The University of the State of New York

The State Education Department
State Review Officer
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No. 24-359

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by Peter Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund the costs for their daughter's attendance at the International Academy for the Brain (iBrain) for the 2023-24 school year. The appeal must be sustained in part and the matter remanded to the IHO for further proceedings.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student in this case has been the subject of four prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 24-187; Application of the Dep't of Educ., Appeal No. 24-065; Application of a Student with a Disability, Appeal No. 22-062; Application of a Student with a Disability, Appeal No. 21-156). Accordingly, the parties' familiarity with the student's educational history is presumed.

The parents describe the student as suffering from a traumatic brain injury resulting in severe impairments in the areas of "language, memory, attention, sensory, motor abilities, information processing, and speech" (Parent Exs. J ¶¶ 1-2). The student has received a diagnosis of severe developmental delay, among numerous others (Parent Ex. N at p. 1; Dist. Ex. 9 at p. 1;

see IHO Ex. XII at p. 3). She is non-ambulatory, nonverbal, has highly intensive management needs, and is g-tube dependent for her hydration, nutrition, and medication administration (Parent Ex. J ¶¶ 2-3; see Parent Ex. N at p. 1). She is fully dependent on others for all activities of daily living (ADLs) (see Parent Ex. N at p. 1 ¶ 4; see Dist. Ex. 11 at p. 1).

A CSE convened on February 7, 2023 and found the student eligible for special education as a student with multiple disabilities (Dist. Ex. 1 at pp. 1, 42).[1] The CSE recommended that beginning in February 2023 the student attend a 12:1+(3:1) special class in a district specialized school and participate in adapted physical education three times per week (id. at pp. 29, 31). For related services, the CSE recommended the student receive four 60-minute sessions of individual occupational therapy (OT) per week, four 60-minute sessions of individual physical therapy (PT) per week, four 60-minute sessions of individual speech-language therapy per week, three 45-minute sessions of individual vision education services per week, and individual school nurse services as needed (id. at pp. 29-30). The CSE also recommended the student receive the support of a 1:1 daily full-time health paraprofessional and assistive technology devices of an individual switch and mount (id. at p. 30). In addition, the CSE recommended that the parents receive one 60-minute session of group parent counseling and training per month (id. at pp. 29-30). The CSE recommended that the student and parents receive these services on a 12-month basis (id. at p. 31).

In a ten-day notice dated June 20, 2023, the parents notified the district of their intent to enroll the student at iBrain for the 2023-24 school year (Parent Ex. E at p. 1). The parents indicated that they were rejecting the most recent recommendations in the February 2023 IEP because the recommendation for a district specialized school would not address the student's educational needs for the extended 2023-24 school year (id. at pp. 1-2). The parents asserted that the district had failed to timely provide a recommendation as there was no information regarding a proposed school location (id. at p. 2).

In a prior written notice dated June 23, 2023 and school location letter dated June 23, 2023, the district summarized the February 2023 CSE's recommendations and identified the public school location to which the district assigned the student to attend to receive the program and services recommended in the February 2023 IEP (Dist. Ex. 14).[2]

On July 6, 2023, the parent electronically signed an enrollment contract with iBrain for the student's attendance at the school for the 2023-24 school year (Dist. Ex. 6 at p. 6).[3] The parent also electronically signed an undated transportation agreement and an undated nursing agreement for the 2023-24 school year (Parent Exs. G; H).[4]

[1] At the time of the CSE meeting, the student attended the International Academy of Hope (iHope) (Dist. Ex. 1 at p. 3).

[2] The notices were also sent in Spanish (see Dist. Ex. 14).

[3] An affidavit from the chief operating officer at iBrain, dated July 25, 2023, stated that the student began attending the school for the 2023-24 school year on July 5, 2023 (Dist. Ex. 2 ¶ 2).

[4] The enrollment agreement included a "Signature Certificate" page (Dist. Ex. 6 at p. 7). Neither the transportation agreement nor the nursing agreement included something similar (see Parent Exs. G; H).

A. Due Process Complaint Notice

In a due process complaint notice dated July 5, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A).[5] Regarding the CSE process, the parents asserted that the district predetermined the student's programming (id. at p. 7). Next, the parents contended that the district failed to appropriately classify the student as a student with a traumatic brain injury (id.). As to the CSE's recommendations, the parents contended that the district's February 2023 IEP was not appropriate as the student required a small, structured classroom with 1:1 instruction, plus a full-time 1:1 paraprofessional and a full-time 1:1 nurse (id. at p. 3). The parents asserted that a district specialized school was inappropriate to meet the student's needs and that a 12:1+(3:1) classroom was "grossly inappropriate" (id. at p. 6). In addition, the parents claimed that the district failed to recommend 1:1 nursing services, appropriate assistive technology devices, appropriate parent counseling and training, music therapy, sufficient OT and PT, and appropriate transportation services and accommodations (id. at pp. 4-5, 7). Finally, the parents argued that they had not received a prior written notice or school location notice as of the date of filing the due process complaint notice (id. at pp. 4, 6).

The parents contended that iBrain was an appropriate unilateral placement and that equitable considerations weighed in favor of an award of tuition funding (Parent Ex. A at pp. 7-8). The parents requested direct payment for the full tuition at iBrain for the 2023-24 school year as well as related services, 1:1 nursing services, and 1:1 paraprofessional services (id. at p. 8).[6]

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 15, 2023 and concluded on March 27, 2024 after six days of proceedings (see Tr. pp. 1-343). In a decision dated July 15, 2024, the IHO found that the district offered the student a FAPE for the 2023-24 school year (IHO Decision at pp. 6, 11). The IHO held that the IEP addressed the student's needs and "was reasonably calculated to enable the Student to receive educational benefit" (id. at p. 6). The IHO credited the testimony of the district school psychologist throughout the decision (id. at pp. 6-11). The IHO found that the lack of a recommendation for music therapy did not render the IEP inappropriate, noting the information available to the CSE did not reflect that the student was receiving music therapy at iHope during the 2022-23 school year and the CSE adopted the approach of incorporating music into the student's OT program (id. at p. 7). Regarding nursing services, the IHO held that the CSE's recommendation for non-individual nursing services as needed was appropriate given the student's health needs and the recommendation for the 1:1 paraprofessional (id. at pp. 7-9). As for transportation services, the IHO determined that the parents "presented no credible testimony or evidence that supports their [due process complaint] claim that a lack of air conditioning" on the bus would have caused the

[5] The parents requested pendency and asserted that the student's pendency entitlements included direct payment of tuition and costs for related services at iBrain plus direct payment for special transportation services based on a prior IHO's decision dated April 4, 2022 (Parent Ex. A at p. 2).

[6] The parents also requested assistive technology services and devices (Parent Ex. A at p. 9).

student to suffer from sustain seizures or that a 1:1 nurse was required to be on the bus (id. at p. 11).

Turning the parent's allegations that a school location letter was not sent timely, the IHO noted that it was sent on June 23, 2023 (IHO Decision at p. 10). The IHO found that the parent did not allege or testify that she had contacted the proposed school and that any allegation it was not appropriate for the student was speculative (id.). Moreover, the IHO found that the proposed school location would have had the capacity to provide the student adequate nursing services (id. at pp. 10-11).

Having determined that the district offered the student a FAPE, the IHO found that the necessary inquiry was at an end and that she did not need to address whether iBrain was an appropriate unilateral placement or whether equitable consideration weighed in favor of the parent (IHO Decision at p. 11). The IHO noted that she reviewed the parents' remaining contentions and found "them to be either unnecessary to this decision, without merit, beyond my jurisdiction, too vague to be of use, or without sufficient basis in the record for a finding and award of relief" (id. at p. 12). The IHO dismissed all of the parent's claims with prejudice (id.).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred by not finding that the district denied the student a FAPE for the 2023-24 school year. The parents contend that the IHO ignored the evidence that the IEP was predetermined due to the district's "administrative predisposition and objection to recommending music therapy [that] amounts to a[n] unlawful policy barring such recommendations" and the district's failure to consider a nonpublic school for the student. In addition, the parents argue that the IHO erroneously approved the CSE's changing of the student's classification from traumatic brain injury to multiple disabilities without any documentary support.

Regarding the CSE's programming and services recommendations, the parents assert that the IHO erred by not finding the CSE failed to address the student's highly intensive management needs per Sate regulations. The parents assert that the student required a high adult to child ratio, yet the CSE recommended a 12:1:3+1 special class instead of a 6:1+1 special class. As for related services, the parents allege that the lack of explanation as to why music therapy was removed from the district IEP when it was on the iBrain "status quo program" was not only "a procedural violation, but also a substantive denial of FAPE." Next, the parents contend that the IHO erred by not finding that the lack of a 1:1 nurse recommendation on the IEP was a substantive denial of FAPE, arguing that the CSE inappropriately deferred a decision regarding the need for a 1:1 nurse to another entity and the district IEP itself reflect that the student needed a 1:1 nurse and was receiving a nurse. In addition, the parents assert that the fact that the district required documentation requesting transportation accommodations was counter to the IDEA and unfairly shifted the burden to the parents. Regarding notice of the school location, the parents argue that the IHO erred by not faulting the district for only sending the prior written notice and school location letter a "few days" before the start of the extended school year.

Lastly, the parents assert that iBrain was an appropriate unilateral placement for the student and that equitable considerations weigh in their favor. The parents contend that the IHO erred by not addressing these issues. For relief, the parents request that the IHO decision be overturned,

and the SRO find that the district denied the student a FAPE for the 2023-24 school year, that iBrain was an appropriate unilateral placement, and that equities weigh in their favor. The parents request full direct funding, or in the alternative, that the matter be remanded to the IHO.

The district, in its answer, responds by arguing the IHO properly found that it offered the student a FAPE for the 2023-24 school year.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[7]

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

[7] 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).

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

Upon careful review, the hearing record reflects that the IHO supported and set forth well-reasoned rationales for her determinations but failed to grapple with the evidence relating to one issue before her that, in this instance, is determinative (see generally IHO Decision). For those issues that the IHO addressed including those related to predetermination, the student's eligibility classification, music therapy, 1:1 nursing, transportation accommodations, and notice of the assigned school location, the IHO accurately recounted the facts of the case, set forth the proper legal standards to determine whether the district offered the student a FAPE for the 2023-24 school year, and applied those standards to the facts at hand. For those issues, the decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that she weighed the evidence and properly supported her conclusions. Thus, as to those issues addressed by the IHO, her conclusions are hereby adopted.

However, the IHO did not specifically address the parents' claim that the recommendation in the February 2023 for a 12:1+3 special class was inappropriate and, instead, without addressing the class size, generally found the IEP was appropriate and credited the testimony of the district's school psychologist that the program was appropriate and provided the least restrictive environment for the student to make meaningful progress (IHO Decision at p. 6).[8]

State regulation indicates that the maximum class size for special classes containing students whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention, shall not exceed six students, with one or more supplementary school personnel assigned to each class during periods of instruction (8 NYCRR 200.6[h][4][ii][a]).[9] According to State regulation, "[t]he maximum class size for those students with severe multiple disabilities, whose programs consist primarily of habilitation and treatment, shall not exceed 12 students. In addition to the teacher, the staff/student ratio shall be one staff person to three students. The additional staff may be teachers, supplementary school personnel and/or related service providers." (8 NYCRR 200.6 [h][4][iii]). The Second Circuit has recently observed that "[i]n the continuum of classroom options, the [12:1+4 special class recommendation]

[8] The IHO acknowledged the parents' argument that the class size was not appropriate when determining that the district offered a "cogent and responsive explanation" for the recommendations made by the CSE (IHO Decision at pp. 5-6).

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

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]).

While the recommendation for a 12:1+(3:1) special class overall may have been supportable by the information before the CSE reflecting that the student would benefit from the support of different school personnel within the classroom to address habilitation and treatments, here, within the statement of the student's management needs, the CSE stated in the IEP itself that the student needed a limited class size of no more than six students (Dist. Ex. 1 at p. 9). There is no explanation in the hearing record regarding this inconsistency.

The management needs section of the February 2023 IEP identified the environmental modifications and human and material resources needed to address the student's management needs as they related to her academic achievement, social development, physical development, and physical health (Dist. Ex. 1 at pp. 9-12). For example, with regard to the student's academic achievement, the IEP indicated that the student required environmental modifications of a quite learning environment, highly structured classroom and equipment positioned to support visual presentation in preferred visual fields; human resources of breaks as needed, additional processing time, limited class size of no more than six students, and one to one direct instruction; and material resources of access to switches and AAC devices, adaptive equipment and adapted materials, and access to alternate seating (id. at pp. 9-10).[10] The IEP stated that, based on her needs the student required a classroom with a high adult to child ratio and a high degree of individualized attention to meet her daily care needs and therefore, the CSE recommended that she receive the support of a dedicated a 1:1 paraprofessional (id. at p. 12). The IEP further stated that the student benefitted from intensive therapy and "small group learning to meet the potential for development among peers in a classroom setting" (id.). Lastly, the IEP stated that the student required "a small, structured class within a specialized school setting along with various related services to make appropriate progress towards individualized goals" (id.).

The evidence in the hearing record reflects that, during the CSE meeting, the student's teachers from the private school expressed concern that a class size of up to 12 students would "be too large" as the student could "become overwhelmed and she need[ed] more individualized support" (Dist. Ex. 1 at p. 38). In addition, the parent expressed concern that a class size of six students would be most appropriate, noting that the student "had adjusted well to that size class and anything larger would not be appropriate" (Tr. p. 146; Dist. Ex. 1 at p. 38).

Notwithstanding the statement in the management needs that the student required a class size of no more than six students (Dist. Ex. 1 at p. 9), the CSE recommended the student attend a12:1+(3:1) special class (id. at pp. 29-30). The district school psychologist who attended the February 2023 CSE testified that the committee recommended a 12:1:(3+1) special class because it was designed "to serve the cognitive, academic, physical, and medical needs of the Student, even as a non-verbal and non-ambulatory student" and that "[t]he special education teacher and four teaching assistants would be able to modify the curriculum to meet the Student's needs and provide sufficient individualized instruction" (Dist. Ex. 16 ¶¶ 7, 11, 18). The school psychologist

[10] The environmental modifications and human and material resources cited from the February 2023 IEP are representative and not exhaustive (see Dist. Ex. 1 at pp. 9-12).

expressed the view that a 12:1+(3:1) special class and a 6:1+1 special class were comparable in many ways (see Tr. pp. 102-03, 147-48). However, the district school psychologist did not testify regarding the statement in the IEP that the student needed a class of no more than six students.

Based on the foregoing, the evidence in the hearing record does not support the IHO's finding that the February 2023 IEP, as written, offered an appropriate program for the 2023-24 school year. Based on the inconsistency contained within the IEP and the district's failure to grapple with the issue, the evidence is insufficient to show that the 12:1+(3:1) special class was appropriate to meet the student's needs. It may be that the statement in the management needs that the student required a class size of no more than six students was inadvertently copied and pasted from some other source; however, review of the iHope documentation that the CSE relied upon does not include the precise statement of the student's need for a class with no more than six students (see Dist. Exs. 16 ¶ 8; 11; 12). Further, other than the district school psychologist's testimony that if the IEP included "any clerical errors" they "could have been addressed had the Parent asked about it" (Dist. Ex. 16 ¶ 18), there is no reference in the hearing record to the IEP containing a clerical error and no testimony claiming that the statement in the management needs was a clerical error. Accordingly, the district cannot disavow the statement of the student's need included in the document; therefore, the IHO's determination that the district offered the student a FAPE for the 2023-24 school year must be reversed.

Having found that the district failed to offer the student a FAPE, the next issue to be discussed is whether iBrain was an appropriate unilateral placement for the student for the 2023-24 school year. As the IHO determined that the district offered the student a FAPE for the 2023-24 school year, she declined to address the appropriateness of iBrain as a unilateral placement (IHO Decision at p. 11). When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, as the IHO has not yet ruled on whether the parents met their burden to prove that the unilateral placement was appropriate or whether equitable considerations would support the parents' request for relief, I will remand the matter to the IHO to address these issues in the first instance.

The IHO upon remand should ensure that an adequate record is developed upon which to base the necessary findings of fact and of law relative to the parent's requested relief. I will leave it to the IHO's sound discretion regarding adequate development of the hearing record on those topics and whether to provide the parent an opportunity to present additional evidence regarding the student's programming and progress at iBrain and a concomitant opportunity for the district to respond. Additionally, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues left to be resolved at the hearing (see 8 NYCRR 200.5[j][3][xi][a]).

VII. Conclusion

While most of the IHO's findings were well supported by the evidence, the district failed to address a substantial defect in the student's IEP as described above. Contrary to the IHO's decision, the evidence in the hearing record leads to the conclusion that the district failed to offer the student a FAPE for the 2023-24 school year. As the IHO did not address the appropriateness of the parent's unilateral placement or equitable considerations, this matter is remanded to the IHO to make determinations on these issues.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 15, 2024, is modified by reversing that portion which found that the district offered a FAPE to the student for the 2023-24 school year; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO to determine whether the services unilaterally obtained by the parent were appropriate for the student for the 2023-24 school year and whether equitable considerations weigh in favor of granting funding for the costs of tuition or related expenses.

Dated: **Albany, New York**
September 20, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER