The University of the State of New York

The State Education Department
State Review Officer
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No. 24-439

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, attorneys for petitioners, by Erik Paul Seidel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail Eckstein, 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 of their daughter's tuition at the International Academy for the Brain ("iBrain") for the 2024-25 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 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 was the subject of prior State-level appeals involving the 2021-22, 2022-23, and 2023-24 school years; accordingly, the parties' familiarity with the student's educational history is presumed (Application of a Student with a Disability, Appeal No. 23-312; Application of a Student with a Disability, Appeal No. 22-150).[1, 2]

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

[2] Previous SRO decisions involving the student were issued on January 9, 2023 (Appeal No. 22-150) and February 14, 2024 (Appeal No. 23-312) (see Parent Ex. C).

A CSE convened on April 16, 2024 to develop an IEP for the student for the 2024-25 school year (see Dist. Ex. 1 at p. 53). Finding the student remained eligible for special education as a student with a traumatic brain injury, the April CSE recommended 12-month programming consisting of placement in an 8:1+1 special class in a specialized school, adapted physical education, and related services of five 60-minute sessions of individual OT per week, two 30-minute sessions of individual orientation and mobility services per week, five 60-minute sessions of individual PT per week, five 60-minute sessions of individual speech-language therapy per week, three 60-minute sessions of individual vision education services per week, one 60-minute session of parent counseling and training per month, and one session of individual assistive technology services per week (id. at p. 46-48). The CSE also recommended full-time paraprofessional services, individual nursing services as needed, and a braille embosser for the student (id.). At the CSE meeting, the student's mother expressed concern with the recommended placement, particularly with the lack of music therapy, and asserted that the recommended specialized school would be "overstimulating" to the student given her specific needs (id. at pp. 56-57).

In a June 14, 2024 prior written notice, the district informed the parents of the recommendations made by the April 2024 CSE (Dist. Ex. 4).[3]

In a school location letter dated June 14, 2024 the district notified the parents of the specific school location the student was assigned to attend for the 2024-25 school year (Tr. p. 180; Dist. Ex. 5).

The parents signed an agreement with Sisters Travel and Transportation Services, LLC on June 16, 2024 (Parent Ex. F).

In a letter, dated June 17, 2024, the parents informed the district that they had re-enrolled the student at iBrain for the 2024-25 school year and intended to seek district funding for the student's program at iBrain (Parent Ex. A at pp. 11-12). The parents also requested that the district pay for an independent educational evaluation (IEE) of the student (id.at p. 12).

On June 18, 2024, the parents signed an enrollment contract for the student to attend iBrain during the 2024-25 school year (Parent Ex. E).

A. Due Process Complaint Notice

In a due process complaint notice dated July 2, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (see Parent Ex. A). The parents alleged that the district failed to provide a prior written notice and failed to recommend an appropriate school location for the student for the 2024-25 school year (id. at p. 7). Moreover, the parents alleged that the recommended 8:1+1 special class was "not

[3] The April 2024 IEP was amended to reflect that the student was placed in a district specialized school as was also shown in the prior written notice and the special class recommendations for both IEPs, rather than a nonspecialized school (compare Dist. Exs. 1 at pp. 46, 53 with 2 at pp. 46, 53; see Dist. Ex. 4). As both special class recommendations identified a specialized school as the student's placement and the parents acknowledged that the April 2024 CSE recommended a district specialized school for the student, the IEP which identified the student's placement as a district specialized school will be treated as the operative IEP for the student for the 2024-25 school year (see Parent Exs. A at p. 5; J at ¶12; Dist. Exs. 1; 4; 5).

appropriate" because the student would not be placed with other students of similar needs and abilities, the recommended classroom presented safety risks, and the recommended placement did not offer an extended school day (id. at p. 8). The parents alleged that the district failed to evaluate the student in all areas of suspected disability and included a request for an IEE (id.). The parents alleged further, that the district failed to consider a nonpublic school in violation of its operating procedures and failed to recommend music therapy and hearing education services for the student (id.).

Finally, the parents contended that iBrain is an appropriate unilateral placement and that equitable considerations weighed in favor of an award of tuition funding (Parent Ex. A at p. 8). The parents requested direct payment for the full costs of the student's tuition at iBrain for the 2024-25 school year as well as related services, 1:1 paraprofessional services, and transportation services (id. at p. 10). In addition, the parents requested district funding for a neuropsychological evaluation and an order directing the district to reconvene the CSE (id.).

B. Impartial Hearing Officer Decision

After a prehearing conference on July 25, 2024 (Tr. pp. 1-44),[4] an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on August 9, 2024 and concluded on August 21, 2024 after three days of proceedings (Tr. pp. 45-279; Aug. 21, 2024 Tr. pp. 210-65).[5] In a decision dated August 30, 2024, the IHO found that the district met its burden to show that it offered the student a FAPE for the 2024-25 school year (IHO Decision p. 9).[6]

The IHO found that the student was enrolled in an extended school year program and was classified by the district as having a traumatic brain injury and attendant impairments in cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem solving; sensory, perceptual and motor abilities; psychosocial behavior; physical functions; information processing; and speech (IHO Decision p. 4). The IHO found that the April 2024 IEP "was developed through

[4] At the prehearing conference, the district's attorney advised the IHO that there was an error in the student's April 2024 IEP, that it was subsequently revised in June 2024 to address a clerical error, and it was reissued prior to the distribution of the prior written notice according to the district representative (Tr. pp. 13-17, 79-81).

[5] While the transcripts of the first three hearing dates were consecutively paginated, the transcript of the August 21, 2024 hearing date began at the same page as the August 9, 2024 hearing date; for ease of reference the first three hearing dates will be cited to by their consecutively paginated transcript pages and the August 21, 2024 hearing date will be cited by reference to the date of the hearing (Tr. pp. 1-279; Aug. 21, 2024 Tr. pp. 210-265).

[6] Prior to the hearing, the IHO issued a July 15, 2024 interim order outlining the procedures for the hearing and communicated with the parties via email regarding the resolution meeting, the scheduling of the prehearing conference, the issuance of subpoenas, and other matters (IHO Exs. I; III-V; IHO Pendency Exs. I). The IHO issued an interim decision on pendency on July 31, 2024 awarding the parents tuition at iBrain for the 12-month school year during the pendency of this proceeding, retroactive to the filing of the due process complaint notice (July 31, 2024 IHO Interim Decision). The IHO amended the student's pendency services by adding transportation services including limited travel time, air conditioning, a lift bus and regular sized wheelchair, and paraprofessional services (August 2, 2024 Interim IHO Decision). The IHO exhibits are separated into exhibits referenced in the IHO's decision and exhibits referenced in the IHO's July 31, 2024 interim decision on pendency and August 2, 2024 amended interim decision on pendency (IHO Decision at p. 23; August 2, 2024 Interim IHO Decision at p. 4; July 31, 2024 Interim IHO Decision at p. 3; IHO Exs. I-VI; IHO Pendency Exs. I-III).

the IDEA's procedures and [wa]s reasonably calculated to enable the [s]tudent to receive educational benefits" (id. at p. 8). Moreover, the IHO found that the April 2024 IEP included appropriate "annual and short-term goals" and an "appropriate frequency and duration" of related services based on sufficient evaluative data (id. at p. 9). Based on that, the IHO found that the district met its burden and turned to the parent's specific arguments to support their contention that the district did not offer the student a FAPE (id.).[7] With regard to the parent's assertion that the district failed to recommend music therapy, the IHO found that "the contention that the utilization of certain techniques and methods by anyone other than a board certified music therapist [we]re somehow wholly stripped of their therapeutic value and rendered completely recreational to be implausible" and determined that evidence in the hearing record demonstrated that the benefits of music therapy could also be achieved through alternative means including related services and classwork (id. at pp. 9-10). The IHO further found that the parent's contention that the student required hearing education services was not supported as the hearing education services received by the student at her prior placement were not recommended by the student's pediatrician and the need for those services was suspect given the testimony and conflicting evidence in the hearing record related to the student's hearing impairment (id. pp. 10-11). Finally, the IHO addressed the parents' argument that the proposed placement could not implement the student's IEP and found that the parents did not tour the proposed placement and merely raised speculative concerns that "carr[ied] no weight" (id. at p. 12). With respect to the parent's contention that the proposed school could not implement the student's IEP because it did not have an extended school day, the IHO noted that related services could have been provided as push-in or pull-out services and, therefore, the school day did not need to be extended for the student to receive all of the recommended related services (id.).

Having determined that the district offered the student a FAPE, the IHO made alternative findings as to the appropriateness of the parents' unilateral placement of the student at iBrain and equitable considerations, determining that the unilateral placement was "reasonably calculated to enable the [student] to receive educational benefits" but the IHO would have reduced the requested relief based on equitable considerations, including the timing of the parents' contracts and notice to the district, excessive tuition costs, and the parents' failure to consider alternative transportation in lieu of the services contracted by the parent (IHO Decision p. 13-15). The IHO also denied the parents' request for funding of an independent educational evaluation as the parents did not identify a district evaluation that they disagreed with, further noting that the district relied on evaluative information provided by iBrain and the hearing record did not support finding that a neuropsychological evaluation was necessary to develop an appropriate educational program for the student (id. at pp. 15-16).

[7] The IHO held that two issues were raised during the hearing which were not included in the parents' due process complaint notice: the CSE's failure to reconvene to correct a "clerical error" and the parents' argument that the April 2024 IEP did not provide transportation with limited travel time (IHO Decision p. 17). The IHO found that the transportation issue was absent from the due process complaint notice and that the parent was notified of the "clerical error" 15 days prior to the hearing and did not amend the due process complaint to address the new facts (id. at p. 18). The IHO concluded that the testimony at the hearing did not sufficiently raise the issues, and neither were within the scope of the hearing (id.).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in finding the district offered the student a FAPE for the 2024-25 school year. The parents argue that the district's "clerical change" to the April 2024 IEP was a procedural violation that amounts to a "per se denial of FAPE" which the IHO did not "adequately address" in his decision. The parents further contend that the IHO erred in finding that the district's proposed school could have implemented the student's IEP and assert that the district predetermined the student's program by failing to consider placement of the student in a nonpublic school or music therapy. Moreover, the parents argue that iBrain was an appropriate placement for the student and that equitable considerations support full reimbursement of the student's tuition at iBrain.

In an answer, the district denies the parents claims and argues the IHO properly determined that the student received a FAPE for the 2024-25 school year and that the parents were given a meaningful opportunity to participate in the development of the April 2024 IEP. The district argues that the parents' contention that the proposed placement could not implement the April 2024 IEP was too general and the allegations were not sufficiently pled in the due process complaint notice.

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]).[8]

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

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

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

VI. Discussion

A. Preliminary Matter—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]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]; see 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 parents argue that the district's failure to reconvene to correct a "clerical error" was a per se denial of FAPE (see Req. for Rev. at ¶12, IHO Decision p. 17). While the parents raised the argument at the underlying hearing, the IHO determined that the argument was not

properly before him as it was not included in the due process complaint notice and was therefore outside the scope of the hearing (see IHO Decision p. 17; 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]). In the instant matter the parents do not appeal from the IHO's finding that their argument was outside the scope of the hearing, rather they resurrect their argument that the student was denied a FAPE based on the CSE's failure to reconvene to correct the student's IEP (see Req. for Rev. at ¶ 21). Accordingly, there is no basis for disturbing the IHO's finding that the issue is outside the scope of the hearing. Nevertheless, to the extent that the parents do raise this as an issue on appeal, it would not result in a finding of a denial of FAPE as the hearing record is clear that the parents were aware of the April 2024 CSE's recommendations. In particular, as noted above, the special class recommendations in both the April 2024 and June 2024 IEPs identified a specialized school as the student's placement and the parents acknowledged, via the student's father's testimony by affidavit, that the CSE recommended a district specialized school for the student prior to the start of the 2024-25 school year (see Parent Ex. J at ¶12; Dist. Exs. 1 at p. 46; 2 at p. 46).

The parents further argue on appeal that "the CSE neither recommended nor conducted any independent assessments or evaluations of [the student] prior to the April IEP meeting" and that "[t]he IHO ignored the importance of this omission"; however, the parents do not assert that the April CSE did not have sufficient evaluative information regarding the student, nor do the parents directly address the IHO's findings regarding the district's obligations to fund an IEE of the student. Accordingly, as the parents do not address the IHO's findings that the April 2024 IEP appropriately described the student's present levels of performance and that the assessments available to the CSE were sufficient to make a recommendation (IHO Decision at pp. 8, 16), the parents' assertions regarding the lack of an independent evaluation will not be further addressed on appeal.

State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

In consideration of the above, the parents' claims related to FAPE in this appeal are limited to their assertions that the district failed to demonstrate it could implement the student's IEP at the assigned school site and that the district predetermined the student's educational program by not considering a nonpublic or music therapy.

B. FAPE for the 2024-25 School Year

In their request for review, the parents allege that the district failed to demonstrate it could implement the student's IEP at the assigned public school site for the 2024-25 school year and that the April 2024 CSE predetermined the student's educational program.

1. Capacity to Implement the April 2024 IEP

The parent argues on appeal that the IHO erred by finding that the district's recommended placement could have implemented the proposed IEP. The student, however, never attended the public school site and, the implementation claims regarding the assigned school that the parent continues to pursue on appeal are impermissibly speculative.

Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]). However, a district's assignment of a student to a particular public school site must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]). The Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 6 [2d Cir. Aug. 24, 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). Additionally, the Second Circuit indicated that such challenges are only appropriate, if they are evaluated prospectively (as of the time the parent made the placement decision) and if they were based on more than "mere speculation" that the school would not adequately adhere to the IEP despite its ability to do so (M.O., 793 F.3d at 244). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (see Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dept. of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]). Such challenges must be based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F., 2016 WL 3981370, at *13; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

At the outset, the parent's claims regarding the provision of related services to the student was not borne out by the evidence, as the student never attended the assigned public school site pursuant to the April 2024 IEP. Any conclusion that the district would not have implemented the

student's IEP or that the assigned public school site could not meet the student's needs would necessarily be based on impermissible speculation, and the district was not obligated to present retrospective evidence at the impartial hearing regarding the execution of the student's programming under the IEP or to refute the parent's claims (R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 9 [2d Cir. Jan. 8, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 87 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 187 & n.3]). Further, any claim that the recommended educational program would not have been able to be implemented without a recommendation for an extended school day is really a "substantive attack[] on [the] IEP . . . couched as [a] challenge[] to the adequacy" of the assigned public school site's capacity to implement the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 244, 245 [2d Cir. 2015]). In view of the foregoing, the parents cannot prevail on their claims regarding implementation of the related services recommended in the April 2024 IEP.

Additionally, as noted by the IHO, the parent's assertion that the assigned school could not implement the April 2024 IEP because it did not have an extended school day is without merit (see IHO Decision at p. 12). In particular, the April 2024 IEP recommended related services at the provider's discretion to be provided either in a separate location or in the student's classroom (Dist. Ex. 1 at p. 47). Accordingly, there is no basis for departing from the IHO's determination that the assigned school did not need to have an extended school day in order to implement the student's IEP, as services could have been provided during the course of the school day, and the parent does not raise any argument to challenge this finding by the IHO. Claims regarding an assigned school's ability to implement an IEP must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5).

Further, to the extent that the parents assert that the district has not submitted evidence to show that the student would have been placed with other students with similar ages, behavioral, academic, and social and emotional needs as required by State regulation, when a student has not yet attended the proposed classroom at issue, claims related to functional grouping tend to be speculative in nature (J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. Mar. 16, 2016] [finding that "grouping evidence is not the kind of non-speculative retrospective evidence that is permissible under M.O." where the school possessed the capacity to provide an appropriate grouping for the student, and plaintiffs' challenge is best understood as "[s]peculation that the school district [would] not [have] adequately adhere[d] to the IEP"], quoting R.E., 694 F.3d at 195; see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]). Various district courts have followed this precedent post M.O. (G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016] [same]; L.C. v. New York City Dep't of Educ., 2016 WL 4690411, at *4 [S.D.N.Y. Sept. 6, 2016] ["Any speculation about which students [the student] would have been grouped with had he attended [the proposed placement] is just that—speculation. And speculation is not a sufficient basis for a prospective challenge to a proposed school placement"]).

Moreover, the hearing record does not support finding that the parents were unable to visit the assigned public school. The student's father testified that he received the school location letter on Friday, June 14, 2024, but did not have time to visit the proposed school prior to the start of the 12-month school year which began " ... after independence day ... " (Tr. pp. 181-83, 202, 205; Parent Ex. J ¶ 12). The student's father testified that the parents attempted to make contact with

the school to visit the proposed school but that no one responded to their request (Tr. pp. 180-81). He stated that they did not show up at the school and ask to visit as "[t]hat seem[ed] very unsafe" (Tr. p. 181). The student's father further explained that both he and his wife worked full time and it was not easy for them to get time off from work (Tr. pp. 182-83). The student's father reported that the parents did not call the proposed school rather he testified that his wife sent one email to the school (in an effort to arrange a school visit), but he could not recall when the email was sent (Tr. pp. 181-83, 197-98, 202, 205). He acknowledged that the parents' exhibits did not include a copy of the email (Tr. p. 182). Accordingly, this is not a case where the parents were not made aware of the assigned public school site prior to the start of the school year so that they could have acquired information regarding the assigned public school.

Overall, the parents' arguments related to the public school assigned to implement the student's IEP for the 2024-25 school year are speculative, as determined by the IHO. Additionally, the parent was provided with information regarding the assigned public school prior to the start of the school year. Accordingly, there is no basis for overturning the IHO's findings as to the assigned public school's ability to implement the student's educational program for the 2024-25 school year.

2. Predetermination and Parent Participation

Turning to the parents' claim that the district predetermined it was not going to offer the student a placement in a nonpublic school, the IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. § 1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). Although school districts must provide an opportunity for parents to participate in the development of their child's IEP, mere parental disagreement with a school district's proposed IEP and placement recommendation does not amount to a denial of meaningful participation (see T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P., 2015 WL 4597545 at *8, *10; E.F., 2013 WL 4495676 at *17 [stating that "as long as the parents are listened to," the right to participate in the development of the IEP is not impeded, "even if the [district] ultimately decides not to follow the parents' suggestions"]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008] ["A professional disagreement is not an IDEA violation"]; Sch. for Language & Commc'n Dev. v. New York State Dep't of Educ., 2006 WL 2792754, at *7 [E.D.N.Y. Sept. 26, 2006] ["Meaningful participation does not require deferral to parent choice"]). When determining whether a district complied with the IDEA's procedural requirements, the inquiry focuses on whether the parents "had an adequate opportunity to participate in the development" of their child's IEP (Cerra, 427 F.3d at 192).

"[T]he IDEA only requires that the parents have an opportunity to participate in the drafting process'" (D.D-S., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], quoting A.E. v. Westport Bd. of Educ., 463 F. Supp. 2d 208, 216 [D. Conn. 2006]; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [noting that the IDEA gives parents the right to participate in the development of their child's IEP, not a veto power over those aspects of the IEP with which they do not agree]).

As demonstrated in the hearing transcript, the student's mother was present and actively participated in the April 2024 CSE meeting (see Dist. Ex. 3). The April 2024 CSE reviewed and considered the October 6, 2023 iBrain quarterly progress reports, a February 12, 2024 orientation and mobility assessment, a February 16, 2024 functional vision assessment, and an April 10, 2024 iBrain report and education plan (Dist. Exs. 4 at p. 4; 6; 7; 8; 9; 12 at p. 1). The transcript of the April 2024 CSE meeting indicated that there was a substantial discussion regarding the parents' concerns with the school placement and the recommended placement's ability to address those concerns, which included the recommendation that the parents visit the proposed placement to see for themselves (Dist. Exs. 1 at pp. 55-57; 3 at pp. 59-70). In particular, the IEP noted that the parent indicated the student required a nonpublic school setting because a public school "would be overstimulating" (Dist. Ex. 1 at pp. 56-57).

Generally, a district is not required to consider placing a student in a nonpublic school if it believes that the student can be satisfactorily educated in the public schools (W.S. v. Rye City Sch. Dist., 454 F.Supp. 2d 134, 148-49 [S.D.N.Y. 2006]). "If it appears that the district is not in a position to provide those services in the public school setting, then (and only then) must it place the child (at public expense) in a private school that can provide those services. But if the district can supply the needed services, then the public school is the preferred venue for educating the child. Nothing in the IDEA compels the school district to look for private school options if the CSE, having identified the services needed by the child, concludes that those services can be provided in the public school . . . IDEA views private school as a last resort" (W.S., 454 F.Supp.2d at 148; see R.H. v. Plano Indep. Sch. Dist., 607 F.3d 1003, 1014-15 [5th Cir. 2010] [noting that under the IDEA, "removal to a private school placement [is] the exception, not the default. The statute was designed primarily to bring disabled students into the public educational system and ensure them a free appropriate public education"] [emphasis in original]; see also 8 NYCRR 200.6[j][1][iii] [State funding for private schools is only available if the CSE determines that the student cannot be appropriately educated in a public facility]; T.G. v. New York City Dep't of Educ., 2013 WL 5178300, at *19-*20 [S.D.N.Y. Sept. 16, 2013]; S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 363 [S.D.N.Y. 2009]).

According to the affidavit testimony of the district representative, the recommended 8:1+1 special class in a specialized school for the 12-month school year, related services of OT, PT, orientation and mobility, vision education services, and speech-language therapy, specialized transportation, the support of health paraprofessional services, and assistive technology would appropriately address the student's extensive academic, social, communication, and management needs, which required a multimodality presentation of materials and additional processing time (Dist. Ex. 12 at p. 2). The affidavit concluded that the recommended small class placement and services were appropriate and reasonably calculated to enable the student to make academic progress during the 2024-25 school year (Dist. Ex. 12 at p. 3).

Additionally, the IHO determined that the April 2024 IEP appropriately described the student's present levels of performance, included appropriate annual goals and short-term objectives, recommended an appropriate frequency and duration of related services, and appropriately addressed the student's transportation needs (IHO Decision at pp. 8-9). None of those findings are challenged on appeal. As a result, these determinations have become final and binding on the parties and need 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]). Additionally, I agree that the goals recommended in the student's April 2024 IEP could all be addressed in the recommended special class placement with the related services recommended consisting of OT, PT, speech-language therapy, vision education services, assistive technology services, and orientation and mobility services, as well as the support of full-time individual paraprofessional services and individual school nurse services, as needed (see Dist. Ex. 1 at pp. 46-48).

At the April 2024 CSE meeting the parent inquired as to whether there was "any way that the [district] c[ould] consider [a] nonpublic placement at this time?" (Dist. Ex. 3 at p. 59). The district representative responded that placement in the district's specialized school would be the least restrictive setting in which the student could be successful (id.). She explained additional evaluations would be required to consider the parent's request for a nonpublic school setting and recommend it, and that the parents were welcome to request those evaluations (id.). She noted that the district felt that the recommended program could meet the student's needs (id.). The district representative indicated that the CSE was "going to articulate … the complex history the parents outlined and [the district member's] hope was that it would not be one of the larger buildings because [they heard] and underst[oo]d that that would not be appropriate" (id.). The district representative concluded by stating that 'if the family [wanted] to explore any other assessments or any other programs, we could definitely have them do that" (id.).

While the parents no doubt preferred that the student continue to attend her placement at iBrain, districts are not required to replicate the identical setting used in private schools (see, e.g., M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018]; Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson, 325 F. Supp. 2d at 145). Although the parent indicated a public school setting would have been too overwhelming for the student, this is not supported by the information available to the April 2024 CSE, and once the CSE found that the recommended program in a district public school was appropriate for the student, it was not required to consider a nonpublic school for the student (see E.P. v. New York City Dep't of Educ., 2015 WL 4882523, at *8 [E.D.N.Y. Aug. 14, 2015] [finding that once the CSE decided on an appropriate placement in the least restrictive environment in which the student could have been educated, it was not required to thereafter consider other more restrictive placements along the continuum]; see also B.K. v. New York City Dep't of Educ., 12 F. Supp. 3d 343, 359 [E.D.N.Y. 2014]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *15 [E.D.N.Y. 2014]; but see E.H. v. New York City Dep't of Educ., 164 F. Supp. 3d 539, 552 [S.D.N.Y. 2016] [finding a CSE was required to consider the parent's point of view that the student needed to be educated in the setting he was attending]).

3 Music Therapy

Finally, the parents argue that the April 2024 CSE predetermined that it would not offer music therapy to the student and that the IHO erred in finding that the district's failure to recommend music therapy did not deny the student a FAPE. In particular, the parents assert that the IHO "simply got it wrong" by ignoring the fact that the CSE did not recommend music therapy in consideration of testimony that the district witness never offered music therapy as a related service.

In their due process complaint notice, the parents asserted that they disagreed with the district's failure to recommend music therapy (Parent Ex. A at p. 5). Staff at iBrain recommended that school-based music therapy should continue as a service to support the student's engagement and progress towards her goals; however, it was not recommended by the April 2024 CSE (Dist. Exs. 1 at p. 7; 3 at p. 48). The parents and the iBrain staff expressed concern over the lack of mandated music therapy, maintaining it was essential for the student's progress (Dist. Exs. 1 at p. 7; 3 at pp. 55-56).

With respect to predetermination, the district representative testified that she could not recall ever recommending a student for music therapy (Tr. p. 113). She stated that she did not know if district staff decided before the CSE meeting that they would not offer music therapy as a related service for the student but she was "not aware of being able to recommend it" (Tr. p. 113). The district representative further testified that although she believed that, per State regulations, music therapy was recognized as a related service her understanding was that music therapy was not part of the continuum that could be offered by the district to the student and she was not able to offer it (Tr. pp. 113-114; Dist. Ex. 3 at p. 55). She explained that no one told her not to offer it but that it was not listed as part of the related services she was able to offer (Tr, pp, 114-15). However, the district representative could not recall ever having received a formal or informal communication from the district telling her not to offer music therapy (Tr. pp. 115-16). At the April 2024 CSE meeting, the district representative recognized the benefits music therapy provided the student, and stated that the CSE would "like to recommend it as an instructional support and continue the use of music in that capacity" (Dist. Ex. 3 at p. 55).

The record indicates that the April 2024 CSE considered the concerns of the parents and private school music therapist, but did not recommend music therapy as a related service.

Although it is undisputed that iBrain recommended that the student receive music therapy during the 2024-25 school year, comparisons of a unilateral placement to the public placement are not a relevant inquiry when determining whether the district offered the student a FAPE; rather it must be determined whether or not the district established that it complied with the procedural requirements set forth in the IDEA and State regulations with regard to the specific issues raised in the due process complaint notice, and whether the IEP developed by its CSE through the IDEA's procedures was substantively appropriate because it was reasonably calculated to enable the student to receive educational benefits—irrespective of whether the parent's preferred program was also appropriate (Rowley, 458 U.S. at 189, 206-07; R.E, 694 F.3d at 189-90; M.H., 685 F.3d at 245; Cerra, 427 F.3d at 192; Walczak, 142 F.3d at 132; see R.B. v. New York City Dep't. of Educ., 2013 WL 5438605 at *15 [S.D.N.Y. Sept. 27, 2013] [explaining that the appropriateness of a district's program is determined by its compliance with the IDEA's requirements, not by its similarity (or lack thereof) to the unilateral placement], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; M.H. v. New York City Dep't. of Educ., 2011 WL 609880, at *11 [S.D.N.Y. Feb. 16, 2011] [finding that "'the appropriateness of a public school placement shall not be determined by comparison with a private school placement preferred by the parent'"], quoting M.B. v. Arlington Cent. Sch. Dist., 2002 WL 389151, at *9 [S.D.N.Y. Mar. 12, 2002]; see also Angevine v. Smith, 959 F.2d 292, 296 [D.C. Cir. 1992] [noting the irrelevancy comparisons that were made of a public school and unilateral placement]; B.M. v. Encinitas Union Sch. Dist., 2013 WL 593417, at *8 [S.D. Cal. Feb. 14, 2013] [noting that "'[e]ven if the services requested by parents would better serve the student's needs than the services offered in an IEP, this does not mean that the services

offered are inappropriate, as long as the IEP is reasonably calculated to provide the student with educational benefits'"], quoting D.H. v. Poway Unified Sch. Dist., 2011 WL 883003, at *5 [S.D. Cal. Mar. 14, 2011]).

The iBrain music therapist participated in the April 2024 CSE meeting, and the information she contributed was reflected in the April 2024 IEP (compare Dist. Ex. 3 at pp. 44-48, with Dist. Ex. 1 at pp. 3-6). According to the music therapist, the student received individual music therapy twice per week and a group session once per week, showing progress in the most recent quarter (Dist. Ex. 3 at p. 44). The music therapist was board-certified and music therapy sessions focused on helping the student achieve goals in the sensorimotor, communication, and cognition domains (Dist. Exs. 1 at pp. 3-5; 3 at pp. 44-47; see Parent Ex. G at p. 74). The April 2024 IEP stated that the student actively engaged in music therapy sessions, where the music therapist used a client-led, developmental, and relationship-based approach combined with neurologic music therapy (NMT) techniques (Dist. Ex. 1 at p. 4). Music therapy sessions focused on encouraging the student's self-agency and self-expression by creating musical experiences based on her responses and emotional state (id.).

According to the student's iBrain music therapist, the student participated in musical attention control training (MACT) to improve her tolerance for nonpreferred activities and effectively communicate her needs (Dist. Exs. 3 at p. 45; see Dist. Ex. 9 at p. 12). The music therapist reported that the student had shown slow steady progress towards her goal to remain regulated and tolerate nonpreferred music exercises (id.). The student was able to sustain and share attention for long periods of time, however she sometimes became frustrated when she wanted a different music therapy exercise or song and would demonstrate slightly aggressive behaviors towards herself or others (id.). According to the music therapist, the student was encouraged to express her wants and needs in a healthy manner, and to sign for a new song instead of becoming frustrated (id.). The October 2023 iBrain progress report indicated that the student was making progress towards this goal and staff would encourage her to express her wants and needs in a healthy manner more consistently in the upcoming quarter (Dist. Ex. 9 at p. 12).

The iBrain music therapist indicated that developmental speech and language through music (DSLM)" training was employed during music therapy to improve the student's receptive and expressive language skills (Dist. Exs. 3 at p. 45; see Dist. Ex. 9 at p. 14). The music therapist reported that the student had demonstrated slow steady progress towards her goal to repeat initial sounds or imitate sounds with decreasing support (Dist. Ex. 3 at pp. 45-46; see Dist. Ex. 9 at p. 14). In addition, the student had made fast steady progress towards her goal to express preferences using a total communication approach (Dist. Ex. 3 at p. 46; see Dist. Ex. 9 at p. 14).

According to the iBrain music therapist, the student participated in therapeutic instrumental music performance (TIMP)" exercises to improve her motor planning and coordination (Dist. Exs. 3 at p. 47; see Dist. Ex. 9 at p. 15). The student had shown slow steady progress toward her goal to independently reach for and play instruments such as a tambourine or bells, with decreasing prompts, and she was encouraged to try new instruments during music therapy (id.).

According to the April 2024 IEP, the student's favorite songs were used to engage her in activities like start and stop, and adjusting tempo and dynamics (Dist. Ex. 1 at p. 4; see Dist. Ex. 3 at p. 45). The music therapist stated that music therapy aimed to enhance the student's

vocalizations, sustained attention, body awareness, and self-regulation (Dist. Ex. 3 at p. 48). The music therapist reported that the student had shown significant progress in cognitive, communication, and sensorimotor domains over the past academic year, resulting in updated goals for the upcoming year (Dist. Ex. 3 at pp. 44-45, 46-47).

The iBrain music therapist opined that in addition to the weekly group session, it would be beneficial increase the student individual music therapy mandate from two to three sessions per week, to further her progress and generalize skills across other therapies and daily activities (Dist. Exs. 1 at p. 6; 3 at p. 48).

Turning to the district's recommendation, an IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" and includes psychological services as well as "recreation, including therapeutic recreation" (20 U.S.C. § 1401[26][A] [emphasis added]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]).

The district representative testified that the goals being addressed with music therapy, as described in the private school's program, could be achieved through other means such as classroom activities or through another related service (Tr. pp. 120-21). Specifically, the district representative testified that the skills targeted by the private school's use of music therapy such as and receptive and expressive language, could be addressed during speech therapy (Tr. p. 121). A review of the student's April 2024 IEP shows that it includes annual goals and short term objectives that address the student's needs related to expressive and receptive language including vocalization, sustained attention, body awareness, and self-regulation – skills that were targeted by music therapy at iBrain (Dist. Ex. 1 at pp. 26-30, 36, 40-41).

As noted above, the IHO found the contention that the use of certain techniques and methods by anyone other than a board certified music therapist would somehow wholly strip music of its therapeutic value and render it completely recreational to be implausible (IHO Decision at p. 10). Additionally, the IHO credited the district representative's testimony that the targeted skills could be addressed in the classroom or during another related service, as the IHO found the witness to be knowledgeable, candid, and thoughtful during her testimony (id.).

Here, the evidence in the hearing record shows that music therapy at iBrain offered a different approach for addressing the student's skill needs that were also identified and addressed by the April 2024 IEP through related services and annual goals, and as such, that the CSE did not recommend music therapy specifically did not result in a denial of a FAPE in this instance. The district was not required to replicate the exact same services that the parent preferred for the student in the private school. Therefore, there is no reason to disturb the IHO's finding that the student did not require music therapy to receive a FAPE (see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 592-93 [S.D.N.Y. 2013] [finding that, although the evidence may have supported that music therapy was beneficial for the student, it did not support the conclusion that the student could not receive a FAPE without it]).

VII. Conclusion

Based on the foregoing, I find that the hearing record supports the IHO's finding that the April 2024 IEP was reasonably calculated to enable the student to receive educational benefit in light of her unique circumstances (Endrew F., 580 U.S. at 404; Gagliardo, 489 F.3d at 112). Having found that the district offered the student a FAPE, I need not reach the issues of whether iBrain was appropriate for the student or whether equitable considerations support the parents' request for relief and the necessary inquiry is at an end (Mrs. C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]; Walczak, 142 F.3d at 134).

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

THE APPEAL IS DISMISSED.

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

STEVEN KROLAK
STATE REVIEW OFFICER