent educational and transition evaluation" and "an independent psychological, neuropsychological, and educational needs assessment" of the student (id.).

B. Impartial Hearing and Impartial Hearing Officer Decisions

The parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH). On April 3, 2024, a prehearing conference was held where the parties discussed the issue of the student's pendency and the parent requested a hearing on pendency (Tr. pp. 1, 26-39, 46-73). At the April 4, 2024 pendency hearing, both parties submitted exhibits into evidence and had the opportunity to argue their respective positions (see Tr. pp. 46-73; Parent Pendency Ex. A; Dist. Pendency Exs. 1-3).[3] The parties agreed that a prior, unappealed IHO decision dated October 6, 2023 formed the basis for the student's pendency program, but disagreed whether the student's pendency program included music therapy and regarding the date when the student's pendency started (Tr. pp. 54-67).

In an interim decision dated April 4, 2024, the IHO found that pendency was based on the prior, unappealed IHO decision dated October 6, 2023, which specifically excluded music therapy because the student did not receive such services during the school years then at issue (Interim IHO Decision; see Dist. Pendency Ex. 1). According to the IHO, in determining the student's pendency program, she lacked "the authority to alter, modify, or enlarge the relief" that was previously ordered (Interim IHO Decision at p. 1). Therefore, the IHO's pendency order tracked the same language that was in the prior October 6, 2023 IHO decision, and included the district funding the student's base tuition and supplemental tuition costs (except for the costs of music therapy) at iBrain for the extended school year at specified amounts, as well as the district funding the costs for 1:1 nursing services and private transportation at specified rates "upon the receipt of appropriate invoices" (id.). Finally, the IHO determined that the student's pendency program was to be retroactive to the date of the filing of the due process complaint notice and would continue

[3] During the impartial hearing, the parties entered certain exhibits into evidence to support their pendency positions, but marked such pendency exhibits with the same letter and number designations that were used to identify the exhibits entered into evidence in support of the parties' positions on the merits (see Tr. pp. 50-51, 88, 104). For clarity in this decision, the parties' exhibits that were entered during the pendency portion of the hearing will be cited as "Pendency" exhibits. According to the IHO's decision and the transcript, Parent Pendency Exhibit B was withdrawn as duplicative of District Pendency Exhibit 1, however the district submitted Parent Pendency Exhibits A-B with the certified hearing record (IHO Decision at p. 11; see Tr. p. 51). In addition, the IHO initially indicated in her decision that Parent Exhibit B was marked for identification, and Parent Exhibits G and H were marked but not admitted into evidence, however the hearing record reflects that the exhibits were later admitted (IHO Decision at pp. 11, 19, 44; see Tr. pp. 104, 155, 197, 232). The district submitted Parent Exhibits A-J with the certified hearing record.

until the conclusion of the matter, unless modified by a subsequent order or agreement (id. at p. 2).

On April 4, 2024, the district filed a motion objecting to paragraph 4 of the IHO's prehearing conference summary and order which required the district's witness to appear in person (IHO Ex. XIII at pp. 2-5). On April 5, 2024, the parent responded to the district's motion (IHO Ex. XIV at pp. 2-4). In a decision dated April 5, 2024, the IHO denied the district's motion (IHO Ex. XV at pp. 2-3). After the parties were given the opportunity to supplement the record, the district provided an affidavit from its witness and the parent subsequently withdrew her request for an in-person hearing (IHO Exs. XV at p. 3; XVI at pp. 1-3; XVII at pp. 1-7).

On April 8, 2024, the parent filed a motion with exhibits requesting that the IHO recuse herself from presiding over the matter (IHO Ex. XIX at pp. 2-144). On April 12, 2024, the district opposed the parent's motion (IHO Ex. XX at pp. 1-11). By decision dated April 14, 2024, the IHO denied the parent's request for recusal (IHO Ex. XXII at pp. 1-9).

On April 17, 2024, the parties reconvened for an impartial hearing on the merits of the parent's claims (Tr. pp. 74-281). In a final decision dated May 15, 2024, the IHO determined that the district offered the student a FAPE for the 2023-24 school year (IHO Decision at pp. 22, 25-33). The IHO also found the parent's argument that the omission of music therapy constituted a denial of a FAPE unpersuasive, noting, among other things, that the IDEA does not require a specific therapy or methodology (id. at pp. 26-27).[4] The IHO concluded that the evidence supported a prior written notice and school location letter were sent to the parent, that the CSE was duly constituted, that the CSE's 67-page IEP appropriately described the student, the IEP "include[ed] appropriate annual and short-term goals that [were] specifically tailored to the student's needs and measurable," and that "the IEP recommended an appropriate frequency and duration of related services (including PCAT) based on Student's deficits, supports for school personnel on behalf of Student, a 12-month service and/ or program to prevent regression, and special transportation" (id. at pp. 27-32). The IHO rejected the parent's claim that a 12:1+(3+1) special class was inappropriate for the student (id. pp. 32-33).

Out of an abundance of caution, the IHO went further and addressed the parent's remaining claims and requests for relief in the alternative and determined that iBrain was not an appropriate unilateral placement and that equitable considerations did not warrant full funding for the cost of the student's attendance, (IHO Decision at pp. 33-39). Lastly, the IHO found that the parent was not entitled to an award of an independent educational evaluation (IEE) at public expense which request had been raised in the due process complaint notice (id. at pp. 39-42).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the district offered the student a FAPE for the 2023-24 school year, that the parent's unilateral placement at iBrain was not appropriate, and that equitable considerations did not favor direct funding. The parent also asserts that the IHO erred in failing to recuse herself and further contends that the IHO exhibited

[4] The IHO discussed that there were forms and discussion the student's medical needs which postdated the CSE meeting and IEP in question (IHO Decision at p. 26).

bias against the parent and her counsel during the proceedings. The parent alleges that the IHO prevented parent's counsel from questioning the district's witness about the student's classification and prevented the parent's counsel "from developing . . . testimony" that the witness had never recommended music therapy. The parent further contends that the district failed to recommend an appropriate class size, extended school day, appropriate medical equipment for special transportation by failing to recommend oxygen on the student's bus, and failed to send a timely prior written notice and school location letter. The parent argues that the IHO ignored the district's failure to send timely notice and discounted the district's failure to present a witness or any evidence that the assigned school was capable of implementing the June 2023 IEP.

Next, the parent alleges that the IHO erred by not ordering direct payment of the full amounts of the enrollment contract for tuition and related services, the costs of transportation and the costs of 1:1 nursing services. The parent contends that the IHO erred by improperly concluding that the parent's witness from iBrain testified unreliably. The parent asserts that the IHO should have found iBrain's IEP was appropriate because she found the district's IEP—which was based on the iBrain IEP—offered the student a FAPE. The parent alleges that the IHO erred by relying on the student's progress in finding iBrain was not appropriate. The parent also argues that the IHO erred in finding equitable considerations did not favor the parent. The parent contends that the district did not raise the issue of reasonableness of cost and the IHO improperly questioned the contracts and would have reduced the award. The parent further asserts that the IHO erred in failing to award the parent an IEE since the district failed to conduct any of its own evaluations. The parent also argues that the IHO erred in failing to recuse herself.[5]

As relief, the parent requests findings that the student was denied a FAPE for the 2023-24 school year, iBrain was an appropriate placement, and that equitable considerations favor the parent's claims. The parent further requests that the IHO be reprimanded for not recusing and requests an order for pendency for the 2023-24 school year for the student's tuition, transportation and related services.[6]

In an answer, the district responds with general denials and asserts that the IHO correctly determined that the district offered the student a FAPE for the 2023-24 school year and properly denied the parent's request for direct funding of tuition, nursing services and transportation. The

[5] The parent has attached four proposed exhibits to her request for review, however the documents are not mentioned in any way in the request for review. To the extent the parent seeks consideration of these documents as additional evidence, generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). As correctly noted by the district in its answer, the four proposed exhibits were included as exhibits submitted with the parent's motion for recusal and are already part of the hearing record (see IHO Ex. XIX at pp. 19-68, 100-08). Thus, the parent's proposed exhibits do not constitute additional evidence and will not be further considered.

[6] The parent appealed the IHO's April 4, 2024 interim order on pendency. By decision dated July 8, 2024, an SRO dismissed the parent's appeal as untimely.

district argues that the IHO's FAPE determinations were supported by the district's documentary and testimonial evidence. The district asserts that the parent did not raise the issue of implementation of the June 2023 IEP in her due process complaint notice and improperly raised it for the first time during the impartial hearing. Nevertheless, the district argues that the IHO engaged in a comprehensive analysis of the parent's claims and correctly found them to be improperly speculative. Next, the district contends that the IHO correctly found that iBrain was not an appropriate unilateral placement and that equitable considerations did not warrant any relief. The district further asserts that the IHO correctly refused to recuse herself and properly denied the parent's request for an IEE.

The parent interposed a reply to the district's answer.[7]

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.,

[7] A reply is authorized when it addresses "claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (8 NYCRR 279.6[a]). Accordingly, to the extent that the parents' reply reiterates arguments raised in the request for review, it is not a proper reply and will not be considered.

346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

1. IHO Bias and Recusal Request

At the outset, I have conducted a thorough review of the hearing record, which included the IHO's meticulous account of the proceedings leading up to the hearing on the merits of the parent's claims and I find the parent's claims of bias to be without merit (see Tr. pp. 1-281; IHO Exs. I-XXVII).

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]; C.E. v. Chappaqua Cent. Sch. Dist., 695 Fed. App'x 621, 625 [2d Cir. June 14, 2017]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as

they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

On review, the hearing record does not support a finding that the IHO demonstrated bias. Rather, as indicated by the district in its opposition to the parent's motion to recuse, the parent did not identify any conduct of the IHO's that was related to the instant matter beyond unfavorable rulings (IHO Exs. 19 at pp. 3, 6, 9-11, 11-12; XX at p. 2). In her decision on recusal the IHO's retelling of the proceedings, and assessment of the parent's counsels' conduct was supported by the hearing record, most notably by parent's counsel advising during the prehearing conference that the parent would be making a motion for recusal (IHO Ex. XXII at pp. 2-6, 7-9; see Tr. p. 12).

The parent's disagreement with the conclusions reached by the IHO does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994]; Application of a Student with a Disability, Appeal No. 13-083). Further, the IHO's rulings fell within her broad discretion (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *7-*8 [S.D.N.Y. Mar. 30, 2017]).

Moreover, the parent has failed to put forth sufficient evidence to demonstrate any bias on the part of the IHO during the conduct of the impartial hearing at issue on appeal. Overall, a review of the IHO's decisions and the hearing record supports a finding that the IHO's decisions were not biased against the parent. Rather, the IHO conducted the hearing within the bounds of standard legal practice and the hearing record does not support a finding of bias (Genn v. New Haven Bd. of Educ., 219 F. Supp. 3d 296, 311 [D. Conn. 2016] [rejecting the parent's claim of IHO bias and noting that conduct that was described as "curt" and "harsh" nevertheless did not amount to bias]). Moreover, an independent review of the hearing record demonstrates that the parent had a full and fair opportunity to present her case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514 [b][2][i], [ii]; 8 NYCRR 200.5 [j]). Similarly, the IHO's conduct in response to the parent's counsels' efforts to have her recuse herself, including her decision not to issue certain requested subpoenas, fell within the bounds of standard legal practice and requirements of due process and was otherwise supported by the lack of any facially sufficient grounds asserted by parent's counsels that would compel her recusal from this matter. Accordingly, I find that the IHO's declination to recuse herself was reasonable under the circumstances. Accordingly, the parent's request for the IHO's recusal in this matter is dismissed.

Even if the IHO had acted improperly, the undersigned has conducted an independent review and as further describe below finds no reason to reach a different conclusion.

2. Scope of Impartial Hearing and Review

The district asserts that the parent did not raise the issue of implementation of the June 2023 IEP in her due process complaint notice and improperly raised it for the first time during the impartial hearing.

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

Review of the parent's March 1, 2024 due process complaint reflects that the parent challenged any and all IEPs offered for the 2023-24 12-month school year "as well as the school location to implement such IEP" and that "[i]t [wa]s mathematically impossible" for the district to implement the student's related services "in a typical school week" (Parent Ex. A at pp. 5, 6). In addition, the IHO set forth in her prehearing conference summary and order that the issues to be determined at the impartial hearing were whether or not the student was denied a FAPE for 2023-24 school year "based on, in part, failure of the [d]istrict to send a [prior written notice] and [school location letter], not offer appropriate class size, not conduct appropriate evaluations, failure to implement appropriate transportation and [specialized] school could not implement the recommended program" (IHO Ex. VIII at pp. 3-4). Notably, the district filed a motion objecting to a paragraph requiring its witness to appear in person; however, the district did not object to the IHO's delineation of the issues to be addressed during the impartial hearing. Thus, the IHO did not err in considering the parent's claim that the district could not implement the June 2023 IEP at the assigned school site.[9]

In addition, the parent's March 1, 2024 due process complaint notice broadly stated that the student was represented "in matters pertaining to the classification, program, placement, and

[9] To the extent the IHO found in her decision that the parent was raising an implementation claim for the first time during the impartial hearing, it was not consistent with her prehearing conference summary and order (compare IHO Decision at p. 27, with IHO Ex. VIII at p. 4). Nevertheless, the IHO engaged in a comprehensive analysis of the parent's implementations claims (IHO Decision at pp. 27-28). While the IHO's statement that the parent's argument was raised for the first time at the impartial hearing was error, it was harmless because her substantive analysis was nuanced and drew a distinction between the facts alleged in the due process complaint notice and the facts borne out by the hearing record (i.e., the difference between the claim that the district failed to offer a school location at all and the claim that the district offered a school location that was factually incapable of implementing an IEP) (id. at pp. 27-29).

implementation of special education and related services" for the 2023-24 extended school year (Parent Ex. A at p. 1). Beyond this statement, the due process complaint notice does not contain a specific challenge to the student's classification. However, in the request for review, the parent indicated that the student's classification was "contrary to his diagnoses" and that "[i]n this regard, the IHO prevented [p]arent's counsel from examining [the district's] witness to this issue" (Req. for Rev. ¶ 17). Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Here, the parents' due process complaint notice did not put the specific issue category of the student's eligibility for special education in dispute, as it contained a generic catch-all allegation that as described above (Parent Ex. A at p. 3), but such catch-all provisions of this variety that lack any specificity and which can apply to virtually all students with a disability are plainly inadequate (Phillips v. Banks, 656 F. Supp. 3d 469, 482 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]).[10]

With regard to the parent's request for an order on pendency set forth in her request for review, the hearing record includes a pendency implementation form as well as an interim order on pendency. In her request for review, the parent requested an order on pendency but failed to raise any challenges related to the IHO's interim order on pendency. Thus, there is no basis to disturb or further address the IHO's April 4, 2024 interim order on pendency.

I further note that the parent has not appealed from the IHO's findings that the June 2023 CSE was properly composed, that the June 2023 CSE considered sufficient evaluative information, and that the parent had waived the student's triennial review (IHO Decision at pp. 29-30). Therefore, those determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Bd. of Educ. of the Harrison Cent. Sch. Dist. v. C.S. et al., 2024 WL 4252499, at *12-*15 [S.D.N.Y. Sept. 20, 2024]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). In addition, the parent has not appealed from the IHO's decision to the extent it did not

[10] Even if it had been raised, the courts have described the disability categorization issue as a "red herring" when there is no dispute that the student is eligible for special education (Navarro Carrillo v. New York City Dep't of Educ., 2023 WL 3162127, at *2 [2d Cir. May 1, 2023]). Under the IDEA, the parties are not supposed to rely on the disability category to determine the needs, goals, accommodations, and special education services in a student's IEP.

address all of the claims in the due process complaint notice. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). As a result, the parent's claims related to FAPE in this appeal are limited to her assertions that the district failed provide timely prior written notice and a school location letter which deprived the parent of meaningful participation in the development of the IEP, failed to recommend an appropriate class size, failed to recommend an extended school day, failed to offer the student music therapy, failed to recommend appropriate medical equipment for special transportation, and that the district failed to demonstrate it could implement the student's IEP at the assigned school site. Consequently, the parent's claims that the CSE was properly composed, that the June 2023 CSE considered sufficient evaluative information, and that the parent had waived the student's triennial review which resulted in adverse findings, and those claims, along with any claims that went unaddressed by the IHO and by the parents in their request for review, have been abandoned and will not be further discussed (8 NYCRR 279.8[c][4]).

B. FAPE - June 2023 IEP

In her request for review, the parent alleges that the IHO incorrectly determined that the June 2023 IEP offered the student a FAPE for the 2023-24 school year, as the district failed to recommend an appropriate class size, music therapy, or medical equipment for special transportation for the student.

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

The parent asserts that the IHO erred by determining that a 12:1+(3:1) special class was appropriate despite noting the student's "need for highly intensive interventions."

State regulation indicates that the maximum class size for special classes containing students whose management needs are determined to be highly intensive and requiring a high degree of individualized attention and intervention shall not exceed six students with one or more supplementary school personnel assigned to each class during periods of instruction (see 8 NYCRR 200.6[h][4][ii][a]). Management needs, in turn, are defined by State regulations as "the nature of and degree to which environmental modifications and human material resources are required to enable the student to benefit from instruction" and shall be determined in accordance with the factors identified in the areas of academic or educational achievement and learning characteristics, social and physical development (8 NYCRR 200.1[ww][3][i][d]).

However, State regulation also 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]).

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

Here, a review of the June 2023 iBrain plan alongside the June 2023 IEP developed by the district reveals they included the same present levels of performance, management needs, and annual goals and objectives (except for music therapy annual goals only recommended by iBrain) (compare Parent Ex. B at pp. 1-41, 43-60, with Dist. Ex. 8 at pp. 2-35, 37-56). It is undisputed that the student demonstrated global developmental delays related to his impairments in cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem-solving, sensory/perceptual/motor abilities, psycho-social behavior, physical functioning, information processing, and speech along with accompanying health-related needs (Parent Ex. B at pp. 33, 38-41; Dist. Ex. 8 at pp. 32-35).

The June 2023 CSE recommended a 12-month program in a 12:1+(3:1) special class in a district specialized school, adapted physical education, and related services consisting of OT, PT, speech-language therapy, and vision education services, as well as school nurse services, and parent counseling and training (Dist. Ex. 8 at pp. 56-58, 63-64). To address the student's significant management needs and his need for 1:1 assistance, the CSE recommended full time 1:1 paraprofessional services in order for him to benefit from participation in an educational setting and for mobility and transfers, 1:1 instruction, Tobii eye gaze device with TDSnap software and table mount, voice output switches, 1:1 nursing services, two-person transfers, activity chair, gait-trainer, and a wheelchair (id. at pp. 29-32, 57-58). Additionally, the CSE recommended attention to the student's needs regarding his impaired respiration and aspiration, seizure activity, skin integrity, and toileting, grooming, and feeding (id. at pp. 16-17, 32-34).

The June 2023 IEP indicated that the CSE also considered for the student 6:1+1, 8:1+1, and 12:1+1 special classes in specialized schools but rejected those placements as unable to meet the student's needs (Dist. Ex. 8 at p. 66). The school psychologist who served at the June 2023 CSE meeting as both a school psychologist and district representative testified that the CSE discussed an appropriate class size for the student and examined the continuum of services, which would have included consideration of a smaller class (Tr. pp. 108, 119, 140). The school psychologist testified that, based on what the CSE discussed and her understanding of the continuum, the CSE felt that the student's needs were best addressed in the classroom it recommended, a 12:1+(3:1) special class, as far as having the appropriate staff and accessibility to programs and services that would be supportive for the student (Tr. pp. 126, 140-41).

The school psychologist testified that she believed it was fair to characterize that the student had highly intensive needs that required specialized and highly intensive interventions (Tr. p. 126). She explained that the student had received medical diagnoses that included cerebral palsy, localization related focal epilepsy with complex partial seizures, hypotonia, microcephaly, chronic lung disease, hearing and visual impairment, and that his visual conditions include myopia,

optic atrophy, chronic conjunctivitis of both eyes, retinopathy of prematurity-bilateral, and cortical visual impairment (Dist. Ex. 14 ¶ 10; see Dist. Ex. 8 at pp. 3, 15). She further testified that the student received all nutrition via gastronomy tube (G-tube) and that he was nonverbal (Dist. Ex. 14 ¶ 10; see Dist. Ex. 8 at pp. 3, 16-17). The school psychologist testified that, given the student's extensive medical, academic, and communicative needs and considering he required assistance with activities of daily living, including travel and navigating the school building, it was the CSE's opinion that a 12:1+(3:1) class in a specialized school was the least restrictive environment in which the student could make educational progress (Dist. Ex. 14 at ¶ 10; see Tr. p. 126; Dist. Ex. 14 ¶ 14).

The adult-to-student ratio required in a 6:1+1 special class and a 12:1+(3:1) special class is similar; however, the 12:1+(3:1) special class ratio provides for variety in the category of school personnel working with the student and which may not be found in other special classes on the continuum designed to address the needs of a student with intensive management needs. Generally, while the student does exhibit highly intensive management needs and requires a high or significant degree of individualized attention and intervention (see 8 NYCRR 200.6[h][4][ii][a]-[b]), his needs include those which require the highest level of support consisting of the type of habilitation and treatment contemplated by regulation to be available in a 12:1+(3:1) setting (see 8 NYCRR 200.6[h][4][iii]; see Navarro Carrillo, 2023 WL 3162127, at *3).

Based upon the foregoing, the evidence in the hearing record leads me to the conclusion that the recommended 12:1+(3:1) special class placement was appropriate and reasonably calculated to enable the student to receive educational benefits and afford him the opportunity to make appropriate progress in light of his circumstances for the 2023-24 school year. Accordingly there is no reason to disturb the IHO's conclusions with regard to the adequacy of the special class placement for the student.

2. Music Therapy

On appeal, the parent argues that the IHO incorrectly found the June 2023 IEP was appropriate despite a failure to recommend music therapy, and that the IHO prevented the parent's attorney from developing this testimony further.

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]).

According to the June 2023 iBrain plan, at that time the student was receiving two 60-minute sessions per week of individual music therapy and one 60-minute session per week of group music therapy (Parent Ex. B at p. 33). The iBrain plan stated that in music therapy staff "use[d] client-preferred live music in a flexible and directed way to help our students make progress towards goals" in the areas of sensorimotor, cognition, and speech-language, and that throughout his sessions, the student engaged in activities revolved around communication, cognition, and improving motor skills (id. at p. 32). The iBrain plan stated that the goals on which

they focused, and that they recommended for the 2023-24 school year, targeted increasing the student's motor coordination and planning, improving attention and tolerance for active therapeutic exercise, and increasing total communication (gesture, AAC device, vocalizations, etc.) (id. at pp. 33; 54-56).

The June 2023 IEP stated that music therapy was not being recommended as part of the current district IEP mandates and that the CSE discussed that music could be used as an instructional tool to support with engagement throughout the school day (Dist. Ex. 8 at p. 14). The IEP reported that the parents and iBrain school team expressed significant concern about the lack of music therapy as a mandated service, noting that the student would not appropriately progress toward the identified goals without the service being provided by a certified music therapist (id.).

The school psychologist testified that she did not recall any instances where she had recommended music therapy (Tr. p. 130). The school psychologist added that, although music therapy was not recommended as a related service on the June 2023 IEP, in her professional opinion, the student's other related service providers could incorporate the music therapy as an instructional support, particularly in speech-language therapy and in OT for fine motor skill support (Dist. Ex. 14 ¶ 12).

The June 2023 IEP included mandates for related services of OT, PT, and speech-language therapy (Dist. Ex. 8 at pp. 57, 64). The IEP included annual goals in these areas targeting the student's receptive language skills; expressive language skills utilizing various modes of communication (mid or high-tech AAC); pragmatic language skills through demonstrating joint attention, engaging in turn-taking, and initiating interaction using multimodal means of communication (low/mid/high tech AAC, facial expression); tolerating oral-motor exercises; performing sit to stand transfers; crawling forward; and improved participation in academic activities, leisure/play activities, and self-care activities (id. at pp. 42-51). In addition, the IEP included a social skills annual goal targeting attending to a variety of small group activities (id. at pp. 39-40).

Although it is undisputed that iBrain recommended that the student receive music therapy during the 2023-24 school year and the June 2023 IEP did not include a recommendation for music therapy services (compare Parent Ex. B at pp. 33, 54-56, with Dist. Ex. 8 at p. 14), 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]).

Accordingly, review of the June 2023 IEP reveals that it provided related services—albeit different than those the parents 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]). Accordingly, the district did not fail to offer the student a FAPE because it did not opt to recommend music therapy as a related service for the student in the same manner as iBrain and instead recommended different supports and services to address the needs which iBrain targeted, in part, with music therapy (see Cruz v. Banks, 2024 WL 1309419, at *6 [S.D.N.Y. Mar. 27, 2024] [collecting cases noting parental preferences for music therapy, but finding it was not necessary to offer a FAPE).

3. Transportation Services - Accommodations

The parent argues that the district failed to recommend appropriate medical equipment as a special transportation accommodation by failing to recommend oxygen on the student's bus.

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Specialized forms of transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891, 894 [1984]; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The transportation must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

For school aged children, according to State guidance, the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate," which may include special seating, vehicle and/or equipment needs, adult supervision, type of transportation, and other accommodations ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at https://www.nysed.gov/sites/default/files/programs/special-education/special-transportation-for-students-with-disabilities_0.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]).

The June 2023 iBrain plan included transportation recommendations of adult supervision – nurse, oxygen, A/C, lift-bus/wheelchair ramp, and limited travel time (60 minutes) (Parent Ex. B at pp. 62-63). Within the iBrain plan's present levels of performance it stated that according to medical records the student had chronic respiratory disease arising in the perinatal period with a history of epilepsy with status epilepticus, hypoxia, increased oropharyngeal secretions, respiratory distress, patent ductus arteriosus, and localization-related focal epilepsy with complex partial seizures (id. at pp. 1, 14). The student's need for oxygen while traveling to and from school was not discussed at hearing by the parent or the iBrain deputy director of special education except that the parent stated, as noted above, that oxygen was included in the student's special transportation services at iBrain (see Tr. pp. 156-281; Parent Exs. G at pp. 1-3; H at pp. 1-4).

Medical administration forms for the 2022-23 school year, dated August 31, 2022 and September 2, 2022, indicated that the student would require oxygen during transport, if he was hypoxic, in respiratory distress, or when his O2 saturations were below 95 percent, and that supplemental oxygen would accompany the student during transport (Parent Ex. I at pp. 9, 21-22).[11] As noted by the IHO, the medical forms were not signed by the parent and stated that treatment should terminate on "12.31.23," indicating that, at the time of the hearing, the medical forms had expired (IHO Decision at p. 26; see Parent Ex. I at pp. 1-23).

The medical administration forms for the 2023-24 school year, dated June 30, 2023, also indicated that the student would require oxygen during transport, if he was hypoxic, in respiratory distress or when his O2 saturations were below 95 percent, and that supplemental oxygen would accompany the student during transport (Parent Ex. J at pp. 2, 6-7). As noted by the IHO, these forms for the 2023-24 school year would not have been available to the June 6, 2023 CSE (see IHO Decision at p. 26).

The June 2023 IEP's present levels of performance mirrored the iBrain plan in stating that the student had chronic respiratory disease, was non-verbal and non-ambulatory, and was fully dependent in all ADLs, which put him at risk for impaired respiration and oxygen levels and that

[11] This exhibit was admitted into evidence and listed as Parent Ex. I at pp. 1-23, however the document is Bates stamped as Parent Ex. K at pp. 1-23 (see Tr. p. 104; Parent Ex. I at pp. 1-23).

he would have his needed oxygen available and accessible at school (compare Dist. Ex. 8 at p. 32, with Parent Ex. B at p. 38).

The school psychologist testified that within the June 2023 IEP the student was recommended for specialized transportation, including a 1:1 nurse, a lift bus, accommodation for his wheelchair, transportation from the closest curb, limited travel time, a route with fewer students, and climate control all of which, according to the school psychologist, took into account the student's needs, including for limited time travel and a climate-controlled setting (Dist. Ex. 14 at ¶¶ 9, 13; see Dist. Ex. 8 at pp. 62, 65). The school psychologist testified that it was her opinion that the IEP's recommendations regarding transportation were appropriate and noted that the CSE recommended a 1:1 travel nurse, who would be able to assist the student if he required a ventilator or oxygen (Dist. Ex. 14 at ¶ 13).

Based on the foregoing, given the other transportation accommodations recommended in the student's IEPs, most specifically the 1:1 nursing support for the student, I find that the IEPs adequately provided for the student's medical needs in the special transportation recommendations, and I decline to find that the IHO erred in failing to find otherwise.[12]

C. Assigned School Site

1. Prior Written Notice and School Location Letter

The IHO found that the hearing record supported a finding that the prior written notice and school location were sent by the district (IHO Decision at p. 29). The IHO also discussed that the parent's due process complaint notice stated the parent did not receive prior written notice and a school location letter with the June 2023 IEP, while the parent's affidavit reflected that the parent never received the documents (id. at p. 27). The IHO further noted that during cross-examination,

[12] The student's need for oxygen can be accommodated within the terms of the district's IEP in this case, and it is not within the preview of the CSE to determine when the student would or would not use oxygen. The use of oxygen would be addressed through medical orders issued by the student's physician. State guidance provides that "[d]ue to the frequency of changes to orders for nursing treatment and/or medications, the specific nursing service and/or medication to be provided should not be detailed in the IEP" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4, Office of Special Educ. Mem. [Jan. 2019], available at https://www.nysed.gov/sites/default/files/programs/special-education/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf). Instead, the guidance document provides that "[t]he nursing treatment and/or medication orders [should be] documented on an Individualized Health Plan (IHP), which is a nursing care plan developed by an RN [and] maintained in the student's cumulative health record . . . and . . . updated as necessary" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4). However, in another State guidance document, it is acknowledged that an IHP is not required by law but "is strongly recommended for all students with special health needs-particularly those with nurse services as a related service on their individualized education plan (IEP)" ("Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs," at p. 9, Office of Student Support Servs. [Jan. 2019], available at https://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf). While it may be appropriate to mention the student's use of oxygen on a student's IEP, the parent and school district are encouraged to address concerns over the documentation of the student's need for oxygen use through an individualized health plan as is not appropriate for a CSE to attempt to specify the extent of oxygen use through an IEP.

the parent testified that she did not "recollect" if she received the prior written notice and school location letter (id.; see Tr. pp. 157-58; Parent Ex. G at ¶¶ 8-9).

The parent alleges that the IHO erred in finding that the district sent the parent a timely prior written notice and school location letter. The parent asserts that the prior written notice and school location letter were sent to the parent "in the evening before the last day [the district] schools were open (Req. for Rev. ¶ 22; see Dist. Ex. 11). The parent contends that "[t]his did not give [the p]arent sufficient time to investigate the proposed school to see if it was appropriate for her child, and prevented her from meaningfully participating in the IEP development process" (Req. for Rev. ¶ 22). The parent asserts that the failure to send a timely prior written notice and school location letter denied the student a FAPE and that the IHO "ignored this critical failure" (id.).

Although federal and State regulations do not expressly state that a district must provide a written notice to the parents in any particular format describing the "bricks and mortar" location to which a student is assigned and where the student's IEP will be implemented, once an IEP is developed and a parent consents to a district's provision of special education services, the IDEA is clear such services must be provided to the student by the district in conformity with the student's IEP (20 U.S.C. § 1401[9][D]; 34 CFR 300.17[d]; see 20 U.S.C. § 1414[d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154, 2010 WL 1193082, at *2 [2d Cir. Mar. 30, 2010]; T.Y., 584 F.3d at 420; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6). To be clear there is no requirement in the IDEA that a student's IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420). Moreover, parents generally do not have a procedural right to participate in the selection of a specific locational placement of their child (see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x. 1, 2013 WL 6726899 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also R.E., 694 F.3d at 191-92 [finding that a district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection]).

With that said, implicit in a district's obligation to implement an IEP is the requirement that, at some point prior to or contemporaneous with the date of initiation of services under an IEP, a district must notify parents in a reasonable fashion of the bricks and mortar location of the special education program and related services in a student's IEP (see T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016] ["a parent must necessarily receive some form of notice of the school placement by the start of the school year"]; Tarlowe, 2008 WL 2736027, at *6 [a district's delay does not violate the IDEA so long as a public school site is found before the beginning of the school year]). While such information need not be communicated to the parents by any particular means in order to comply with federal and State regulation, it nonetheless follows that it must be shared with the parent before the student's IEP may be implemented.

This analysis also fits with the competing notions that, while a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]), a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

Here, there is no dispute that the district provided the parent with a prior written notice and school location letter, both dated June 26, 2023 (Dist. Ex. 12). However, the parent points to the email from the district sent on June 26, 2023 and timestamped 7:57 p.m., by which the district transmitted the prior written notice and social location letter, arguing that this reflects the prior written notice and school location letter were untimely (Dist. Ex. 11). While the school location letter was sent very close to the first day of the school year, in this instance, it did not deny the parent an opportunity to learn about the school location since the school to which the district assigned the student to attend for the 2023-24 school year was the same school that, according to the parent, the student attended for four years (compare Parent Ex. A at p. 3, with Dist. Ex. 12 at p. 5; see Tr. pp. 159-60). Further, the parent has not claimed " that she would have acted differently had she been notified of the school placement . . . earlier or that, had she learned of the school earlier that she had any "intention of exploring or understanding the placement or of seeking alternatives and adjustments at a different District [specialized] public school placement" (Ambrister v. Banks, 2024 WL 4326933, at *4 [S.D.N.Y. Sept. 27, 2024]).[13]

Review of the hearing record in this matter shows that even if the district's email sent after business hours resulted in a delay in notifying the parent of the school that the student was assigned

[13] In addition, the parent's June 20, 2023 10-day notice letter rejected any program to be developed by the June 6, 2023 CSE, stating that "none of the proposed IEPs to be implemented during the 2023-2024 extended school year would be designed to enable the [s]tudent to receive educational benefits or receive appropriate related services" (Parent Ex. C at p. 2). After the parent received the June 6, 2023 IEP, the parent did not send a new 10-day notice letter rejecting the IEP and instead filed her due process complaint notice on March 1, 2024 (Parent Ex. A at p. 1). Although the due process complaint notice included specific allegations regarding the June 2023 IEP, it also repeated a similar allegation from the June 2023 10-day notice, indicating that the parent "challenges herein any and all IEPs offered to [the student] for the 23/24 ESY" (id. at p. 5). Having reviewed these assertions, it does not appear that the parent was genuinely considering placement in a public school. Rather, the language of the parent's June 20, 2023 10-day notice letter and March 1, 2024 due process complaint notice indicated that any consideration of a public school placement was pretextual on her part and, accordingly, an untimely school location letter would not have affected the parent's decision to reject the June 2023 IEP.

to attend to receive the educational programming recommended in the June 2023 IEP, the district's delay did not result in any harm that would rise to the level of denial of a FAPE.

2. Capacity to Implement the June 2023 IEP

The parent argues on appeal that the IHO discounted the district's failure to present a witness or any evidence to show that the assigned school site could implement the June 2023 IEP. This challenge appears to relate back to the parent's allegation in the due process complaint notice that it was "mathematically impossible for [the district] to provide [the student] with all of his related services in a typical school week in a [specialized] school, as there [we]re simply not enough hours in the school week to provide [the student] with all of his mandated instructional time and related services" (Parent Ex. A at p. 6). The student, however, never attended the public school site and, the implementation claims regarding the assigned school that the parent continues to pursue on appeal are impermissibly speculative.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such

challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F., 2016 WL 3981370, at *13; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

At the outset, the parent's claims regarding the provision of related services to the student was not borne out by the evidence, as the student never attended the assigned public school site pursuant to the June 2023 IEP. Any conclusion that the district would not have implemented the student's IEP or that the assigned public school site could not meet the student's needs would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's programming under the IEP or to refute the parent's claims (R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 187 & n.3]). Further, any claim that the recommended educational program would not have been able to be implemented without a recommendation for an extended school day is really a "substantive attack[] on [the] IEP . . . couched as [a] challenge[] to the adequacy" of the assigned public school site's capacity to implement the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 244, 245 [2d Cir. 2015]). In view of the foregoing, the parent cannot prevail on her claims regarding implementation of the related services recommended in the June 2023 IEP.

Moreover, even if the parent's assertion regarding the assigned school was not speculative, the hearing record does not support the allegation that the student's IEP could not have been implemented had he attended the district's placement. Review of the June 2023 IEP shows that the student was to receive 35 periods per week of instruction in the special class, together with related services consisting of five 60-minute sessions per week each of OT, PT, and speech-language therapy, two 60-minute sessions per week of vision education services, and one 60-minute session per week of assistive technology services (Dist. Ex. 8 at pp. 56-58). The location of where the related services were to be provided stated "Separate Location Provider's discretion-Classroom/Therapy Area School Building," therefore, some of the student's related services sessions could have been delivered in the student's special class (id. at pp. 57-58). Additionally, the IEP does not mandate the specific schedule for which those related services were to be delivered, for example, that the five sessions per week of OT, PT, and speech-language therapy each occur once per day, on the same day that the assistive technology and vision education services also occur (id. at p. 57). Even assuming that the IEP was implemented such that the student received at least three hours of related services per day (one session each of OT, PT, and speech-language therapy), the district had the discretion to implement the student's assistive technology and vision education services on separate days to avoid five hours of related services on one particular school day; as such and contrary to the parent's assertion, it was not mathematically impossible to implement the June 2023 IEP.

Thus, this is not a case in which the evidence shows that the public school site is "factually incapable" of implementing the IEP. In sum, the IHO correctly determined that the parent's arguments were entirely speculative as no specific information was presented regarding the particular class to which the student would have been assigned had he attended the specialized

public school (IHO Decision at pp. 28-29). Accordingly, based on the above, I decline to find that the district would have been incapable of implementing the June 2023 IEP.

D. Independent Educational Evaluation

Lastly, the parent asserts that the IHO erroneously denied the parent an IEE. The IHO denied the parent's request as the parent raised a disagreement with the district's failure to evaluate the student for the first time in her due process complaint notice (IHO Decision at pp. 40-42).

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

In the March 1, 2024 due process complaint notice, the parent requested an IEE in the form of independent psychological assessment, educational needs assessment, assistive technology evaluation and a neuropsychological evaluation as part of her requested relief (Parent Ex. A at p. 7). The parent does not, however, in the March 2024 due process complaint notice identify what district evaluation, if any, the parent disagreed with, but indicated that the parent "restate[d] her disagreement with the [district's] evaluations" (id.). The parent does not allege that there was any request for an IEE made to the district prior to the due process complaint notice.

Recently, the District Court of the Southern District of New York found that a parent may commence an impartial hearing and request a district-funded IEE in a due process complaint notice in the first instance and need not communicate with the school district or the CSE prior to seeking

an impartial hearing regarding their request for such an IEE (Moonsammy v. Banks, 2024 WL 4277521, at *15-*17 [S.D.N.Y. Sept. 23, 2024]).[14] Accordingly, the parent's request for an IEE at public expense may not be denied on this basis.[15] However, there is another ground to deny the parent's request.

Here, the hearing record reflects that on March 18, 2021, the parent signed a form which indicated that she was in agreement with the district's decision that a triennial reevaluation of the student was not necessary at that time (Dist. Ex. 13). Accordingly, at that point, the evidence in the hearing record reflects the parent's agreement with the district's decision not to evaluate (id.). There is no evidence in the hearing record that the parent thereafter changed her mind prior to the next time the student would be due for a triennial evaluation and requested that the district conduct an evaluation of the student. As the Second Circuit explained:

> A school has the right in the first instance to obtain a comprehensive evaluation upon which to structure a student's IEP, and only if the child's parents believe that the evaluation is insufficient can they seek an IEE at public expense for the school's additional consideration. The publicly funded IEE protects parents' ability to contribute and have their voices heard; but this right arises in response to school action, it does not preempt it. Nor does it give parents the first and final word. The school, as a beneficiary of federal funds, has the right and obligation to conduct an evaluation in the first instance and to prove that its evaluation was appropriate. Only when those established procedures fall short does a parent get an IEE at public expense.

Trumbull, 975 F.3d at 165-66). Accordingly, the parent may not on the one hand agree to the district's decision not to evaluate the student and then use that decision "as a hook to obtain publicly funded comprehensive independent evaluations before the school can conduct its own" (id. at 166; see B.D. v. Eldred Central School District, 661 F. Supp. 3d 299, 316 [S.D.N.Y. 2023] [finding a district cannot be required to fund an IEE where the parent refused to consent to the district's

[14] Under 34 CFR 300.502(b)(2), it would appear that the district has only one option to forestall litigation on the issue, and that is to grant the IEE at public expense before the presentation of evidence begins in the due process hearing that was commenced by the parent. This is of little consequence so long as the district is in agreement with the parent to grant the IEE. However, with the burden of production and persuasion placed on school districts under State law, there is little incentive for a parent to use the resolution meeting with a school district. Strategically, it would almost always be more effective from a parent's perspective to force a district into defending itself in an impartial hearing as soon as possible on this issue. The district's second option under the regulation to commence a due process hearing of its own accord "without unnecessary delay" is illusory in cases where the parent has already initiated the proceeding by making the initial request for an IEE in their own due process complaint notice.

[15] Although the District Court in Moonsammy found that a parent may request an IEE in the due process complaint notice in the first instances (2024 WL 4277521, at *15-*17), parents should endeavor whenever possible to "[s]eparat[e] the IEE process from the formal dispute resolution process" as the Second Circuit Court of Appeals has explained this "serves to reinforce the focus on collaboration and communication among an IEP Team" and "provides an additional opportunity for discussion and cooperation between parent and school before the parties feel that they need to resort to formal procedures" (Trumbull, 975 F.3d at 170).

evaluation]). Moreover, the IHO found that the CSE had sufficient evaluative information about the student and the parent has not appealed that finding (IHO Decision at pp. 29-30).

Thus, the IHO did not have the benefit of the district court's view in Moonsammy, but ultimately, it does not require reversal of her determination to deny the parent's request for an public funded IEE.

VII. Conclusion

Based on the foregoing, I find that the hearing record supports the IHO's finding that the June 2023 IEP was reasonably calculated to enable the student to receive educational benefit in light of his unique circumstances (Endrew F., 137 S. Ct. at 1001; Gagliardo, 489 F.3d at 112; Frank G. v. Board of Educ., 459 F.3d 356, 364-65 [2d Cir. 2006]). Having found that the district offered the student a FAPE, the necessary inquiry is at an end and there is no need to reach the issue of whether iBrain was an appropriate unilateral placement for the student or whether equitable considerations support an award of tuition funding (Burlington, 471 U.S. at 370; Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 30, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER