The University of the State of New York

The State Education Department
State Review Officer
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No. 24-363

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 Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's tuition and special transportation costs at the International Academy for the Brain (iBrain) for the 2023-24 school years and for an independent educational evaluation (IEE). The district cross-appeals from those portions of the IHO's decision which denied the district's application to dismiss the parent's claims with regard to the 2021-22 school year as time-barred due to the statute of limitations; held that it failed to offer an appropriate educational program to the student for the 2021-22, 2022-23, and 2023-24 school years; and directed the district to conduct certain evaluations of the student. The appeal must be sustained in part. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

Review of the hearing record shows that the student received diagnoses of cerebral palsy, autism spectrum disorder, and a seizure disorder and presented with "severe developmental delays" (see Parent Ex. B at p. 1; Dist. Exs. 1 at p. 19; 3 at p. 17).

A CSE convened on March 24, 2022 to formulate the student's IEP for the end of the 2021-22 school year and beginning of the 2022-23 school year (see generally Dist. Ex. 1). The CSE found the student eligible for special education and related services as a student with multiple disabilities and recommended that he attend a 12:1+(3:1) special class in a district specialized school and receive related services of two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual physical therapy (PT), two 30-minute sessions of individual and one 30-minute session of group per week of speech-language therapy in Spanish, and two 45-minute sessions per year of group parent counseling and training (id. at pp. 1, 40-41, 46).[1] The CSE also recommended adapted physical education for three periods per week and assistive technology consisting of a dynamic display speech generating device (SGD) for home and school (id. at pp. 40-41). The student was recommended to receive the recommended programming and services over a 12-month school year (id. at p. 42). In a prior written notice to the parent, dated April 6, 2022, the district summarized the recommendations from the March 2022 CSE meeting and referenced a March 2022 social history assessment as the source for the proposed action (Dist. Ex. 2).

A CSE convened on March 20, 2023 and developed an IEP for the student with a projected implementation date of March 21, 2023 (see generally Dist. Ex. 3). The CSE found the student continued to be eligible for special education as a student with multiple disabilities and again recommended 12-month school year programming consisting of a 12:1+(3:1) special class in a district specialized school, adapted physical education, assistive technology, and related services of two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and two 30-minute sessions of individual and one 30-minute session of group per week of speech-language therapy in Spanish (compare Dist. Ex. 3 at pp. 1, 37-39, 44, with Dist. Ex. 1 at pp. 1, 40-42, 46).[2] In addition, the CSE recommended a change from two 45-minute sessions per year of group parent counseling and training in the previous year's IEP to one 45-minute group of individual or group parent counseling and training per month (compare Dist. Ex. 3 at p. 38, with Dist. Ex. 1 at p. 40). The March 2023 CSE additionally recommended individual school nursing services daily, as needed (Dist. Ex. 3 at p. 38). In a prior written notice to the parent, dated April 3, 2023, the district summarized the recommendations from the March 2023 CSE meeting (Dist. Ex. 4). The prior written notice again cited the March 2022 social history assessment as the basis for the recommendations (id. at p. 2). In a letter to the parent dated May 26, 2023, the district identified the particular public school location to which the district assigned the student to attend for the 2023-24 school year (Parent Ex. I).

[1] The March 2022 IEP specified the ratio of the recommended special class as 12:1+(3:1) in accordance with the State regulation, which provides that "[i]n addition to the teacher, the staff/student ratio shall be one staff person to three students" (see Dist. Ex. 1 at p. 39; see also 8 NYCRR 200.6[h][4][iii]). For purposes of this decision, although the special class ratio is at times referred to in the hearing record as "12:1+4," the recommended special class will be referred to as a 12:1+(3+1) special class.

[2] To begin in September 2023, the CSE adjusted the frequency of the recommended 12:1+(3:1) special class for sciences and social studies (Dist. Ex. 3 at p. 37).

The student began attending iBrain on September 11, 2023 (Parent Ex. M).[3] On January 23, 2024, the parent electronically signed a "School Transportation Annual Service Agreement" with Sisters Travel and Transportation Services, LLC (Sisters Travel) for the student's transportation to and from iBrain for the 2023-24 school year (see Parent Ex. D). On March 20, 2024, the parent entered into an enrollment contract for the student's attendance at iBrain (Parent Ex. C at p. 6). The contract encompassed the period from September 11, 2023 to June 21, 2024 (id. at p. 1).

In a letter dated March 20, 2024, the parent, through her attorney, advised the district that she disagreed with the recommendations of the March 2023 CSE and that she had not received notice of a school location for the student to attend for the 2023-24 school year (Parent Ex. F at pp. 1-2). The parent notified the district that, as a result, she intended to unilaterally place the student at iBrain for the 2023-24 extended school year and seek public funding for the costs thereof (id.). In addition, the parent requested that the CSE reconvene to recommend an appropriate placement for the student and "for the purpose of requesting an [IEE]" (id. at p. 2).

A. Due Process Complaint Notice

In a due process complaint notice dated April 19, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22, 2022-23, and 2023-24 school years (see Parent Ex. A). Initially, the parent contended that the statute of limitations would not bar any claims alleged as the parent did not know about the district's denial of a FAPE until the student "was assessed and evaluated" just prior to his enrollment at iBrain (id. at p. 1). For all three school years at issue, the parent alleged that the district improperly found the student eligible for special education as a student with multiple disabilities rather than as a student with a traumatic brain injury, failed to recommend an appropriate class size, failed to recommend an appropriate public school, failed to recommend appropriate related services and supports, and failed to recommend appropriate special transportation services (id. at pp. 5-10). In addition, for the 2023-24 school year, the parent alleged that the district failed to conduct necessary evaluations for the student (id. at pp. 9-10).

As relief, the parent requested an interim order of pendency maintaining iBrain as the student's stay-put placement for the 2023-24 school year; findings that the district denied the student a FAPE for all three school years, that iBrain was an appropriate unilateral placement for the 2023-24 extended school year, and that equitable considerations warranted full funding of the student's placement at iBrain for the 2023-24 extended school year; an order directing the district to pay iBrain directly for the cost of the student's full tuition for the 2023-24 school year and to pay Sisters Travel for special transportation services; an order requiring the district to reconvene the CSE, conduct revaluations of the student in regard to vision and assistive technology, and fund an IEE to include an independent psychological, neuropsychological and educational needs assessment; and an order of compensatory education to consist of two years of tuition and related services, including special transportation for the district's failure to address the student's needs during the 2021-22 and 2022-23 school years (see Parent Ex. A at pp. 11-12).

[3] 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).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on May 28, 2024 and concluded on July 1, 2024 after seven days of proceedings inclusive of a prehearing conference and a hearing date devoted to addressing the student's pendency placement (Tr. pp. 1-361).[4] In a decision dated July 15, 2024, the IHO determined that the district failed to meet its burden to prove that it offered the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years (IHO Decision at pp. 21-24). The IHO declined to entertain the district's statute of limitations defense, finding that the district failed to develop a sufficient factual basis to establish the affirmative defense (id.). In addition, the IHO determined that the district failed to meet its burden to prove that it provided the student a FAPE for 2021-22 school year because the IEP in place for that school year was not in evidence and the special education teacher who testified did not attend the CSE meeting (id. at p. 22). In regard to 2022-23 and 2023-24 school years, the IHO found that the district failed to offer a FAPE because, although the special education teacher testified that the Student Annual Needs Determination Inventory (SANDI), the reinforcer checklist, and OT, PT, and speech language therapy assessments were performed, the district did not present evidence that it conducted any "formal evaluations" of the student; the prior written notices only referenced the social history assessment; there was no evidence that a vision, assistive technology or neuropsychological evaluation was conducted; and the district failed to memorialize which evaluations the CSE reviewed (id. at pp. 22-24). The IHO also found that, given the student's "intensive management needs," the CSEs' recommendations for a 12:1+(3:1) special class were not appropriate (id. at p. 24).

Next, the IHO found that the unilateral placement selected by the parents for the 2023-24 school year was appropriate (IHO Decision at pp. 24-29). In particular, the IHO found that the documents and evidence provided by the parent, which included the enrollment contract, the transportation agreement, an educational plan prepared for the student by iBrain for the 2023-24 school year, three quarterly progress reports, attendance records, the class schedule, and two medical accommodations request forms, sufficiently established that the student's individual special education needs were addressed by the school, that the instruction offered was "reasonably calculated to enable the child to receive educational benefits," and that the student showed some progress (id. at pp. 25-27, 29). The IHO also found the testimony of the deputy director to be credible (id. at pp. 27-28). Finally, the IHO cited the classroom size, which comported with State regulations, to be another factor weighing in favor of the appropriateness of the parent's unilateral placement (id. at p. 29).

Turning to equitable considerations, the IHO denied the parent's request for direct funding of iBrain tuition because the parent did not send the district 10-day notice of her intent to unilaterally place the student until March 20, 2024, more than six months after the student's September 2023 enrollment in the private school (IHO Decision at pp. 30-32, 36).

The IHO also denied the parent's request for district funding of an IEE given the absence of any evidence that the parent requested it prior to filing her due process complaint notice (IHO

[4] In an interim decision, dated June 20, 2024, the IHO found that iBrain was not the student's pendency placement (see Interim IHO Decision).

Decision at pp. 33-35). However, due to what she perceived as there being "virtually no record of this Student being comprehensively evaluated," the IHO ordered the district to conduct a neuropsychological evaluation, an assistive technology evaluation, and a functional visual assessment of the student within 30 days of the date of the decision and directed that, if the district did not complete the evaluations by that date, the parent could "obtain private evaluations of the Student by providers of her choice, to be funded by the [district]" (id. at pp. 34-35, 36-37).

Finally, the IHO denied the parent's request for two years of tuition as compensatory education for the denial of the FAPE for the 2021-22 and 2022-23 school years, citing a district court decision that characterized a request for prospective tuition to remedy past FAPE violations as essentially an impermissible request for money damages (IHO Decision at pp. 35, 36). The IHO directed the district to convene a new IEP meeting within 30 days of receiving the ordered evaluations and that every participant be provided with copies of the evaluations (id. at p. 37).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that equitable considerations did not support the requested relief and in denying the parent's request for direct funding by the district of iBrain tuition and transportation costs and district funding for an IEE.

In an answer, the district responds to the parent's allegations, arguing that the IHO properly denied the parent's requested relief on equitable grounds and properly denied the parent's request for an IEE at public expense. As for a cross-appeal, the district alleges that the IHO erred in finding that the district denied the student a FAPE for the 2021-22, 2022-23, and 2023-24 school years. The district argues that the IHO should have granted its motion to dismiss the parent's claims pertaining to the 2021-22 school year because the parent knew or should have known about her claims no later than the end of the first semester of the 2021-22 school year. For the 2022-23 and 2023-24 school years, the district contends that the IHO erred in finding that the lack of evaluative materials in evidence that were considered by the March 2022 and March 2023 CSEs demonstrated that the district committed a procedural violation resulting in a denial of a FAPE. In addition, the district argues that the IHO erred in finding that the 12:1+(3:1) special class recommended in the March 2022 and March 2023 IEPs would not have addressed the student's management needs. Finally, the district cross-appeals the IHO's directive for the district to conduct a neuropsychological evaluation, an assistive technology evaluation, and a visual assessment of the student.

In a reply and answer to the cross-appeal, the parent responds to the district's allegations.

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. 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]).[5]

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. Additional Evidence

Both parties submit additional evidence with their pleadings. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO'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 a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; Landsman v. Banks, 2024 WL 3605970, at *3

[5] 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).

[S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

With the request for review, the parent submits a redacted copy of an email and a copy of the student's March 2024 IEP. With the answer with cross-appeal, the district submits a copy of the student's May 2021 IEP.

Regarding the parent's proposed exhibits, during the impartial hearing, the parent offered the documents as evidence (see Tr. pp. 305, 315, 317; IHO Ex. II). The IHO declined to admit the IEP as the parent failed to comply with the 5-day disclosure rule for evidence and the hearing record as developed at that point did not suggest that it was relevant as there was no testimony regarding it (Tr. pp. 306-07). The IHO declined to admit the e-mail as he found it unreliable and noted the parent had not presented it until after she had rested her case (Tr. pp. 304-05). Although the parent submits the documents as additional evidence, she does not allege in her request for review that the IHO erred in the evidentiary rulings. Moreover, the parent does not specifically reference either document to support her arguments and, instead, only cites them in the reply and answer to the cross-appeal. Because the parent does not contend that the IHO abused her discretion in excluding the documents and because they are not necessary in order to render a decision, I decline to consider the parent's additional evidence.

Regarding the district's proposed exhibit, because the document could have been offered at the time of the impartial hearing and because it is not necessary to render a decision, I decline to consider the district's additional evidence.

2. Statute of Limitations

The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]).[6] Because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]; see K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at *14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Further, two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8

[6] New York State has not explicitly established a different limitations period; rather, it has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

NYCRR 200.5[j][1][i]). A second exception may apply if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).

The district argues that the parent's claims for the 2021-22 school year should be barred by the statute of limitations because the parent knew or should have known of any claims with regard to the May 2021 IEP by the end of the first semester of the 2021-22 school year, i.e., no later than December 31, 2021.

The due process complaint notice alleged for the 2021-22 school year that district and/or the CSE: failed to appropriately classify the student, failed to mandate an appropriate class size, failed to recommend an appropriate public school, failed to recommend appropriate related services and supports, and failed to recommend appropriate transportation services and accommodations (Parent Ex. A at pp. 5-6). The parent, in her allegations, indicated she attended the May 2021 CSE meeting and expressed concerns about the student's assistive technology device and communication skills (id. at p. 4). Moreover, the evidence shows that the student attended a district school for the 2021-22 school year to receive the programming recommended in the May 2021 IEP (see Tr. p. 74).

The parent's claims relating to the category of classification and the CSE's special class, related services, and special transportation recommendations are such that they each likely accrued at the time of the CSE meeting or when the parent received a copy of the resultant IEP; in other words, "almost immediately" after each action underlying the complaint occurred, notwithstanding that the parent may have subsequently "acquired additional information" about her claims (Roges v Boston Pub. Schools, 2015 WL 1841349, at *3 [D. Mass. Apr. 17, 2015]). Moreover, at the latest, the parent knew or should have known about her claim directed at the assigned public school for the 2021-22 school year when the student began attending such school. Thus, on its face, the due process complaint notice reveals that, as of the May 17, 2021 CSE meeting, which she attended, or, at the latest, when the student began attending the district public school, the parent knew or should have known about her claims for the 2021-22 school year. Accordingly, the IHO erred in finding that the hearing record was insufficiently developed to conclude when the parent knew or should have known about the claims.

In the reply and answer to the cross-appeal, the parent argues that the hearing record did not demonstrate that the parent received a copy of the procedural safeguards notice prior to the date of accrual. The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]). Case law interpreting the "withholding of information" exception to the statute of limitations has found that the exception applies only to the requirement that parents be provided with certain procedural safeguards required under the IDEA (Bd. of Educ. of N. Rockland Cent. School Dist. v. C.M., 744 Fed. App'x 7, 11 [2d Cir. Aug. 1, 2018]; R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4, *6 [S.D.N.Y. Sept. 16, 2011]; see D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; Avila v. Spokane Sch. Dist. 81, 2014 WL 5585349, at *8 [E.D. Wash. Nov. 3, 2014]; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d

630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943, 945 [W.D. Tex. 2008]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *7 [E.D. Pa. Nov. 4, 2008]). Such safeguards include the requirement to provide parents with prior written notice and procedural safeguards notice containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3], [d]; 34 CFR 300.503, 300.504; 8 NYCRR 200.5[a], [f]). Under the IDEA and federal and State regulation, a district must provide parents with a copy of a procedural safeguards notice annually, as well as: upon initial referral or parental request for evaluation; the first occurrence of the filing of a due process complaint; and upon parental request (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). However, if a parent is aware of his or her rights in developing a student's educational program, it has been held that the failure to provide the procedural safeguards does not under all circumstances prevent the parent from requesting an impartial hearing (see R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

Here, although the district raised the statute of limitations defense during the impartial hearing, the parent did not, in turn, argue before the IHO that an exception to the statute of limitations should apply. In any event, the evidence in the hearing record shows that the April 2022 prior written notice stated in both English and Spanish that the parent could download a copy of the procedural safeguards notice from the district's website or call a provided phone number to request a copy (Dist. Ex. 2 at pp. 2-3, 6). The notice gave additional sources to contact to obtain assistance in understanding the special education process (id. at pp. 3, 6). Further, the prior written notice stated that, if the parent did "not agree with [the CSE's] recommendation, [she] ha[d] the right to request mediation or an impartial hearing" and provided addresses to submit such requests (id. at pp. 3, 7). The parent's April 19, 2024 due process complaint notice was filed more than two years after the April 6, 2022 prior written notice (compare Parent Ex. A, with Dist. Ex. 2). Accordingly, the evidence in the hearing record does not support a finding that the parent was prevented from timely request an impartial hearing based on any earlier failure by the district to provide the parent notice of her rights.

Based on the above, the parent's claims for 2021-22 are barred by the statute of limitations as the parent filed her due process complaint notice on April 19, 2024, more than two years after the parent knew or should have known about her claims and no exception applies.

3. Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulation provides that a pleading must set forth "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 specifies 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 Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]; L.J.B. v. N. Rockland Cent. Sch. Dist., 2024 WL 1621547, at *6 [S.D.N.Y. Apr. 15, 2024]; Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the

precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).

Here, the parent has not appealed the IHO's denial of relief in the form of two years of iBrain tuition as compensatory education, which the parent requested to remedy violations relating to the 2021-22 and 2022-23 school year. Accordingly, the IHO's denial of such relief has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The parent did not seek any other relief relating to those school years (see Parent Ex. A at pp. 11-12; see also Req. for Rev. at p. 10). As a result, any analysis of the merits of the parent's claims pertaining to the 2021-22 (even if it was not barred by the statute of limitations) and 2022-23 school years has been rendered academic. In addition, the IHO relied on the sufficiency of evaluation and the appropriateness of the 12:1+4 special class to rule that the district denied the student a FAPE (IHO Decision at pp. 22-24). The IHO did not address the parent's claims relating to the category of classification, the CSEs' related service recommendations, or special transportation services, or the appropriateness of the public school recommendation (see Parent Ex. A at pp. 5-10). On appeal, the parent has not alleged that the IHO erred in failing to address these claims or otherwise pursued the issues in response to the district's allegation that the IHO erred in finding a denial of a FAPE (see generally Req. for Rev.; Answer to Cr.-Appeal). Accordingly, as the parent has not set forth these issues for review, they are deemed abandoned and will not be further discussed (see 8 NYCRR 279.8[c][2], [4]).[7] Finally, the district has not cross-appealed the IHO's determination that iBrain was an appropriate unilateral placement for the student for the 2023-24 school year so that finding is final and binding as well (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

B. 2023-24 School Year

1. Sufficiency of Evaluations

A review of the hearing record shows that the information available to the March 2023 CSE was comprehensive and sufficiently identified the needs of the student; accordingly any failure of the district to present evidence of evaluations of the student does not support a finding that the district denied the student a FAPE for the 2022-23 or 2023-24 school year.

Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR

[7] With respect to the parent's allegations about the category of classification the parties do not dispute the student's eligibility for special education. Thus, even if properly appealed, the parent would not prevail, as the Second Circuit Court of Appeals has noted "a 'student's disability classification is generally immaterial in determining whether a FAPE was provided if the IEP otherwise sufficiently met the needs of the disabled student'" (Polanco v. Banks, 2024 WL 2105530, at *2 [2d Cir. May 10, 2024], quoting Polanco v. Porter, 2023 WL 2242764, at *6 [S.D.N.Y. Feb. 27, 2023]).

300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

a. March 24, 2022 CSE

As noted above, a discussion of the claims underlying the parent's allegation of a denial of a FAPE for the 2022-23 school year is academic since the parent has not appealed the IHO's denial of relief for that school year. Moreover, although the IHO ruled upon the sufficiency of evaluations before both the March 2022 and the March 2023 CSEs (see IHO Decision at pp. 22-24), review of the parent's due process complaint notice shows that the parent only alleged a deficiency in the evaluative information before the March 2023 CSE (see Parent Ex. A at pp. 7-10).[8] Ultimately, however, the information before both CSEs is discussed herein as a review of the district's assessments of the student leading up to the March 2022 CSE meeting provides context for a review of the sufficiency of the evaluations at the time of the March 2023 CSE meeting.

During the 2021-22 school year (fourth grade), a CSE convened on March 24, 2022, determined the student's remained eligible for special education services as a student with multiple disabilities, and developed an IEP to be implemented on April 15, 2022 (Dist. Ex. 1 at pp. 1, 4, 47).

The student's present levels of performance were laid out over twenty-six pages in the March 2022 IEP (Dist. Ex. 1 at pp. 1-26). The evaluation results section of the IEP reflects the results of a February-March 2022 administration of the SANDI as well as the student's response

[8] 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]).

to a reinforcer inventory, and performance on the School Function Assessment and New York State English as a Second Language Achievement Test (NYSESLAT) (id.at pp. 1-3).[9]

According to the March 2022 IEP, administration of the SANDI yielded a score of 51 out of 436 on the reading subtest (Dist. Ex. 1 at pp. 1, 4). The IEP noted that the student was able to respond to gestures made by a familiar person by looking toward and acknowledging the person and turned pages of a book three to five times when cued with "turn the pages," both with 80 percent accuracy and no additional prompts (id.). He was also able to respond to some sensory activities by showing excitement and demonstrated object permanence by looking for an object that has been moved out of sight, both with 60 percent accuracy and no more than one redirection and one prompt (id. at p. 4).

On the SANDI writing subtest the student attained a score of 46 out of 276 (Dist. Ex. 1 at p. 1). According to the IEP, the student was able to pick up small objects using a pincer grasp and use a switch to activate a familiar toy or an adaptive device, both with 80 percent accuracy and no additional prompts (id. at pp. 4-5). He was also able to trace or make marks with a writing instrument using a tripod grasp on a horizontal and vertical surfaces or electronic device; however, with less accuracy and additional prompts (id. at p. 6). As reflected in the March 2022 IEP, the student attained a score of 33 out of 396 on the SANDI math subtest, and, with 80 percent accuracy and no additional prompts, was able to reach for a math manipulative/object and demonstrate an understanding of the concept of "more" by taking more from a group of objects (id. at pp. 1, 6). In addition, the student could ask for more when shown preferred items (toys, snacks, music) using his preferred mode of communication (id. at p. 6). Lastly, the March 2022 IEP noted that the student was able to count up to five objects using one to one correspondence when given familiar objects with redirecting and prompting (id.). With respect to the SANDI activities of daily living skills subtest, the IEP indicated the student received a score of 71 out of 384 (id. at p. 1). The student's positive reaction to being fed, as evidenced by his turning toward, orienting toward, looking at, or smiling while being fed was a relative strength as was his ability to feed himself bites/pieces of a finger food and drink from a straw (id.). With less accuracy, the student was able to activate a switch to access a preferred leisure activity and dress and undress with assistance from an adult (id. at pp. 6, 8). The March 2022 IEP indicated that, with redirection and maximum prompting, the student was able to express interest or preference for special items or activities by choosing an item or activity from two choices and to scoop food with a spoon taking it from plate or bowl to his mouth, with some success getting food in his mouth (id. at p. 8). The March 2022 IEP included additional information obtained from administration of the SANDI, including specific skills that the student could perform with varying levels of prompting and accuracy and noted that he scored 19 out of 316 on the science subtest, 86 out of 352 on the social/emotional subtest, and 69 out of 236 on the gross motor subtest (id. at pp. 1-15). The IEP noted that the student was alternately assessed (id. at p. 26).

Next, the March 2022 IEP indicated that the student was assessed using a reinforcer inventory checklist and showed a preference for "[iPad], Elmo songs, goldfish, juice and musical

[9] The March 2022 IEP stated that the student's speech was assessed "vis CSS pro le" but provides no additional information regarding this assessment (Dist. Ex. 1 at p. 1).

toys," and noted that these items would be used daily to increase on-task behavior (Dist. Ex. 1 at p. 1).[10]

In addition to reflecting assessments results, the March 2022 IEP included updated descriptions of the student's abilities from the providers who worked with him in OT, PT, and speech-language therapy (Dist. Ex. 1 at pp. 2, 19-25). The student's special education teacher who was also the district representative at the March 2022 CSE meeting testified that the evaluations conducted were part of a standard procedure for all of their students (Tr. p. 77).

With respect to activities of daily living, the March 2022 IEP noted that the student required assistance in all areas including, mobility transitions, hygiene, feeding, dressing, and toileting and the student needed verbal and physical prompting support from classroom paraprofessionals (Dist. Ex. 1 at pp. 6-8, 14, 22-24). According to the IEP, the student had "extremely limited participation in areas of school mobility/transition, arrival/dismissal and bathroom/toileting activities" (id. at p. 2).

The IEP indicated that during a 2022 social history evaluation, the parent stated that the student was making progress and was learning things he did not know (Dist. Ex. 1 at p. 15). Further, she noted that he was achieving some of his IEP goals, as he was learning how to use his walker to walk independently (id.). The parent expressed interest in any parent training that she was "able to attend if it would help" the student and agreed to attend parent counseling and training (id. at p. 18).

According to the March 2022 IEP, the student benefited from repeated directions, use of manipulatives, visuals, offers of choices, small group instruction, and frequent repetition of information to access information (Dist. Ex. 1 at p. 8). The IEP noted that, based on his classroom performance and teacher's observations, the student was considered a visual learner as he learned by "seeing pictures, visual demonstrations, and illustrations" (id. at p. 10). In addition, the IEP stated that the student had some difficulty with spoken directions and was easily distracted by sounds (id.). The IEP indicated that the student required verbal, gestural, and physical prompting, adapted seating, and an IEP driven dynamic display speech generating device "in order to participate in class" (id. at p. 22).

Turning to the student's speech-language development and communication skills, the March 2022 IEP indicated that, although he was nonverbal, the student had an assistive technology device and supplemented his communication by way of gestures (pointing) and non-speech vocalizations (Dist. Ex. 1 at p. 10). According to the IEP, the student used his device "intentionally and accurately during highly motivating items such as playing, eating, drinking, and labeling colors" (id.). He was considered an English Language Learner (ELL), whose home language was Spanish, and he received English as a New Language (ENL) services to support his acquisition of the English language (id.). The March 2022 IEP identified Spanish as the language of service for the student's recommended speech-language therapy (id. at p. 41).

[10] The IEP indicates that the reinforcer survey was conducted in September 2022. This is presumed to be a typographical error.

With respect to the student's social/emotional development, the March 2022 IEP described the student as happy and indicated that the student sometimes engaged in behaviors of yelling and crying and had difficulty transitioning to non-preferred activities (Dist. Ex. 1 at p. 8). The IEP also noted that the student preferred solitary play and working in a 1:1 setting or a small group (id. at p. 12). At the March 2022 CSE meeting, the parent expressed concern with the student's lack of interaction with his brother as the student only wanted to play with the iPad at home (id. at p. 17). The IEP indicated that this concern had been addressed and the teacher stated that he would continue to use his device to interact with peers to increase his social interaction (id.). The parent expressed concern about the student's challenging behaviors at home as he was "very aggressive toward her," had tantrums, pulled her hair, and pulled down the window curtains when corrected (id. at p. 18). In addition, she reported the student enjoyed changing TV channels with the remote control but watched TV and his iPad at high volumes and had tantrums when she tried to lower the volume (id. at pp. 18, 49).

In terms of physical development, the IEP indicated that the student had not yet established hand dominance and continued to use a digital pronate grasp when scribbling (Dist. Ex. 1 at p. 19). Assessment of the student's motor skills using the School Function Assessment (SFA) indicated that he demonstrated delays in writing skills (id. at p. 2). The student was at a prewriting level and preferred to scribble but would imitate simple lines given verbal and visual cues (id.). According to the IEP, the student had "di[ff]iculty with [fi]ne motor activities including placing items in small containers, opening containers, and using classroom tools like glue sticks and scissors (id.). The IEP noted that the student had a tendency to put things in his mouth and close to his nose as if to smell them and he needed close supervision, especially when using playdough (id. at p. 19). The IEP indicated that the student "constantly rocked his body while sitting in his wheelchair" and liked to rock back and forth while in the activity chair (id. at pp. 10, 19). The student was able to feed himself with a fork with occasional assistance (id.). The student's physical therapist indicated that he presented with deficits in muscle strength, endurance, and flexibility and demonstrated impaired balance, protective/equilibrium reactions, and coordination (id.at p. 20). Further, the student exhibited increased muscle tone on his extremities and overall muscle tightness (id.). The IEP indicated that as measured by the Gross Motor Function Classification System (GMFCS) the student's gross motor function was at "Level IV" (id.). The student required physical assistance or a mobility seating system in most settings, adaptive seating, physical assistance for most transfers, and could walk using a gait pacer for small indoor distances with moderate to maximal assistance for safety and steering (id.). The IEP reflected information provided by the student's physical therapist that indicated the student was able to move through various neurodevelopmental positions up to tall kneeling; "W-sit, heel sit and short sit"; and move around the floor by rolling or bunny hopping (id.). However, the student required moderate/maximal assistance with transfers, lacked motivation to independently propel his wheelchair, and required moderate to maximal assistance to use a gait trainer due to forward trunk leaning and scissoring of his legs (id.).

As reflected above, the district conducted its own evaluations of the student which included the SANDI, which generally assessed the student's academics, communication, socio–emotional skills, gross motor and adaptive/daily living skills (Dist. Ex. 1 at pp. 1-8). The district also assessed the student by teacher observation, a reinforcer inventory checklist, and a review the student's prior year's IEP (id. at p. 1). In addition, then-current assessments from the student's related services providers were documented in the IEP, as well as input from the parent, the student's providers

and teachers, all of which constituted sufficient evaluative information for the CSE to develop the student's IEP (id. at pp. 1-12). The hearing record indicates that the CSE was able to consider current evaluative information largely derived from the district's own assessments and reports to develop the student's IEP for the 2022-23 school year.

b. March 20, 2023 CSE

A CSE convened on March 20, 2023 to determine the student's continued eligibility for special education services and to recommend a program to address the student's individual needs (Dist. Ex. 3 at p. 1). The CSE considered the results of a March 2023 administration of the SANDI, the NYSAA decision making checklist, the SFA, GMFCS, and teacher observations (id.). The March 2023 administration of the SANDI yielded scores that were slightly higher than the SANDI scores attained in March 2022 and the resultant narrative was relatively unchanged from the previous IEP (compare Dist. Ex. 3 at pp. 1-7 with Dist. Ex. 1 at pp. 1-8). The IEP stated that based on the classroom teacher's observations the student's intellectual functioning appeared to be in the moderate to severe range (id. at p. 8). The IEP identified specific skills related to reading, writing, math, and activities of daily living that were assessed by the SANDI and described the percentage of accuracy with which the student could perform each skill as well as the level of prompting he required (id. at pp. 1-7). The IEP indicated that the student was alternately assessed and that the parents understood and agreed that the student should remain alternately assessed (id. at pp. 1, 4, 25).

The March 2023 IEP continued to describe the student as "joyful," and indicated he was nonverbal and used a communication device as well as facial expressions, one-word vocalizations and gestures to communicate with others (Dist. Ex. 3 at p. 15). The March 2023 IEP noted that the student had made some progress "since the beginning of the year" using his device functionally during academic lessons (id. at p.10). The IEP added that the student used a total communication approach (pictures, symbols, device, gestures) to answer yes/no questions and responded well to a token board, with his preferred reinforcers being music and iPad games (id. at p. 12).

According to the March 2023 IEP, the student was still a visual learner and preferred lessons with songs and hand-on activities, required "constant" repetition to strengthen short- and long-term memory, and for problem solving required verbal and gestural prompts to focus on his classwork (Dist. Ex. 3 at p. 10). In addition, the student required verbal, gestural, and physical prompts to help him calm down when rocking in his wheelchair (id.). The IEP noted that the student required a highly structured instructional environment with established routines, an individualized visual schedule, a first-then board, token board, and preferred positive reinforcers throughout the school day (id. at p. 14). In addition the IEP noted the student continued to need access to small group and 1:1 instruction; visuals; manipulatives; choices; verbal, gestural, and physical prompting; an IEP driven dynamic display speech generating device; and support from classroom paraprofessionals and the related service providers to meet his individual needs (id.).

The March 2023 IEP included updated descriptions of the student's abilities provided by the providers who worked with him in OT, PT, and speech-language therapy (Dist. Ex. 3 at pp. 1-24). With regard to OT, the IEP indicated that the student continued to work toward his goals but commonly showed displeasure by engaging in self-directed behaviors such as by throwing objects on the floor (id. at p. 19). According to the March 2023 IEP, the student's occupational therapist

reported that he was able to follow simple directions and demonstrated "good upper extremity strength and range of motion," (id. at p. 23). In contrast, the student had difficulty with tasks that required bilateral hand use and with fine motor coordination (id.). As recorded in the IEP, the student's physical therapist indicated that he would ambulate for a short distance with and assistive device and moderate to maximum physical assistance (id.). The IEP indicated that in adapted physical education the student demonstrated improving strength and endurance to carry out gross motor tasks, which facilitated training in his motor planning, coordination, and balance (id.). Still, the IEP indicated that the student required ongoing PT to address his school mobility and transition needs (id.).

The IHO was correct in identifying procedural deficiencies in the district's process. For example, pursuant to State and federal regulation, a prior written notice must include, among other things, a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]). Here, the April 2023 prior written notice cited only a March 2022 social history assessment as the basis for the CSE's recommendations (Dist. Ex. 4 at p. 2). Nevertheless, as acknowledged by the IHO, the evidence in the hearing record demonstrated that the CSE relied on other sources of information, including the SANDI and the Reinforcer Inventory Checklist, as well as related services assessments, and the IEP documents (see IHO Decision at p. 23; see generally Dist. Ex. 3 at pp. 1-25). Moreover, the failure to list all of the sources relied upon in the prior written notice amounts, at most, to a procedural violation but, given the identification of sources of information in the IEP itself, it does not amount to a denial of a FAPE (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

Although the IHO took issue with the district's failure to offer copies of the assessments that the CSEs relied upon into evidence (see IHO Decision at p. 23), here, the parent did not dispute the accuracy of the description of the student in the IEPs and, instead, specifically alleged the absence of certain assessments, namely that the district failed to conduct a vision assessment, an assistive technology assessment, or a neuropsychological assessment and the IHO agreed (IHO Decision at p. 23; Parent Ex. A at pp. 9-10). Yet, the parent did not allege that the IEP was deficient for failing to address the student's vision or assistive technology needs, and, while the parent may have felt that a neuropsychological evaluation would have been the best source to determine the students functioning, the "IDEA does not compel a school district to perform every sort of test that would arguably be helpful before devising an IEP for a student" (Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 373 F. Supp. 2d 292, 299 [S.D.N.Y. 2005]), and the district's failure to conduct these evaluations does not render the IEP legally inadequate in light of the full description of the student's needs set forth in the IEP (see Phillips v. Banks, 2024 WL 1208954, at *2 [2d Cir. Mar. 21, 2024]).

In summary, as described above, the district thoroughly evaluated the student in preparing for the student's annual review meetings for both the 2022-23 and 2023-24 school years. The hearing record and testimony from the student's special education teacher who was also the district representative at the March 2022 and March 2023 CSE meetings showed that the CSEs in developing the student's IEPs had sufficient updated evaluative information from formal assessments and updated related service reports as well as provider and parent input.

2. 12:1+4 Special Class

The district asserts that the IHO erred in finding that, based on the student's management needs, the special class ratio recommended by the district was not suitable for the student and could not address his needs. The district argues that the 12:1+(3+1) special class offered the student an environment with the necessary supports to make progress and that the IHO "oversimplified" the argument that the student should be placed in a smaller class due to his intensive management needs and did not consider the student's multiple severe disabilities, which required a program in the areas of rehabilitation and treatment, a student to staff ratio of at least one staff to three students and services from teachers, supplementary school personnel, and related service providers.

As the IHO noted, State regulation indicates that the maximum class size for special classes containing students whose management needs are determined to be intensive and requiring a significant degree of individualized attention and intervention, shall not exceed eight students with one or more supplementary school personnel assigned to each class during periods of instruction (8 NYCRR 200.6[h][4][ii][b]; see IHO Decision at p. 24). Management needs 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 special class recommendation] is the most supportive classroom available" (Navarro Carrillo v. New York City Dep't of Educ., 2023 WL 3162127, at *3 [2d Cir. May 1, 2023]; see Cruz v. Banks, 2024 WL 1309419, at *7–*8 [S.D.N.Y. Mar. 27, 2024]; Melendez v. Banks, 2023 WL 6283108, at *7 [E.D.N.Y. Sept. 26, 2023];).

Where a student's needs could be deemed to fit within the definitions for more than one special class ratio, such as an 8:1+1 and a 12:1+4 special classes, pursuant to the definitions set forth in State regulation, the student's unique needs must dictate the analysis of whether the CSE recommended an appropriate class size (Carrillo v. Carranza, 2021 WL 4137663, at *17 [S.D.N.Y. Sept. 10, 2021], aff'd sub nom., Navarro Carrillo, 2023 WL 3162127). While the IHO was correct in stating that the student's management needs were intensive due to his health, her analysis did not take into account the State regulation describing the 12:1+(3:1) special class recommended by the March 2023 CSE (see, 8 NYCRR 200.6[h][4][iii]).

To address the student's significant management needs, the March 2023 IEP recommended the following modifications, accommodations, and resources: repeated directions, use of manipulatives, visuals, choices, frequent repetition of information to access information, access to reinforcers throughout the school day, small group instruction, 1:1 instruction, individualized visual schedule, first-then board, token board, prompting as needed (verbal, gestural, physical), use of individualized assistive technology to support current communication needs, New York State Alternate Assessment (NYSAA) as applicable, testing accommodations (use of assistive

technology and on-task focusing prompts), support from classroom paraprofessionals and related service providers, ENL services, and school nursing services as needed (Dist. Ex. 3 at pp. 25, 43). The student's needs, as detailed above, indicated that the student was "fully dependent" for all mobility, personal grooming, toileting, and transitions in the school setting (id. at p. 23). He required adapted seating, a dynamic display speech generating device, and verbal, gestural and physical prompting to participate in class (id.). Of note, his physical therapist provided recommendations of PT carryover in the classroom for the student which included: access to daily programmatic mat time; access to daily programmatic adapted walking program with appropriate assistive device; access to least restrictive programmatic adapted seating as deemed necessary and appropriate for the student to access academic curriculum; and, access to a programmatic stander as deemed necessary and appropriate for the student (id. at p. 25).

The March 2023 IEP indicated that the CSE considered a special class ratio of 12:1+1 or home/hospital instruction for the student but rejected these options as the CSE stated that the 12:1+1 special class would not provide the structured environment and small group size that the student needed to address his academic, behavioral and communication needs and the home/hospital instruction would be too restrictive (Dist. Ex. 3 at p. 48).

According to the student's special education teacher, who was also the district representative at the March 2023 CSE meeting, the student's placement in the 12:1+(3+1) special class was appropriate as he needed intensive support and a highly structured environment due to his cognitive level and physical and emotional challenges (Tr. pp. 88-89). She explained that the district 12:1+(3:1) class was for students with multiple disabilities who required lots of attention (Tr. p. 89). The teacher indicated that there were many paraprofessionals in the classroom, "there was always a para[professional] assigned to three students," and some students had one-to-one health paraprofessionals assigned to them (id.). She described the classroom as one that focused on academics such as "reading, writing. . . science and math," and related services but also explored music (Tr. p. 90). The teacher stated that she modified the general education curriculum based on individual needs, aligning academics with each student's individual goals (Tr. p. 91). She also noted that there were no safety concerns, regarding the student when he was in her classroom but noted that he rocked too much when he was in his wheelchair and presented with physical challenges (Tr. p. 92). She testified that she did not recall that the parent shared any concerns at the March 2023 CSE meeting about the program recommendations but that the parent had shared concerns regarding the student's behaviors at home in regard to wanting to play with his communication device rather than using it functionally (Tr. p. 108). The teacher testified that she felt that the March 2023 IEP provided appropriate recommendations for the student, and, in her opinion, the parent seemed happy with the student's placement in the 12:1+(3+1) classroom (Tr. p. 110). She noted that the parent had never spoken to her about removing the student from public school (Tr. p. 110). Further, a review of the hearing record indicates that the student had been placed in a 12:1+(3+1) special class in a district public school for both the 2021-22 and 2022-23 school years and the teacher indicated in her testimony that the parent had not shared a concern regarding the class size for either year (Tr. p. 111; Dist. Exs. 1; 3).

Based on a review of the above, the hearing record contains sufficient information to show that the March 2023 CSE had information available to make a determination that the student 's recommended placement in a 12:1+(3:1) special class with related services and assistive technology was reasonably calculated to enable the student to continue to make progress in light

of his circumstances for the 2023-24 school year in an educational program which focused largely on habilitation and treatment, taking into account his intensive management needs, medical needs, and multiple diagnoses. Based on the foregoing, evidence in the hearing record does not support the IHO's finding that the recommended 12:1+(3:1) special class placement was inappropriate or denied the student a FAPE for the 2023-24 school year.

C. Independent Educational Evaluation and District Evaluations

The parent asserts that the IHO erroneously denied the parent's request for district funding for an IEE.

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 April 19, 2024 due process complaint notice, the parent requested district funding for an IEE (Parent Ex. A at pp. 10-12). The parent did not, however, identify in her due process complaint what district evaluation, if any, the parent disagreed with, but instead alleged that the district failed to conduct the necessary evaluations of the student (id. at pp. 9-10). The parent's 10-day notice requested that the CSE reconvene to discuss the parent's disagreement with the March 2023 IEP and "for the purpose of requesting an [IEE] for [the student]"; therefore, the parent did not request an IEE at that time but instead stated a future intent to seek an IEE (Parent Ex. F).

Nevertheless, 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]).[11] Accordingly, the parent's request for an IEE at public expense may not be denied on this basis.[12] While the IHO did not have the benefit of the district court's view in Moonsammy, ultimately I am constrained to reverse her determination to deny the parent's request for an public funded IEE on this ground.

Taking into account the parent's request for an IEE in the due process complaint notice and given the recent district court authority permitting this practice, the district was required to defend its evaluation of the student. As discussed above, the summary of the student's needs in the IEP demonstrates that the district had sufficient evaluative information available to it such that the district's failure to offer into evidence the actual evaluation documents is not determinative on the question of whether the district's evaluation of the student impeded the student's right to a FAPE or caused a deprivation of educational benefits.[13] In contrast, for purpose of assessing the parent's request for an IEE, it was incumbent upon the district, at a minimum, to offer the results of the last evaluation of the student into evidence. Having failed to do so, I find that the district shall be required to fund an independent neuropsychological evaluation of the student subject to the district's criteria.

As to the IHO's order requiring the district to conduct evaluations, given the determination herein that the district offered the student a FAPE for the 2023-24 school year, there is no basis

[11] 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.

[12] Although the District Court in Moonsammy found that a parent may request an IEE in the due process complaint notice in the first instance (2024 WL 4277521, at *15-*17), the Court indicated that 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 that 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).

[13] Because the parent's request for an IEE was made in the due process complaint notice, after the IEPs were developed at the CSE meetings in this case, an IEE after the fact cannot be used to retrospectively attack the IEPs under the principles set forth in R.E. (694 F.3d at 188; see D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 361-62 [S.D.N.Y. 2013] [explaining that a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE]).

for an order of relief in the form of district evaluations and, accordingly, the IHO's order in this regard shall be vacated.

VII. Conclusion

The evidence in the hearing record establishes that the parent's claims in regard to 2021-22 are barred by the statute of limitations and, further, that the IHO's denial of relief relating to the 2021-22 and 2022-23 school year is final and binding rendering academic any review of the parent's claims that the district denied the student a FAPE for those school years. In addition, the evidence in the record establishes that the district sustained its burden to establish that it offered the student a FAPE for the 2023-24 school years. The IHO's finding regarding the appropriateness of iBrain for the 2023-24 school year is also final and binding. Given these determinations, there is no need to reach the issue of whether equitable considerations would support an award of tuition reimbursement (Burlington, 471 U.S. at 370).[14] Finally, the parent is entitled to an IEE at district expense.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated July 15, 2024, is modified by reversing those portions which denied the parent's request for an IEE at district expense and directed the district to conduct a neuropsychological evaluation, an assistive technology evaluation, and a functional visual assessment of the student; and ordered the CSE to reconvene to consider those evaluations; and

IT IS FURTHER ORDERED that the district shall fund an IEE to include a functional vision evaluation, an assistive technology evaluation, and a neuropsychological evaluation of the student subject to the district's criteria.

Dated: **Albany, New York**
October 11, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[14] Were I to reach the IHO's determination regarding equitable considerations, I would not have disturbed the IHO's denial of tuition funding for the 2023-24 school year on equitable grounds (see IHO Decision at pp. 30-32, 36). After having attending a district public school program in the prior school years, the student began attending iBrain in September of 2023, yet the 10-day notice was dated March 20, 2024, more than six months later (Parent Exs. F; M), thereby depriving the district of an opportunity, before the child was removed, to assemble a team, evaluate the child, devise an appropriate plan and determine whether a FAPE can be provided in the public schools (20 U.S.C § 1412[a][10][C][iii][I]; Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]).