The University of the State of New York

The State Education Department
State Review Officer
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No. 20-116

Application of a STUDENT WITH A DISABILITY, by her 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:
The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Erin O'Connor, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, 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 the decision of an impartial hearing officer (IHO) which determined that respondent (the district) offered the student an appropriate educational program and denied the parent's request to be reimbursed for her daughter's tuition costs at the Manhattan STAR Academy (STAR) for the 2019-20 school year, along with the costs of home-based services. The district cross-appeals from the IHO's determination that the Committee on Special Education (CSE) was required to have reconvened after the district conducted a psychoeducational evaluation of the student. The appeal must be dismissed. 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 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 parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and, therefore, they will not be recited in detail here. Briefly, the student had exhibited language delays as a young child, received a diagnosis of an autism spectrum disorder, and was provided instruction using applied behavior analysis (ABA), speech-language therapy, occupational therapy (OT), and physical therapy (PT) through the Early Intervention Program (Dist. Ex. 4 at p. 1). She attended an 8:1+2 special class for preschool and continued to

receive ABA instruction and related services (id. at p. 2). During her early elementary school years, the student attended a nonpublic school program that did not provide ABA services, at which she reportedly exhibited "some behavioral concerns" (id.).

The student attended STAR during the 2017-18 and 2018-19 school year (fourth and fifth grades) in a 6:1+1 special class and received OT, PT, speech-language therapy, and counseling (see Parent Ex. B at p. 2; Dist. Exs. 4 at p. 2; 6 at p. 1).[1] For the 2018-19 school year, she also received 20 hours per week of home-based ABA services after school (Dist. Ex. 4 at p. 2; see Dist. Ex. 2 at p. 1). The student was the subject of two prior impartial hearings regarding the 2016-17 and 2017-18 school years and the 2018-19 school year, respectively, both of which resulted in orders requiring the district to fund the student's tuition at STAR and the costs of home-based services (see Parent Ex. B at p. 2).[2]

As relevant to this appeal, the CSE convened on March 5, 2019, to formulate the student's IEP for the 2019-20 school year (see generally Dist. Exs. 2; 3). The CSE determined that the student was eligible for special education and related services as a student with autism and recommended a 12-month program consisting of an 8:1+1 special class placement in a specialized school together with OT, speech-language therapy, and counseling services (Dist. Ex. 2 at pp. 1, 20-21, 24). The district conducted a psychoeducational evaluation of the student and completed a social history update at the end of March 2019 (see Parent Exs. H; I). By school location letter dated June 11, 2019, the district advised the parent of which school location the student was assigned to attend for the 2019-20 school year (Dist. Ex. 9).[3]

On June 11, 2019, the parent executed a contract for the student's attendance at STAR for the 2019-20 school year (see Parent Ex. M). The student attended STAR for the 2019-20 school

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

[2] Reportedly, a December 18, 2017 IHO decision concerning the 2016-17 and 2017-18 school years ordered the district to fund 20 hours per week of home-based ABA services plus two hours per week of supervision by a Board Certified Behavior Analyst (BCBA) on a going forward basis and ordered compensatory ABA services (10 hours per week plus one hour of supervision) for the weeks during the 2016-17 and 2017-18 school years during which the student had not been provided with ABA (see Parent Ex. B at pp. 2-3). The IHO in that matter also ordered the district to fund an independent neuropsychological evaluation (see id. at p. 3). The neuropsychological evaluation was conducted in October 2018 (see Dist. Ex. 4). During the impartial hearing concerning the student's 2018-19 school year, an IHO determined that the district would be required to fund the student's tuition at STAR, related services, and home-based ABA services as the student's stay put placement during the pendency of those proceedings (Parent Ex. B at p. 1). In a final decision relating to the 2018-19 school year, dated June 12, 2019, the IHO in that matter found that the district conceded that it failed to offer the student a FAPE, the unilateral placement of the student at STAR along with related services and 20 hours of home-based ABA services was appropriate, and that equitable considerations weighed in favor of the parent's request for relief (id. at pp. 11-15). However, the IHO in that matter found that the two hours of BCBA supervision was not appropriate and, therefore, dismissed the parent's request for public funding of those services (id. at pp. 14, 15).

[3] Prior to this, in a letter dated March 28, 2019, the district had assigned the student to attend a different school location (Dist. Ex. 8).

year and received home-based ABA services from an agency, Province Therapeutics (see Parent Exs. O; P; S; T).

In a due process complaint notice dated July 1, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Parent Ex. A).[4]

An impartial hearing convened on July 24, 2019 and concluded on February 25, 2020 after nine days of proceedings (Tr. pp. 1-397). In an interim decision dated July 24, 2019, the IHO found that the student's stay put placement for the pendency of the proceedings was based on an unappealed IHO decision dated July 24, 2019 and consisted of the student's attendance at STAR, related services, and 20 hours per week of home-based ABA services (IHO Ex. I; see Parent Ex. B). In a final decision dated May 22, 2020, the IHO determined that the district offered the student a FAPE for the 2019-20 school year (IHO Decision at pp. 8-9). The IHO went on to find that STAR was an appropriate unilateral placement but that the student did not require home-based ABA services (id. at pp. 9-10). The IHO also found that there were equitable considerations "that would also [have] affect[ed] any payment of tuition and home based services" even had the IHO found a denial of FAPE (id. at p. 10).[5]

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, they will not be recited here in detail. The gravamen of the parties' dispute on appeal is whether the March 2019 CSE's recommendation for the student to attend an 8:1+1 special class in a specialized school was appropriate for the student, in light of the information available to the CSE and the student's attendance at STAR and receipt of home-based ABA services in the time leading up to the March 2019 CSE meeting. The parent also raises issues pertaining to the effect of an IHO decision issued regarding the student's 2018-19 school year and claims relating to parent participation and

[4] The hearing record contains duplicative copies of the parent's due process complaint notice (compare Parent Ex. A, with Dist. Ex. 1). For purposes of this decision, only the parent's exhibit is cited.

[5] The IHO also found "no discrimination" under section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a) (IHO Decision at p. 10).

predetermination, annual goals, related services, and the district's alleged failure to reconvene the CSE. The parent's specific arguments will be further described below.[6, 7]

In an answer with cross-appeal the district generally denies the parent's allegations. As a cross-appeal, the district argues that the IHO erred in agreeing with the parent that the CSE should have reconvened following the district's evaluation of the student that occurred on March 28, 2019.

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.,

[6] The parent also alleges that the IHO erred in failing to deem factual allegations in the due process complaint notice admitted, correctly apply the law, hold the district to its burden of proof, and develop the hearing record, and in relying on evidence offered by the district to the exclusion of the parent's evidence, ignoring facts. As I am conducting an independent review of the hearing record, I find it unnecessary to examine in detail the merits of each of the parent's allegations relating to the adequacy of the IHO's reasoning and, therefore, this decision will focus on the parent's specific procedural and substantive claims. In addition, on appeal, the parent alleges that the IHO erred by not finding that the district violated section 504; however, State law does not make provision for review of such claims through the State-level appeals process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parents' claims regarding section 504 and such claims will not be further discussed herein (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).

[7] With her request for review, the parent submits as additional evidence four documents identified as SRO exhibits A-D (see Req. for Rev.; SRO Exs. A-D). Generally, documentary evidence not presented at an impartial hearing is 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]; 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]). Here, the proffered documents are either already part of the hearing record or were available at the time of the impartial hearing and are not necessary to resolve the issues presented on appeal, and, therefore, I decline to exercise my discretion to consider these exhibits as additional evidence.

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. __, 137 S. Ct. 988, 999 [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., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [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]

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—Preclusive Effect of Prior IHO Decision

The parent asserts that the IHO "erroneously ignored the preclusive impact of findings" in a June 2019 IHO decision pertaining to the 2018-19 school year, which determined that the student made progress in the program at STAR with 20-hours of ABA instruction per week and that the district should fund that program (Req. for Rev. ¶ 5). In the June 2019 decision, the IHO in that matter found that STAR along with the 20 hours per week of home-based services was an appropriate unilateral placement for the student for the 2018-19 school year and ordered the district to "continue to fund" such program "on a twelve month basis" (Parent Ex. B at p. 15).[9] The parent

[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., 137 S. Ct. at 1000).

[9] It does not seem that the IHO in that matter intended to order the district to fund STAR and home-based ABA services for the student on a prospective basis (i.e., continuing into the 2019-20 school year); rather the suggestion that the funding was to "continue" seems to be in reference to the previously determined obligation of the district to fund the program pursuant to pendency (see Parent Ex. B at pp. 1, 15). However, even assuming that the IHO in that matter intended to order prospective funding of the student's program, this would still not have a preclusive effect on the present matter. That is because neither IHOs nor SROs have authority to enforce prior decisions

seems to argue that the March 2019 CSE's offer of "an entirely different program" as compared to the student's unilateral placement for the 2018-19 school year could not be deemed appropriate absent "new clinical documentation or progress reports" (Req. for Rev. ¶ 5). However, this is beyond what the IDEA requires.

The IDEA requires that a student's IEP be reviewed periodically, but not less frequently than annually, and revised as appropriate (20 U.S.C 1414[d][4][A]; 34 CFR 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]), and, in examining a district's offer of a FAPE, each school year is treated separately (see J.R. v. New York City Dep't of Educ., 748 Fed App'x 382, 386 [2d Cir. Sept. 27, 2018]; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dpe't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]). While review of the district's offer of a FAPE need not occur in a vacuum and a decisionmaker may take into account issues that arise with a student's IEP in context, there is no requirement that an SRO or IHO be bound by the prior decision of an IHO who rendered a determination concerning a different school year. Here, the determination in the 2018-19 proceeding was made by a different IHO after considering the evidence in a different hearing record that was not before the IHO in this proceeding. Although the prior IHO's decision has become final and binding on the parties relative to the student's 2018-19 school year, the prior decision is not binding on the IHO's or SRO's consideration of the merits of the parent's claims pertaining to the 2019-20 school year, and does not in and of itself provide a basis for a finding that the district failed to offer the student a FAPE.

Moreover, even if it was appropriate to rely on prior findings of an IHO regarding a CSE's similar recommendations, there is absolutely no support for the parent's view that the district would be required to defend a CSE's recommendations for a student as measured against a prior finding regarding the appropriateness of a unilateral placement (M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *28 [S.D.N.Y. Sept. 28, 2018] [noting that while "the district's proposed program would not have replicated the class size, structure and supports available at [the unilateral placement]. . . . that is not the standard the statute imposed on the CSE"]; see Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009]; Watson v. Kingston City Sch. Dist., 325 F.Supp.2d 141, 145 [N.D.N.Y. 2004], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]).

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rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent enforcement power and granting an injunction requiring the district to implement a final SRO decision]). In the event that a parent experiences difficulty with the district in implementing a final decision of an IHO or SRO reached through the impartial due process hearing process, such parent may file a State complaint against the district through the State complaint process for failure to implement an IHO or SRO's due process decision or may seek enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R., 407 F.3d at 76, 78 n.13).

Based on the foregoing, there is no merit to the parent's argument that the IHO in the present matter erred in ignoring the effect of the June 2019 IHO decision.

B. March 2019 CSE—Parent Participation and Predetermination

Next, the parent argues that the IHO erred by failing to address the parent's allegation that the district predetermined the student's program and placement, as well as her allegations that the district denied her meaningful participation by failing to provide her copies of the IEP, psychoeducational evaluation report, or notice of the particular public school site to which the district assigned the student to attend prior to the start of the school year and by failing to issue prior written notices (Req. for Rev. ¶¶ 15, 20, 21).

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 F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 Fed. App'x 38, 40 [2d Cir. Aug. 24, 2018] [noting that "'[a] professional disagreement is not an IDEA violation'"], quoting P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 383 [S.D.N.Y. 2008]; T.F. v. New York City Dep't of Educ., 2015 WL 5610769, at *5 [S.D.N.Y. Sept. 23, 2015]; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8, *10 [S.D.N.Y. July 30, 2015]; E.F. v. New York City Dep't of Educ., 2013 WL 4495676, at *17 [E.D.N.Y. Aug. 19, 2013] [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"]; 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). Moreover, "the IDEA only requires that the parents have an opportunity to participate in the drafting process" (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *11 [E.D.N.Y. Sept. 2, 2011], aff'd, 506 Fed. App'x 80 [2d Cir. Dec. 26, 2012], 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]).

1. Predetermination

As to predetermination, the consideration of possible recommendations for a student prior to a CSE meeting is not prohibited as long as the CSE understands that changes may occur at the CSE meeting (T.P., 554 F.3d at 253; A.P. v. New York City Dep't of Educ., 2015 WL 4597545, at *8-*9 [S.D.N.Y. July 30, 2015]; see 34 CFR 300.501[b][1], [3]; 8 NYCRR 200.5[d][1], [2]). The key factor with regard to predetermination is whether the district has "an open mind as to the

content of [the student's] IEP" (T.P., 554 F.3d at 253; see D.D-S., 2011 WL 3919040, at *10-*11; R.R. v. Scarsdale Union Free Sch. Dist., 615 F. Supp. 2d 283, 294 [E.D.N.Y. 2009], aff'd, 366 Fed. App'x 239 [2d Cir. Feb. 18, 2010]). Districts may "'prepare reports and come with pre[-]formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions'" (DiRocco v. Bd. of Educ. of Beacon City Sch. Dist., 2013 WL 25959, at *18 [S.D.N.Y. Jan. 2, 2013] [alternation in the original], quoting M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 506 [S.D.N.Y. 2008]; see B.K. v. New York City Dept. of Educ., 12 F. Supp. 3d 343, 358-59 [E.D.N.Y. 2014] [holding that "active and meaningful" parent participation undermines a claim of predetermination]).

There is no dispute that the parent received written notice of the March 5, 2019 CSE meeting and that, in addition to district members, the March 2019 CSE meeting was attended by the parent, the educational curriculum supervisor at STAR, and the owner of Province Therapeutics, the agency that delivered the student's home-based services, who all participated in the meeting via telephone (see Tr. pp. 51, 370; Dist. Exs. 2 at p. 28; 7 at p. 1).

The parent argues that, in making its program and placement recommendations, the district completely disregarded evaluative information that recommended the student continue at STAR and receive 1:1 home-based ABA instruction. The school psychologist who attended the March 2019 CSE meeting testified that the CSE based the student's IEP on information included in an October 2018 neuropsychological evaluation report, a December 2018 STAR progress report from fall 2018, and verbal reports from the student's home-based provider (Tr. pp. 46-47, 50, 54; Dist. Ex. 2 at pp. 1-6, 28). According to the school psychologist, the CSE's understanding of the student's needs, annual goals, and service recommendations were based not only on the student's academic and cognitive testing results but also on the December 2018 STAR report, which indicated what areas of need the student presented in the classroom (Tr. pp. 57-62, 169-70). The school psychologist testified that information provided by the home-based provider was incorporated into the student's IEP (Tr. pp. 70-72, 83-84). In addition, the school psychologist stated that the district did not create a draft IEP for the March 2019 CSE meeting but rather that the IEP was drafted as the meeting was conducted (Tr. pp. 81-82).

The parent testified that she participated in the CSE meeting and that the CSE "discussed [the student's] current schooling and her needs" but that was "about it" (Tr. pp. 370-71). She did indicate that the CSE considered the STAR report, as well as "psychological or clinical material" (Tr. p. 381). According to the IEP, the parent expressed at the CSE meeting that the student's program at STAR had "been beneficial" (Dist. Ex. 2 at p. 26; see Tr. p. 379). The parent indicated that she agreed with the related services recommendations included in the March 2019 IEP (Tr. pp. 382-83, 392). She testified that she was not made aware of the program recommendation during the CSE meeting (Tr. p. 371).

According to the IEP, the CSE considered but rejected other options for the student including special education teacher support services (SETSS), integrated co-teaching (ICT) services, and special classes with different student to adult ratios (including a 6:1+1, a 12:1, and a 12:1+1) (Dist. Ex. 2 at p. 26).

Overall, despite the recommendation in the October 2018 neuropsychological evaluation for a "small, structured, private special education program" and ABA services "for 15 to 20 hours per week, divided between school-based and community-based services" (see Dist. Ex. 4 at pp. 19-20), there is no evidence in the hearing record that the CSE had a robust discussion about such recommendation. However, once the March 2019 CSE determined an appropriate class placement for the student, the district was not obligated to consider a more restrictive setting, such as a nonpublic school (see B.K., 12 F.Supp.3d at 359 [indicating that "once the CSE determined that a 6:1:1 placement was appropriate for [the student], it was under no obligation to consider more restrictive programs"]; E.F., 2013 WL 4495676, at *15 [explaining that "under the law, once [the district] determined . . . the least restrictive environment in which [the student] could be educated, it was not obligated to consider a more restrictive environment"]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *7-*8 [S.D.N.Y. Mar. 19, 2013] [finding that "[o]nce the CSE determined that [the public school setting] would be appropriate for the [s]tudent, it had identified the least restrictive environment that could meet the [s]tudent's needs and did not need to inquire into more restrictive options"]). Moreover, as discussed below, the recommendation for an 8:1+1 special class without home-based ABA services aligned with the student's needs as known to the CSE and offered the student a FAPE, so any failure to discuss home-based services did not rise to the level of a denial of a FAPE in this instance.

2. Copies of Documents

New York law provides a presumption of mailing and receipt by the addressee where there is proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed (T.C. v. New York City Dep't of Educ., 2016 WL 1261137, at *9 [S.D.N.Y. Mar. 30, 2016]; Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]; see News Syndicate Co. v. Gatti Paper Stock Corp., 256 N.Y. 211, 214 [1931] [stating that the presumption is founded on the probability that the officers of the government will do their duty and the usual course of business]). As long as there is adequate testimony by one with personal knowledge of the regular course of business, it is not necessary to solicit testimony from the actual employee in charge of the mailing (T.C., 2016 WL 1261137, at *9; Nassau Ins. Co., 46 N.Y.2d at 829-30; In re Lumbermens Mutual Casualty Co. v. Collins, 135 A.D.2d 373, 374 [1st Dep't 1987]; Gardam & Son v. Batterson, 198 N.Y. 175, 178-79 [1910] [stating that "the rule upon the subject requires . . . in the absence of any evidence as to its being deposited with the post office authorities, that the proof shall establish the existence of a course of business, or of office practice, according to which it naturally would have been done"]; but see Rhulen Agency, Inc. v. Gramercy Brokerage, Inc., 106 A.D.2d 725, 726 [3d Dep't 1984] ["It is necessary to prove by testimony of the person who mails them that letters are customarily placed in a certain receptacle and are invariably collected and placed in a mailbox."]). In order to rebut the presumption of mailing and receipt, the addressee must show more than the mere denial of receipt and must demonstrate that the sender's "routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed" (T.C., 2016 WL 1261137, at *9; Nassau Ins. Co., 46 N.Y.2d at 829-30).

Here, the parent testified that she did not receive a copy of the March 2019 IEP, the March 2019 psychoeducational evaluation report, or a notice of the school to which the district assigned the student to attend (Tr. pp. 371, 373-74). The school psychologist testified that she knew that the March 2019 IEP was sent to the parent because she had "a tracking system on [her] computer" that noted when a document was "finalized and . . . mailed to the parent" and she further stated

that she put the IEP in an envelope and put it in the mailroom (Tr. pp. 52-53). However, the district's events log included in the hearing record indicates that the March 2019 IEP was "Set to Final Status," but there is not a separate entry to reflect that the IEP was sent to the parent (see Parent Ex. R at p. 2).[10]

As to the other documents, the hearing record includes school location letters addressed to the parent and the events log indicated that they were sent to the parent (Parent Ex. R at pp. 1, 2; Dist. Exs. 8 at pp. 1-2; 9 at pp. 1-2). The events log also reflects that the March 2019 psychoeducational evaluation was emailed to the parent on April 10, 2019 (Parent Ex. R at p. 1).

Given the evidence in the hearing record, the only question of the parent's receipt of documents that requires serious consideration is the district's provision of the March 2019 IEP. Districts must ensure that the parents are provided with a copy of the IEP (see 34 CFR 300.322[f]; 8 NYCRR 200.4[e][3][iv]); however, a failure to provide a copy of the IEP is a procedural violation that does not necessarily rise to the level of a denial of a FAPE, and evidence that the parent attended the CSE and had awareness of the programming recommended by the CSE may defeat a claim that such a procedural violation impeded a student's education (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 754-55 [2d Cir. 2018] [finding no denial of a FAPE where the parents attended every meeting "and did not allege that they were unaware of any programming selected" for the student]; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 586 [S.D.N.Y. 2013] [finding that any failure to provide the parents with a copy of the student's IEP prior to the start of the school year did not impede their opportunity to participate in the decision-making process when the parents, among other things, attended the CSE meeting with their attorney and participated in the development of the student's IEP]; see also Cerra, 427 F.3d at 193-94; J.G. v. Briarcliff Manor Union Free School Dist., 682 F. Supp. 2d 387, 396 [S.D.N.Y. 2010]).

Here, the parent attended March 2019 CSE meeting by telephone (see Dist. Exs. 2 at p. 28; 3 at p. 3). As noted above, the parent testified that she was not made aware of the program recommendation during the CSE meeting (Tr. p. 371). Ultimately, however, the parent enumerated multiple perceived short-comings with the March 2019 CSE's recommendations (i.e., that the CSE did not recommend ABA services, 1:1 instruction, or toilet training) in her July 1, 2019 due process complaint notice, indicating that the parent was at least to some degree aware of the March 2019 CSE's recommendations (Parent Ex. A at p. 5-6). Accordingly, even assuming that the parent did not receive a copy of the IEP in a timely manner, the evidence in the hearing record does not support a finding that such a procedural violation rose to the level of a denial of a FAPE.

With regard to the prior written notices, the district acknowledges that a prior written notice dated after the March 2019 CSE meeting "was not entered into evidence at the hearing" and that this was a "procedural error" (Answer ¶ 17). State and federal regulations require that a district provide parents of a student with a disability with prior written notice "a reasonable time before the school district proposes to or refuses to initiate or change the identification, evaluation, educational placement of the student or the provision of a free appropriate public education to the

[10] The testimony at the impartial hearing was sparse with regard to explaining the log and/or the significance of the entries or lack thereof.

student" (34 CFR 300.503[a]; 8 NYCRR 200.1[oo]; 200.5[a][1). Pursuant to State and federal regulation prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposed or refused the action; a description of the other options that the CSE considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action; and a description of the other factors relevant to the CSE's proposal or refusal (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]).

The district's failure to provide prior written notice to the parent in compliance with State and federal regulations constitutes a procedural violation. However, the parent has not asserted any substantive harm related to the district's failure to comply with the regulations. Additionally, there is no indication in the hearing record that the procedural violation rose to the level of a denial of FAPE as it did not impede the student's right to a FAPE, significantly impede the parent's opportunity to participate in the decision-making process, or cause a deprivation of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). Nonetheless, going forward, the district should provide the parent with prior written notice in compliance with State and federal regulations (see 34 CFR 300.503; 8 NYCRR 200.5[a]).

C. March 2019 IEP

1. Sufficiency of Evaluative Information

The parent contends that the IHO erred in not finding that the district failed to conduct appropriate evaluations of the student prior to the March 2019 CSE meeting in order to justify the change in services and placement. In particular, the parent alleges that the district did not conduct an assessment to examine the degree to which the home-based ABA instruction was contributing to the student's progress and did not conduct a functional behavioral assessment (FBA), a social skills assessment, or a speech-language evaluation.

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student, and any other "appropriate assessments or evaluations" as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). 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], [B]; 34 CFR 300.304[b][1][ii]; 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]). Whether it is an initial evaluation or a reevaluation of a student, 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).

The school psychologist testified that the March 2019 CSE relied upon the October 2018 neuropsychological evaluation report submitted by the parent, a September-December 2018 progress report from STAR, and verbal reports from the parent and the owner of Province Therapeutics, the agency that delivered the student's home-based services, to decide the supports which would help the student to continue to make academic and social/emotional improvements (Tr. pp. 54, 57; see Dist. Exs. 4; 6). In addition, the district conducted a December 2018 classroom observation (Tr. pp. 73-74; Dist. Ex. 5).

A review of the March 2019 IEP present levels of performance revealed they reflected the findings within the October 2018 neuropsychological evaluation report (compare Dist. Ex. 2 at pp. 1-2, 4, with Dist. Ex. 4 at pp. 11-12, 18, 21). Administration of the Stanford-Binet: Fifth Edition, to the student yielded a full scale IQ of 59 (very low range), verbal IQ of 52 (very low range), nonverbal IQ of 70 (low range), fluid reasoning index of 73 (low range), knowledge factor of 72 (low range), quantitative reasoning factor of 59 (very low range), visual-spatial index of 62 (very low range), and working memory index of 60 (very low range) (Dist. Ex. 2 at pp. 1-2). The IEP reflected statements from the neuropsychologist that, overall, the student "present[ed] with a series of cognitive and academic 'splinter skills' that [were] common in learners on the autism spectrum" (id. at p. 2). Additionally, the IEP indicated that the student "demonstrated relative strengths in decoding and spelling" but challenges in applying decoding and spelling skills, and with reading comprehension, writing sentences, and math tasks (id.).

The March 2019 IEP present levels of performance, citing to the December 2018 progress report, detailed the student's academic skill levels and needs (compare Dist. Ex. 2 at pp. 2-3, with Dist. Ex. 6 at pp. 1-6). Regarding reading, the March 2019 IEP stated that the student was working on independently answering comprehension questions with 80 percent accuracy and answering questions that related to identifying story elements (character, setting) with an emphasis placed on "what is a character" and "who is a character" (Dist. Ex. 2 at p. 2). According to the March 2019 IEP, per the most recent assessment and observation the student: could answer five questions related to making inferences, vocabulary definitions, story elements/sequencing and problem/solution with 60 percent accuracy; could correctly identify a character and the setting of a story with 80 percent accuracy; could identify the problem and solution of a story and did not require prompting to use vocabulary from the text; consistently identified the title and author of a story; could identify the meaning of a vocabulary word in a choice of three with less than 50 percent accuracy; and could identify story elements (characters, setting, events, problem/solution) with teacher scaffolding in the form of verbal and gestural prompts and specific directions to look back at the text (id.). The March 2019 IEP also noted that the student required prompts in order to accurately retell the sequence of events in a story (id.).

In the area of writing, the March 2019 IEP present levels of performance stated that the student was working on writing a paragraph that featured a topic sentence, four supporting sentences and a closing sentence that conveyed an appropriate thought or feeling about the paragraph—which, according to recent assessments, the student was able to complete with 80 percent accuracy—and using "sequencing words," and appropriate punctuation and capitalization (Dist. Ex. 2 at p. 2). The March 2019 IEP noted that the student required significant teacher support

during the editing process, support to edit spelling for particular suffixes, and the support of a graphic organizer to organize her thoughts (id.). The March 2019 IEP stated that, moving forward, the student would work on decreasing her reliance on verbal prompts, independently using sequencing words, and increasing the complexity of her sentences (id.).

With respect to math, the March 2019 IEP stated that the student was working on solving two- and three-digit addition and subtraction problems with 80 percent accuracy and representing multiplication and division problems when prompted to use set circles (Dist. Ex. 2 at pp. 2-3). According to recent assessment, the student read and wrote multi-digit whole numbers represented as base ten numerals, expanded form and number names and was able to complete activities in representing multiplication and division problems with 60 percent accuracy, although the student required teacher prompting to complete each step of the process (id.).

a. FBA

Turning to the student's social development and need for an FBA, although both parties were silent at the hearing regarding this issue, review of the evidence in the hearing record available to the March 2019 CSE showed that the student did not exhibit behaviors which impeded her learning or that of others such that she required an FBA.

State regulation requires that an initial evaluation include a variety of assessment tools and strategies, identifies specific assessments that must be conducted as a part of an initial evaluation, and also requires "other appropriate assessments or evaluations, including [an FBA] for a student whose behavior impedes his or her learning or that of others, as necessary to ascertain the physical, mental, behavioral and emotional factors which contribute to the suspected disabilities" (8 NYCRR 200.4[b][1]). State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it (8 NYCRR 200.1[r]).

With respect to the student's social development, the March 2019 IEP present levels of performance reflected the December 2018 progress report and stated that the student received two 30-minute sessions of counseling services per week which focused on improving her emotion identification, emotion regulation, coping, and social skills (Dist. Ex. 2 at p. 4; see Dist. Ex. 6 at p. 3). The March 2019 IEP stated that in the beginning of the year the student struggled to label emotions such as sad or frustrated and fixated on being happy or feelings she perceived as good; however, it was also noted that the student was beginning to tolerate expressing other emotions (Dist. Ex. 2 at p. 4). Reportedly when the student was experiencing emotions such as frustration or sadness she may yell, cry, and ask to be happy and that it could be difficult for her to regulate until she heard a response that she wanted to hear (id.). Within the March 2019 IEP, it was noted that the clinician reported that she had introduced the "Zones of Regulation" curriculum as a strategy to help the student to better regulate and the student reportedly understood the zones

conceptually and would label what zone she was in with the support of an adult (id.).[11] Additionally, the student was working on incorporating coping strategies into her repertoire so that she could better manage feelings of frustration or sadness and the March 2019 IEP noted that therapy sessions had focused on expanding the student's use of these strategies independently (id.). Further it was reported that the student benefitted from taking deep breaths when she felt upset and might ask an adult for a hug as a strategy (id.).

According to the meeting minutes prepared during the March 2019 CSE meeting, STAR staff reported that although the student engaged in "echoing" and "self-stimulating behaviors" she did not exhibit "tantrums or self-harm behaviors" (Dist. Ex. 3 at p. 2; see Tr. pp. 65-66). The meeting minutes indicated that the student "like[d] interacting with adults" and was working on turn-taking skills with peers (Dist. Ex. 3 at p. 2). Review of the October 2018 neuropsychological evaluation report did not reflect concerns that the student exhibited behaviors that impeded her learning or that of others, aside from her attentional difficulties and language issues related to her diagnosis of autism spectrum disorder (see Dist. Ex. 4 at pp. 17-18). Nor were such impeding behaviors observed during classroom observations of the student conducted in September 2018 and December 2018 by different clinicians (see Dist. Exs. 4 at pp. 13-14, 20; 5). Additionally, the reports from STAR indicated that the behaviors exhibited by the student in school were addressed with typical in-class interventions (identifying emotions, taking deep breathes) and did not suggest that such behaviors impeded her learning or that of others (see Dist. Ex. 6). Based on this evaluative information, the March 2019 CSE determined that the student did not need strategies including positive behavioral interventions, supports, and other strategies to address behaviors that impeded the learning of the student or that of others, nor did the student require a behavioral intervention plan (BIP) (Dist. Ex. 2 at p. 6).

Based upon the foregoing, the evidence in the hearing record does not support the parent's contention that the lack of an FBA denied the student a FAPE.

b. Social Skills Assessment

With respect to the evaluative information available to the March 2019 CSE regarding the student's social skills, the October 2018 neuropsychological evaluation report included results from the administration of the Gilliam Autism Rating Scale, Third Edition (GARS-3) (a parent report scale that assesses the student's behaviors in relation to specific behaviors consistent with an autism spectrum disorder) and the Autism Diagnostic Observation Schedule-2 (ADOS-2) (a semi-structured, interactive observation designed to evaluate a child's responses to social situations) (Dist. Ex. 4 at p. 17). The neuropsychologist reported that the student struggled during make-believe play, did not consistently engage in play with or respond to the examiner calling her name, could not tell a story from a book without words, reenact cartoons, make up a novel story with random objects, and could not discuss relationships, her feelings, or future plans (id. at pp. 17-18).

[11] The special education teacher stated that STAR used the Zones of Regulation curriculum with the student as a support for social and emotional development and described it as a system that was used to help students identify "what state" they were in "as far as being regulated or dysregulated" and that it helped students identify the feeling (Tr. p. 295).

Measures of the student's ability to recognize affect in pictures yielded scores in the average range and she was able to compare emotions between two faces, yet struggled with a field of four faces (Dist. Ex. 4 at p. 17). The student also struggled on a task measuring her ability to interpret the intentions of others based on stories (id.). The parent's completion of the Behavior Assessment System for Children, Third Edition (BASC-3) indicated that the student had difficulty socializing with peers and managing her feelings (id.). Teacher responses on the BASC-3 indicated that the student experienced social withdrawal and difficulty interacting with her peers (id.). On language tasks, the neuropsychologist indicated that although the student engaged in verbal communication with the examiner and the parent, the quality of those interactions was "quite poor" in that she was "unable to initiate or maintain a conversational exchange" (id. at p. 15).

The October 2018 neuropsychological evaluation report also included behavioral observations of the student during testing, and a classroom observation (Dist. Ex. 4 at pp. 10-11, 13-14). The neuropsychologist reported that the student asked to play with toys, engaged in self-directed behaviors, exhibited fleeting eye contact and restricted affect, yet with prompting was able to complete formal assessment procedures (id. at pp. 10-11). During the classroom observation, the student said goodbye to her mother, greeted a teacher, and joined a group of peers although did not make eye contact with them (id. at p. 13). The student was also observed to respond to a peer and make a comment about the interaction to a teacher (id. at p. 14).

In addition, the March 2019 IEP present levels of performance included reports from STAR that the student continued to participate in a weekly social skills class which focused on abstract social thinking concepts, developing an increased understanding and awareness of social situations, and the ability to understand the perspective of others (Dist. Ex. 2 at p. 3). Reportedly the student had demonstrated an increased social awareness and with maximal verbal support she was able to problem solve and deduct appropriate ways to react to different situations (id.). The March 2019 IEP indicated that often the student's rigidity and fixation on tangential topics interfered with her ability to have meaningful social interactions and noted deficits of a decreased pragmatic and narrative retelling skill and a decreased use of functional communication throughout the day (id.). The December 2018 STAR report regarding the student's counseling services and how they addressed her social skill needs were also reflected in the March 2019 IEP (compare Dist. Ex. 2 at p. 4, with Dist. Ex. 6 at p. 3). According to the IEP the student was working on expanding her play schema repertoire and appeared to enjoy playing taking-turn games with the clinician and peers in her class (Dist. Ex. 2 at p. 4). The IEP indicated that the student was "generally able to take turns with her peers and to play the games appropriately" (id.).

Thus, contrary to the parent's assertion, the March 2019 CSE had sufficient formal and informal evaluative information obtained from a variety of sources regarding the student's social skills and needs in order to develop an appropriate IEP.

c. Speech-Language Evaluation

Regarding the parent's assertion that the district failed to conduct a speech-language evaluation, review of the October 2018 neuropsychological evaluation report shows that the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5), the One Word Picture Vocabulary Test (both receptive and expressive subtests), and the word generation subtest of the NEPSY-II were administered to the student (see Dist. Ex. 4 at pp. 15-16, 22-23). According to the

report, the student exhibited "highly variable performance on language tasks," which suggested to the neuropsychologist that the student experienced "considerable language delays despite the considerable 'splinter skills'" (id. at p. 15). Specifically, the report indicated that during cognitive testing the student struggled on measures of her verbal comprehension, phonological processing, verbal fluency, reading, and expressive writing (id. at pp. 15, 21). Although the student performed in the high average range on a task that required her to generate words beginning with a specific letter, she had more difficulty naming words from a specific category, with a confrontation naming task, and with receptive recognition (id. at p. 15). Formal measures of the student's language processing skills including her ability to recognize classes and functions of words, explain language concepts, and follow complex directions yielded scores in the very low range (id. at p. 16). The student's performance was also in the very low range on expressive language tasks such as recalling and repeating complex sentences, formulating sentences given pictures and word prompts, and organizing sentences fragments into two different types of sentences (id.).

In addition to the evaluative information about the student's language skills contained in the October 2018 neuropsychological evaluation report, the school psychologist acknowledged that, although a specific speech-language evaluation was not conducted, the March 2019 CSE also relied on the speech-language therapy portion of the December 2018 progress report, which included the skills the student continued to work on, the needs the student continued to have, and the amount of services she was receiving to address those needs (Tr. pp. 91-93; see Dist. Ex. 6 at p. 4).

The March 2019 IEP present levels of performance reflected the December 2018 progress report in noting that the student's speech-language intervention continued to focus on receptive, expressive, and pragmatic language skills and in detailing the student's progress and needs (compare Dist. Ex. 2 at p. 3, with Dist. Ex. 6 at p. 4). The March 2019 IEP reflected that the student demonstrated increased comprehension of less familiar "wh" questions (who, when, why) during structured tasks (Dist. Ex. 2 at p. 3). According to the March 2019 IEP, the student benefitted from repetition of target information, visual supports, and the use of question prompts to redirect her attention to the task (id.). The student reportedly continued to exhibit moderate deficits in her comprehension of inferences although improvement had been noted recently (id.). The March 2019 IEP stated that the student's expressive skills had been targeted through both structured and less structured tasks such as narrative tasks and activities that focused on retelling personal information (id.). The student continued to benefit from moderate verbal support to focus on pertinent story elements such as actions, setting and relevant characters, and required verbal redirection to maintain focus and to expand her ideas (id.). The March 2019 IEP stated that deficits persisted in the student's ability to express her ideas and produce a cohesive oral narrative and in descriptive language skills, including describing feeling states and inferences, as the student often produced random associations and required redirection to task (id.). Regarding pragmatic skill development the March 2019 IEP stated that therapy continued to focus on the student's ability to maintain appropriate joint attention and interaction with peers and adults during both dyadic exchanges and classroom activities (id.). The student reportedly continued to require maximum support to maintain a conversation with peers or adults for more than two to three turns, demonstrated progress in her ability to produce relevant questions and comments during therapy, and continued to present with perseverative verbal behaviors and scripting that occasionally interfered with her ability to attend to the task and engage with others (id.).

In light of the above and contrary to the parent's assertion, the March 2019 CSE had adequate evaluative information regarding the student's speech-language skills such that a specific evaluation of the student in this area was not required.

d. Summary

Overall, while the district did not conduct an FBA, social skills assessment or speech-language evaluation, a review of the March 2019 IEP, as detailed above, reveals that the CSE obtained and used sufficient information to gather relevant functional, developmental, and academic information about the student to assist in determining the content of the student's IEP.

As to the parent's allegation that the district did not conduct an assessment as to the extent to which the home-based ABA instruction "impacted or contributed to [the student's] progress" (Req. for Rev. at ¶ 8), there is no specific assessment that the district was required to conduct to obtain such information; rather, the CSE was required to make the determination regarding IEP program and services recommendations based on the results of the initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental, and functional needs of the student, including, as appropriate, the student's performance on any general State or district-wide assessments as well as any special factors as set forth in federal and State regulations (34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]).

Finally, as for the parent's allegation that the district realized it had insufficient evaluations to support the proposed changes to the student's program and sought testing after-the-fact to try to justify termination of services, the hearing record provides no support for this position. As discussed above, the March 2019 CSE gathered sufficient evaluative information and district made no attempt to use the results of the March 28, 2019 psychoeducational evaluation to alter or justify any recommendations made for the student's program for the 2019-20 school year.

2. Annual Goals

Next, the parent argues that the IHO erred by failing to address the adequacy of the annual goals in the March 2019 IEP. The parent asserts that the goals were vague, not measurable, and not individually tailored to address the student's needs.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

The March 2019 IEP included 13 annual goals with accompanying short-term objectives addressing the student's identified needs in English language arts (ELA), writing, and math, and those needs addressed through counseling, OT, speech-language therapy, and adapted physical education (Dist. Ex. 2 at pp. 7-19). A review of the student's December 2018 progress report and

the March 2019 IEP present levels of performance revealed that the annual goals and short-term objectives addressed the student's identified needs (compare Dist. Ex. 2 at pp. 1-6 and Dist. Ex. 6 at pp. 1-6, with Dist. Ex. 2 at pp. 7-19).

The ELA annual goal and its short-term objectives targeted the student's ability to improve her reading skills by answering questions involving inferences, vocabulary definitions, story elements (character, setting, plot), story sequencing, and conflict/resolution (Dist. Ex. 2 at p. 8). The writing annual goals and short-term objectives contained within the March 2019 IEP targeted sequencing words to increase the complexity of sentences, using graphic organizers in writing, answering open-ended questions, identifying unknown vocabulary words, using appropriate spelling and grammar, and using "inventive" spelling with unfamiliar words (id. at pp. 8-11). The math annual goals and short-term objectives addressed solving two- and three-digit addition and subtraction problems as well as solving multiplication and division problems using pictorial symbols (id. at pp. 11-13). The counseling annual goals and short-term objectives included in the March 2019 IEP targeted identifying and labeling emotions when frustrated, tolerating others' emotions when taking turns in school, expanding coping strategies for independence, incorporating coping strategies to better manage feelings of frustration or sadness, and improving turn-taking skills with peers (id. at pp. 13-15). The OT annual goal and short-term objectives addressed improving sensory processing regulation, increasing tolerance to textures, and using strategies such as heavy lifting, pushing, pulling and jumping to encourage muscles to feel all the different forces and responses required in various situations (id. at p. 16). The speech-language annual goals and short-term objectives targeted the use of descriptive language skills to maintain focus and to expand on ideas, as well as manage verbal and perseveration behaviors that occasionally interfered with the student's ability to attend to the task and engage with others (id. at pp. 17-18). Lastly, the March 2019 IEP included an adapted physical education annual goal and short-term objectives that addressed improving the student's ability to modify basic movement skills with movement variables to feel all the possible ways in which that movement skill could be performed (id. at p. 19).

The school psychologist testified that there was no disagreement at the March 2019 CSE from the parent or STAR curriculum advisor regarding the annual goals (Tr. p. 82). The parent testified that she believed that the annual goals targeting making inferences, vocabulary definitions, and story elements were appropriate areas for the student to be working (Tr. p. 385).

The parent alleges that the annual goals were vague and/or were incomplete; however, to the extent that is true, the inclusion of short term objectives in this case cured any lack of specificity in the annual goals (Dist. Ex. 5 at pp. 6-14; see E.F., 2013 WL 4495676, at *18-*19 [finding that, although the goals were vague, they were modified by more specific objectives that could be implemented]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6 [S.D.N.Y. Mar. 21, 2013]; A.D., 2013 WL 1155570, at *10-*11; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *8 [S.D.N.Y. Sept. 22, 2011]).

In addition, a review of the annual goals and short-term objectives included in the March 2019 IEP reveals that they included evaluative procedures (i.e., check lists, trial tracking sheets, classroom session logs, and homework logs), and schedules of when progress would be measured (i.e., one time per month) (Dist. Ex. 2 at pp. 7-19). As for evaluative criterion, 12 of the 13 annual goals identified "NYSAA data folio-style" as the evaluative criterion, which does not sufficiently

identify how well the student must perform the task contemplated by a goal in order to consider it met (see Dist. Ex. 2 at pp. 7-19).[12] The other goal included more specific criteria (80 percent accuracy) (id. at p. 11). In addition, at least one of the goals that referenced the "NYSAA data folio-style" as the evaluative criteria included more specific criteria within the short-term objective (i.e., 100 percent accuracy) (id. at pp. 7-8).

In any event, even though some of the goals were lacking in regard to the identified evaluative criterion, courts generally have been reluctant to find a denial of a FAPE on the basis of an IEP failing to sufficiently specify how a student's progress toward his or her annual goals will be measured when the goals address the student's areas of need (D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; A.D., 2013 WL 1155570, at *10-*11; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *13 [S.D.N.Y. Feb. 20, 2013]; P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]), and I similarly find that this procedural violation did not arise to a denial of a FAPE. That is, overall, review of the March 2019 IEP shows that the annual goals related to the student's needs identified in the present levels of performance.

3. 8:1+1 Special Class

On appeal, the parent alleged that the IHO erred in finding that the March 2019 CSE's recommendation for an 8:1+1 special class was appropriate for the student. Specifically, the parent notes that the adult to student ratio of the student's classroom at STAR was 9:1+2 and makes a distinction between the ability of the teaching assistants in the classroom at STAR to provide instruction to students as compared to a paraprofessional in a district class. The parent characterizes the CSE's recommendation for an 8:1+1 special class to be a "significant reduction in staff to student ratio" (Req. for Rev. ¶ 11).

In support of the parent's position, within the October 2018 evaluation report the neuropsychologist reported that the student was in a class with a 6:1+1 student to teacher ratio, and that at the time of the classroom observation there were seven students and four adults in the classroom (Dist. Ex. 4 at pp. 2, 13). During the classroom observation the student presented as distracted and was often off-task when not provided direct attention from her teacher yet the neuropsychologist also noted that the student was responsive to attempts at redirection (id. at p. 14). The neuropsychologist also noted that the student was able to participate in small group math class (two students) but was frequently off task when not given the teacher's direct attention (id.). During morning meeting, the student was observed to respond to questions with prompts and supports (id.). The October 2018 neuropsychological evaluation report included recommendations which "strongly recommended that [the student] remain in a small, structured, private special education program that incorporate[d] multi-sensory learning supports and interventions integrated throughout the entire school day" (id. at p. 19).[13]

[12] The acronym NYSAA relates to the student's participation in the alternate assessment program (see Dist. Ex. 2 at p. 23).

[13] Although not available to the March 2019 CSE, during the impartial hearing, the neuropsychologist expressed his opinion that the student should continue to attend the program at STAR. The neuropsychologist testified that

The December 2018 progress report stated that the student was attending STAR five days per week for five and a half hours a day in a "small classroom setting" (Dist. Ex. 6 at p. 1). According to the December 2018 progress report, the student required teacher prompting in math and in retelling the events of a story, moderate prompting to follow transition procedures, and support during the writing process (id. at pp. 1-2). Also, the December 2018 progress report stated that the student "benefit[ted] from the small, structured classroom and the multi-disciplinary approach used at" STAR and that "[f]or appropriate educational progress and social/emotional development, [the student] should remain in her current setting" (id. at p. 3).

Turning to the March 2019 CSE's recommendations, the March 2019 IEP reflected a 12-month program consisting of an 8:1+1 special class placement in a specialized school (Dist. Ex. 2 at pp. 20, 24). State regulation provides that a special class with a maximum class size not to exceed 8 students, staffed with one or more supplementary school personnel, is designed for "students whose management needs are determined to be intensive, and requiring a significant degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][b]). The March 2019 CSE also recommended related services consisting of one 30-minute session per week of individual counseling, one 30-minute session per week of counseling in a group of three, one 30-minute session per week of individual OT, three 30-minute sessions per week of individual speech-language therapy, and one 60-minute session per month of individual/group parent counseling and training (Dist. Ex. 2 at pp. 20-21, 24). The CSE determined that the student would participate in alternate assessments and receive special transportation services (id. at pp. 23- 24). The March 2019 IEP also identified the student's need for the following accommodations and supports: a multisensory learning environment, access to rewards, token economy, redirection and prompting, visual schedule and supports/symbols, highlighted writing paper, timers, increased use of visuals/charts/models/exemplars for easy reference, use of multisensory techniques, movement breaks, positive reinforcement and encouragement, visual/graphic depictions of routines/procedures/steps, visual and auditory reinforcement of taught materials, concrete examples, consistency of routine, and preview/review of major concepts (id. at pp. 5-6).[14]

The school psychologist stated the recommendation of an 8:1+1 special class was based on the December 2018 STAR report, the neuropsychological evaluation report, and reports that were presented in person and via the phone, which indicated that the student required a small class ratio and also exposure to students that were positive peer models (Tr. p. 62). She stated that in an

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that while the student had some "really good" skills in isolation, she needed "a lot of support" to capitalize on those skills and make progress (Tr. p. 190). According to the neuropsychologist, he recommended that the student continue at STAR because he thought they were working with the student on identifying those isolated skills and developing them (Tr. pp. 190, 192, 197). Also, the neuropsychologist testified to additional reasons for recommending STAR, including that the student should remain at STAR for the purpose of continuity, because the program at STAR had the "diversity to support" the student and provide the structure and behavioral supports which she utilized and needed, and because it had been working for her at that time (Tr. pp. 197, 202).

[14] With respect to the parent's assertion on appeal that the IHO erred in failing to find that the student required a full-time multisensory learning environment, the March 2019 IEP management needs provided both a "[m]ulti-sensory environment" and "[u]se of multi-sensory techniques to present information, cue students, and aid in learning of all content areas" and the annual goals include the use of multisensory strategies and scaffolding as well as visual/verbal supports and modeling (Dist. Ex. 2 at pp. 5-6, 8-19). Accordingly, the parent's allegation is without merit.

8:1+1 special class in a specialized school the student would have "intensive support" in a highly structured classroom with minimal distractions (Tr. p. 62; see Dist. Ex. 2 at p. 24). Further, the school psychologist testified that with the 8:1+1 special class, the ratio was at least one adult to four students which allowed the student to have "that small group" instruction in order to be able to provide the prompts, support, and "things that she needs" as well as to continue to work on the social skills and "build on that" (Tr. p. 62). The school psychologist testified that the March 2019 IEP included the parent report to the CSE that the student's then-current school support had been beneficial for her and that from her understanding of the March 2019 CSE meeting, there wasn't a disagreement with the classroom ratio (Tr. pp. 63-64; see Tr. p. 392; Dist. Ex. 2 at p. 26). The school psychologist stated that she believed that the services that were recommended were appropriate to continue for the student to make academic and social/emotional progress (Tr. pp. 83-84).

The parent contends that the IHO erred in finding the recommended 8:1+1 special class appropriate, particularly given the evidence that the student was attending a classroom with a 9:1+2 ratio at STAR. However, review of the hearing record shows that at the time the March 2019 IEP was developed, the information available to the CSE inconsistently identified the student to teacher ratio of the student's classes at STAR; citing anywhere from a 6:1+1 ratio, to a class with seven students and four adults, to a "small classroom setting," and that it was not until the 2019-20 school year—well after the March 2019 CSE meeting—that the student's homeroom was an 8:1+2 class ratio, and she received academic instruction in writing and social studies in a 9:1+2 class ratio (Tr. pp. 192, 201, 227-28, 252-54; Dist. Exs. 4 at p. 2; 6 at p. 1). Further, while the parent may have preferred the class ratio at STAR, districts are not required to replicate the identical setting used in private schools (see, e.g., Z.D., 2009 WL 1748794, at *6; Watson, 325 F. Supp. 2d at 145).

The parent also appears to draw a distinction between the teaching assistants assigned to the student's classroom at STAR, which along with the teacher provided direct instruction to students, and a "paraprofessional" in a district classroom, which the parent argues would not be permitted by State regulation to provide direct instruction. State regulations do not define the term "paraprofessional" as the term "paraprofessional" was replaced with the term "supplementary school personnel" (see "'Supplementary School Personnel' Replaces the Term 'Paraprofessional' in Part 200 of the Regulations of the Commissioner of Education," VESID Mem. [Aug. 2004], available at http://www.p12.nysed.gov/specialed/publications/policy/suppschpersonnel.pdf). Supplementary school personnel "means a teacher aide or a teaching assistant" (8 NYCRR 200.1[hh]). A teaching assistant may provide "direct instructional services to students" while under the supervision of a certified teacher (8 NYCRR 80-5.6 [b], [c]; see also 34 CFR 200.58[a][2][i] [defining paraprofessional as "an individual who provides instructional support"]). A "teacher aide" is defined as an individual assigned to "assist teachers" in nonteaching duties, including but not limited to "supervising students and performing such other services as support teaching duties when such services are determined and supervised by [the] teacher" (8 NYCRR 80-5.6 [b]). State guidance further indicates that a teacher aide may perform duties such as assisting students with behavioral/management needs ("Continuum of Special Education Services for School-Age Students with Disabilities," at p. 20, Office of Special Educ. [Nov. 2013], available at http://www.p12.nysed.gov/specialed/publications/policy/continuum-schoolage-revNov13.pdf). Here, there is no evidence in the hearing record as to whether the supplementary school personnel assigned to the 8:1+1 special class in the district that the student was assigned to attend was a teaching assistant or a teacher aide; however, there is also no evidence in the hearing record that

the student needed the support of a teaching assistant in the classroom (as opposed to a teacher aide) in order to receive educational benefit.

Therefore, review of the evidence in the hearing record does not support the parent's claim that the IHO erred in finding that the March 2019 CSE's recommendation of an 8:1+1 special class was appropriate for the student.

4. Home-Based ABA Services

The parent contends that the IHO erred in finding that the CSE appropriately recommended a program for the student that did not include 1:1 home-based ABA instruction. The parent argues that the reports and evaluations considered by the CSE recommended continuation of the student's attendance at STAR, along with 15 to 20 weekly hours of 1:1 instruction using ABA.

Several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 2014]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *14 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; Student X, 2008 WL 4890440, at *17; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at *7 [S.D.N.Y. Apr. 21, 2008]; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]). Moreover, the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion, absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014], aff'g 2011 WL 12882793, at *16 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257 [indicating the district's "broad discretion to adopt programs that, in its educational judgment, are most pedagogically effective"]). However, where the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should indicate this (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]; see also A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]; R.B., 589 Fed. App'x at 576; A.S., 573 Fed. App'x at 66 [finding that it could not "be said that [the student] could only progress in an ABA program"]).

While home-based ABA services for the purpose of generalization are most likely beneficial to a student that is not alone a basis for providing them going forward, even in this case

where the student has been getting home-based ABA services as part of a unilateral placement and/or compensatory remedy from previous IHO decisions from December 2017 and June 2019 (see Parent Ex. B at pp. 2-3, 11-15) because, as alluded to above, the determination must be made each year based upon a review of the student's past progress and current needs (see Walczak, 142 F.3d at 131–32 [noting that the IDEA does require a program to maximize potential or "everything that might be thought desirable by loving parents" [quotation and other citations omitted]; see also Doe v. Bd. of Educ. of Tullahoma City Schs., 9 F.3d 455, 460 [6th Cir. 1993]).

In this case, the October 2018 neuropsychological evaluation report recommended, among other things, that the student receive 15 to 20 hours per week of ABA "divided between school-based and community-based services" (Dist. Ex. 4 at p. 19). In making this recommendation, the neuropsychologist cited the student's "considerable cognitive and language delays" and "weaknesses in sustained attention and language processing" (id.). In addition, the neuropsychologist recommended that the student be provided in-home, structured behavioral intervention (discrete trial training) under the coordination and supervision of a board certified behavior analyst (BCBA) to reduce regression due to any discontinuity of services and that the parent must be provided with ongoing parent support and training in the use of these techniques in order to maintain treatment fidelity (id. at p. 20; see Tr. p. 307). The neuropsychologist testified that he believed that STAR used a "modified ABA approach" and stated in the October 2018 evaluation report that ABA had proven to have been successful with children with autism spectrum disorder and "strongly" recommended that the student continue to receive ABA in order to increase her level of independence (Tr. p. 200; Dist. Ex. 4 at pp. 4, 19-20). He further testified, however, that he did not consult with the student's teacher and providers in reaching this recommendation (Tr. pp. 209-10).

Initially, in order to satisfy its obligation to consider the private evaluation, the CSE was not required to adopt the recommendations of the neuropsychologist (J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *11 [S.D.N.Y. Aug. 5, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson, 325 F. Supp. 2d at 145 [holding that a CSE's recommendation is not necessarily rendered inappropriate by "[t]he mere fact that a separately hired expert has recommended different programming"]). Rather, the school psychologist testified that the CSE relied on the "data" and the results of the assessments as set forth in the evaluation report, in addition to information about the student's progress in the classroom and parent input (Tr. pp. 84-85). As discussed above, the evidence in the hearing record shows that the CSE considered the student's needs and recommended an 8:1+1 special class with related services to address her cognitive, language, attention, and language needs. Moreover, as detailed below, the evidence in the hearing record does not support the view that the student needed to receive instruction using ABA methodology in order to receive educational benefit. As to the timing of the delivery of services, the neuropsychologist's recommendations were at first nonspecific as to the need for after-school services per se (i.e., the neuropsychologist recommended that ABA hours be "divided" between home and school at unspecific durations). Further, the recommendation for home-based services to "reduce regression due to any discontinuity of services" was without further elaboration as to why a service such as parent counseling and training, on its own, would not be sufficient to maintain such continuity.

Turning to a more detailed view of the question of methodology, the December 2018 progress report from STAR noted that the student "benefit[ted] from multi-sensory instruction influenced by DIR/Floortime, TEACCH, and ABA (with the support of a BCBA)" (Dist. Ex. 6 at p. 3). The December 2018 progress report further stated that the ABA support allowed the team to address problem/inappropriate behaviors in a consistent, evidence-based manner (id.). The special education teacher from STAR testified that she had been teaching the student for three years, that she provided all of the student's academic instruction during the 2018-19 school year, and that during the 2019-20 school year she was the student's homeroom, writing, and social studies teacher (Tr. pp. 225, 227-28, 274).[15] The special education teacher testified that the STAR program incorporated elements of DIR, Floortime and ABA, all of which the student was "exposed" to over the past three years (Tr. pp. 227, 254-55, 270).[16] She further testified that although DIR, Floortime, and ABA instruction was not a "separate" or "pull-out service," elements of those methodologies were incorporated throughout the day in conjunction with each other (Tr. pp. 254, 270). The special education teacher explained that "ABA-type" techniques would be used in classes such as math or writing in situations where the student was being taught a new skill or strategy, in which case staff would work on that one specific skill, in isolation, for a specified amount of repetitions in order for the student to internalize or incorporate the new skill (see Tr. pp. 271-74). The special education teacher stated that she was not "formally trained" in ABA and that she had "just been shown ways to incorporate it in the classroom" (Tr. p. 272).

While STAR may have employed some ABA techniques while working with the student, the evidence in the hearing record shows that other methodologies were also used with success (Tr. pp. 227, 254-55, 270; Dist. Ex. 6 at p). Therefore, there does not appear to be a "clear consensus" that the student required a particular methodology, such as ABA, on the March 2019 IEP in order to receive a FAPE (see R.E., 694 F.3d at 194).

As for home-based services, lacking from the special education teacher's testimony was any indication that the student needed the home-based services in order to support her learning in the school environment. If anything, the student's teacher may have been a source for the greatest insight regarding the student's need for home-based or ABA instruction in order to receive benefit from in-school instruction; however, in this instance, despite the progress report from STAR, the participation at the CSE meeting of a representative from STAR, and the testimony from the student's special education teacher at STAR, no representative from STAR expressed an opinion either way regarding the student's need for home-based instruction.

The owner of Province Therapeutics, the agency that provided the student's home-based services, attended the March 2019 CSE and, according to the meeting minutes, shared her view that the student responded positively to the home-based services and that the skills being worked on included cognitive goals, social skills, and increasing utterances in conversation (Dist. Exs. 2 at p. 28; 3 at p. 2, see Tr. pp. 69-70). The parent testified that the student had been receiving home-

[15] During the special education teacher's testimony and cross examination, it was not always clear which school year she was referring to (see Tr. pp. 223-297, 357-366).

[16] According to the STAR special education teacher, DIR "incorporate[d] elements of Floortime as an ABA methodology" and was "a component of ABA" (Tr. p. 254). However, she also stated that DIR and Floortime "go together" and are different than ABA (Tr. pp. 270-71).

based ABA for 20 hours per week for about two years and that they were working on social skills, language skills, increasing vocabulary, and math and reading skills (Tr. pp. 369, 375-76). A BCBA from Province Therapeutics testified that she provided supervision and programming for the student's ABA but that a separate provider delivered the student's 1:1 ABA services after school (Tr. pp. 304-05, 308-09, 313-14).[17]

According to the October 2018 neuropsychological evaluation report, the student's "ABA services" had "focused on intraverbal skills" (Dist. Ex. 4 at p. 2). The BCBA testified that, when the student began receiving ABA services in spring 2018, she was speaking mostly in one-word utterances, was socially disconnected, did not provide eye contact, and did not engage (Tr. p. 316). In differentiating the home-based instruction her agency provided the student from that provided by a speech-language therapist, the BCBA explained that, while a speech-language therapist may work on articulation and pacing, her agency worked more on pragmatics (ability to use verb tenses, syntax, language abstraction) and on generalizing the skills so that the student could use them in functional communication and not "just while she's sitting at a table" (Tr. p. 343).[18] The BCBA stated that they worked on how those different skills function to create social integration for a student and to make sure that the student could go in the community, be understood by other people, be as independent as possible, and be integrated into society as possible (Tr. p. 344). The BCBA stated that they were looking at appropriate speech and appropriate use of language as a behavior (Tr. pp. 344-45).

The BCBA stated that it was necessary for the student to continue to receive 20 hours of ABA per week, along with two hours of supervision, in order for her to progress and for her to maintain her skills (Tr. p. 334).

The evidence in the hearing record demonstrates that the March 2019 IEP addressed the student's needs identified by the BCBA. The school psychologist testified that the March 2019 IEP provided the strategies and annual goals that were "worked on" during the provision of the student's home-based ABA services, and that the 8:1+1 special class, the annual goals, and related services provided in the IEP would "provide the supports that [the student] need[ed] to make progress" (see Tr. p. 84). For example, the school psychologist explained that the skills and

[17] While the CSE did not have information available to it regarding the skills that the student would work on during home-based services during the 2019-20 school year, a review of the BCBA's testimony in this regard shows that the skills were the same type of skills addressed in the student's school-based program at STAR during the 2018-19 school year. Specifically, the December 2018 progress report indicated that the student worked on improving her reading comprehension, writing, math calculation and math problem solving skills (Dist. Ex. 6 at pp. 1-2). The BCBA testified that during the 2019-20 school year, academically the student was working on reading comprehension skills, basic writing skills, ability to compare numbers, and math word problems (Tr. p. 322). Reportedly the student worked on making inferences, using sequencing words, syntax conventions, expanding her emotion vocabulary and appropriately expressing her feelings, coping strategies, play skills with peers, pragmatic language skills, maintaining appropriate joint attention, and social skills (compare Tr. pp. 320-21, 343-44, with Dist. Ex. 6 at pp. 1-5). Further, the December 2018 progress report indicated that during the 2018-19 school year, at STAR the student received three sessions of speech-language therapy per week, two sessions of counseling per week, and participated in a weekly social skills class (Dist. Ex. 6 at pp. 3-4).

[18] The BCBA acknowledged that she did not know what the student's speech-language pathologists were working on and that she did not have any interaction with them (Tr. p. 345).

strategies that were identified by the home-based ABA provider were incorporated into the March 2019 IEP's management needs section (e.g. positive reinforcement, token board economy, rewards, visual schedules) (Tr. pp. 70-72; see Dist. Ex. 2 at pp. 5-6). The March 2019 IEP identified additional needs of the student which required supports and accommodations such as the use of visual/graphic depictions of routines/procedures/steps, visual and auditory reinforcement of taught materials, concrete examples, and consistency in routine (Dist. Ex. 2 at p. 6). Further, as discussed above, the March 2019 IEP included annual goals and short-term objectives that addressed the student's ability to make inferences, sequence words to increase the complexity of her sentences, answer open-ended questions, use appropriate spelling and grammar in writing, tolerate others' emotions when taking turns, use coping strategies and descriptive language, and manage verbal and perseverative behaviors that occasionally interfered with her ability to attend to task and engage with others (id. at pp. 8-11, 14-15, 17-18). Also, as indicated above the March 2019 CSE recommended related services for the student consisting of one 30-minute session per week of individual counseling, one 30-minute session per week of counseling in a group of three, one 30-minute session of individual OT, three 30-minute sessions per week of individual speech-language therapy, and one 60-minute session per month of individual/group parent counseling and training (id. at p. 20).

Finally, as alluded to above, the October 2018 neuropsychological evaluation report recommended the home-based services in part to avoid regression due to any discontinuity of services (see Dist. Ex. 4 at p. 20). However, the district school psychologist testified that the CSE recommended parent counselling and training as a support "to ensure that strategies that are used in the classroom are also presented for the parent to continue" in the home (Tr. pp. 64-65). Indeed, parent counseling and training is defined in State regulation as for the purpose of: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]).

Therefore, while the BCBA referred to maintenance of skill as one purpose of the ABA services, the evidence in the hearing record reflects that the recommendation was predominantly for purposes of generalizing the student's skills into the home or community setting (a purpose outside of the purview of the CSE), encouraging continuity of services in the home (addressed by the IEP recommendation for parent counseling and training services), or to work on the student's pragmatic and language skill areas (addressed by recommendations for related services). Based on all of the evidence in the hearing record—including evidence that the March 2019 IEP was designed with supports and services to address the student's needs during the school day—there is insufficient basis to reverse the IHO's determination that the student did not require home-based ABA services in order to receive educational benefit (see IHO Decision at p. 10; see also Y.D. v. New York City Dep't of Educ., 2017 WL 1051129, at *8 [S.D.N.Y. Mar. 20, 2017] [finding out-of-school services were unnecessary to ensure the student made progress in the classroom and would, instead, be aimed at managing behaviors outside the school day]; M.L., 2014 WL 1301957, at *11 [finding no denial of FAPE based on the CSE's failure to recommend a home-based program, noting evidence that the student would make progress without the home services, "even if not at the same rate"]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013] ["While the record indicates that [the student] may have benefited from home-based services, it contains no indication that such services were necessary"], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; C.G. v. New York City Dep't of Educ., 752 F. Supp. 2d 355,

360 [S.D.N.Y. 2010] [noting that, while some skills areas may be difficult to address in school, "such limitations are not sufficient to demonstrate that the IEP is calculated to yield regression rather than progress"]).[19]

5. Related Services

The parent asserts that the IHO erred in failing to find that the March 2019 IEP was appropriate notwithstanding that the CSE did not recommend music therapy and art therapy for the student for the 2019-20 school year.

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]).[20]

While the parent points to evidence that the music and art therapy services addressed the student's needs with respect to social skills, communication, sensory stimulation and regulation, self-awareness, and focus (see Parent Ex. T at p. 7; Dist. Ex. 6 at p. 5), the evidence in the hearing record reveals that these needs were otherwise appropriately addressed by the March 2019 IEP.

The music therapy update included in the December 2018 progress report indicated that the student was receiving two 30-minute sessions per week of group music therapy and that she worked on social skills, creative communication, and exploring dynamic group activities meant to enhance interpersonal awareness (Dist. Ex. 6 at p. 5).[21] The March 2019 CSE recommended for the student one 30-minute session per week each of individual and group counseling services, one

[19] To the extent that the parent also alleges on appeal that there was no evidence that the assigned public school site would have been able to provide any ABA or a multi-sensory learning environment for the student, these allegations are based on speculation and/or are really attacks on the IEP couched as challenges to the assigned public school site (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]) and, therefore, it is not necessary to further discuss this argument.

[20] Under State law, creative arts therapists, who are often trained in music therapy, are licensed as mental health practitioners (see Educ. Law § 8404[1][a], [b] [defining the practice of creative arts therapy as the "assessment, evaluation, and the therapeutic intervention and treatment . . . of mental, emotional, developmental and behavioral disorders through the use of the arts as approved by the [Education D]epartment" and involving the "use of assessment instruments and mental health counseling and psychotherapy to identify, evaluate and treat dysfunctions and disorders for purposes of providing appropriate creative arts therapy services"]; Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 386 [2004] [noting that for purposes of State licensing "music therapists" are now referred to as "creative arts therapists"]; People v. R.R., 12 Misc. 3d 161, 168 [Sup. Ct. New York Cnty. 2005]; see generally Educ. Law § 8412; 8 NYCRR 79-11.3, 79-11.7, 200.1[qq]).

[21] Although the student received art therapy during the 2019-20 school year, the December 2018 STAR progress report did not include evidence that the student was receiving art therapy at that time (Tr. pp. 236, 238; Dist. Ex. 6 at pp. 1-6).

30-minute session per week of individual OT, and three 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 2 at p. 20).

Review of the March 2019 IEP annual goals and short-term objectives for counseling showed that they were designed to improve the student's ability to identify and label emotions when frustrated, tolerate others' emotions, develop, expand and use her coping strategies, take deep breaths when upset, and improve turn-taking and play skills (Dist. Ex. 2 at pp. 13-15). The student's OT annual goals addressed her need to improve her sensory processing and regulation (id. at p. 16). Speech-language annual goals addressed the student's need to improve her ability to use descriptive language skills to describe feeling states, maintain focus and expand on ideas, and manage verbal behaviors and perseverative behaviors that occasionally interfered with her ability to attend to the task and engage with others (id. at pp. 17-18). Further, the March 2019 IEP included accommodations and supports such as a multisensory environment, redirection and prompting, visual schedule and supports, highlighted writing paper, timers, movement breaks, and positive reinforcement and encouragement (id. at pp. 5-6).

As such, review of the March 2019 IEP reveals that it provided related services—albeit different than those the parent preferred—and supports to address the student's needs that STAR addressed through music and art therapy (see N.K., 961 F. Supp. 2d at 592-93 [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]).

D. Failure to Reconvene

In a cross-appeal, the district asserts that the IHO erred by determining that the CSE should have reconvened following the district's March 28, 2019 psychoeducational evaluation of the student. The parent argues that the IHO erred in finding that the district's failure to reconvene to consider the results of that evaluation did not deny the student a FAPE.

As a general matter, in addition to a district's obligation to review the IEP of a student with a disability periodically but at least annually, the IDEA and federal and State regulations also require a CSE, upon review, to revise a student's IEP as necessary to address: "[t]he results of any reevaluation"; "[i]nformation about the child provided to, or by, the parents" during the course of a review of existing evaluation data; the student's anticipated needs; or other matters (20 U.S.C. 1414[d][4][A]; 34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]). State regulations additionally provide that, if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). In a guidance letter, the United States Department of Special Education Programs (OSEP) indicated that it is the district's responsibility to determine when it is necessary to conduct a CSE meeting but that parents may request a CSE meeting at any time and, if the district determines not to grant the request, it must provide the parents with written notice of its refusal, "including an explanation of why the [district] has determined that conducting the meeting is not necessary to ensure the provision of FAPE to the student" (Letter to Anonymous, 112 LRP 52263 [OSEP Mar. 7, 2012]; see 34 CFR 300.503; 8 NYCRR 200.5[a]). OSEP has also indicated that "[g]enerally, an IEP meeting must take place before a proposal to change the student's placement can be implemented" (Letter to Green, 22 IDELR 639 [OSEP 1995]).

None of the foregoing authority requires a district to convene a CSE within a specified period of time upon completion or receipt of an evaluation. However, the school psychologist acknowledged that the CSE did not convene following the March 28, 2019 psychoeducational testing and further acknowledged that upon receipt of new evaluations the district's typical practice was to schedule a new IEP meeting to discuss the results and to her knowledge that was not done in this case (Tr. pp. 175-76). However, while the neuropsychologist noted that the district's March 2019 psychoeducational evaluation did not include assessment of the student's academic skills, he further testified that he did not find the district's March 2019 evaluation results as being "radically different" from the results of the October 2018 evaluation he conducted (Tr. pp. 194-95, 197; compare Parent Ex. H at pp. 2-5, with Dist. Ex. 4 at pp. 11-12, 15-16, 18-19). Further, the parent did not request a CSE meeting to discuss the report and, between the time the district received the evaluation report and through the course of the 2019-20 school year, the district did not make any new decisions with respect to the provision of a FAPE to the student and did not attempt to implement a change in the student's placement. To the extent the results of the March 28, 2019 psychoeducational evaluation constituted the results of a reevaluation, the CSE was required to review it at its annual or periodic review and revise the IEP at such review only "as appropriate" (see 20 U.S.C. 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]; see also Kings Local School Dist., Bd. of Educ. v. Zelazny, 325 F.3d 724, 731 [6th Cir. 2003] [noting that "[t]he federal courts have said little on the failure to revise programs, but the school district is required to revise the programs as appropriate"]).

On the whole, the hearing record does not indicate that the CSE was required to reconvene a CSE meeting and, even if the district was procedurally obligated to reconvene the CSE, the hearing record also does not support a finding that the failure to do so in this instance (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 (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]). That is, the hearing record does not indicate that, had the CSE reconvened to review the March 2019 psychoeducational evaluation report upon its receipt thereof, it would have warranted a revision to the student's IEP.[22]

E. Cumulative Procedural Violations

Under some circumstances, the cumulative impact of procedural violations may result in the denial of a FAPE even where the individual deficiencies themselves do not (L.O. v. New York City Dep't of Educ., 822 F.3d 95, 123-24 [2d Cir. 2016]; T.M., 752 F.3d at 170; R.E., 694 F.3d at 190-91 [noting that "even minor violations may cumulatively result in a denial of a FAPE"]; see also A.M., 845 F.3d at 541 [noting that it will be a "rare case where the violations, when taken

[22] The parent also argues that the IHO impermissibly relied upon the March 2019 psychoeducational evaluation report, which post-dated the March 2019 CSE meeting, in order to evaluate the appropriateness of the IEP. In reviewing the program offered to the student, the focus of the inquiry is on the information that was available at the time the IEP was formulated (see C.L.K. v Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013]; D.A.B., 973 F. Supp. 2d at 361-62). Retrospective evidence presented at a hearing that materially alters an IEP may not be relied upon and/or used to rehabilitate an inadequate IEP (see R.E., 694 F.3d at 188). However, review of the IHO's decision reveals that she seemed to review the March 28, 2019 psychoeducation evaluation in order to assess whether the parent's claim about the district's failure to reconvene the CSE amounted to a substantive denial of a FAPE (IHO Decision at p. 8).

together," rise to the level of a denial of a FAPE when the procedural errors do not affect the substance of the student's program]).

Based on the above discussion, the procedural violations in the present matter amount, at most, to the district's failure to timely provide the parent with a copy of the IEP or to provide a prior written notice and the CSE's failure to include sufficient evaluative criteria in the IEP to measure the student's progress towards meeting the annual goals. None of these violations affected the substantive appropriateness of the student's March 2019 IEP (see A.M., 845 F.3d at 541). Further for the reasons detailed above, none of these violations, individually or cumulatively, impeded the student's right to a FAPE, hindered the parent's opportunity to participate in the decision-making process, or otherwise deprived the student of educational benefits (see 20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]).

F. Pendency Compensatory Education

Although I have determined that the district offered the student a FAPE for the 2019-20 school year, the district is responsible for the costs of the student's attendance at STAR, related services, and the costs of 20 hours per week of home-based ABA services pursuant to its obligation to fund the student's stay-put placement during the pendency of these proceedings which have spanned the entirety of the 2019-20 school year (IHO Ex. I). With that said, on appeal, the parent alleges that the district has failed to fully implement pendency (see Req. for Rev. ¶ 30).

The Second Circuit has held that where a district fails to implement a student's pendency placement, students should receive the pendency services to which they were entitled as a compensatory remedy (E. Lyme, 790 F.3d at 456 [directing full reimbursement for unimplemented pendency services awarded because less than complete reimbursement for missed pendency services "would undermine the stay-put provision by giving the agency an incentive to ignore the stay-put obligation"]; Student X, 2008 WL 4890440, at *25, *26 [ordering services that the district failed to implement under pendency awarded as compensatory education services where district "disregarded the 'automatic injunction' and 'absolute rule in favor of the status quo' mandated by the [IDEA] and wrongfully terminated [the student's] at-home services"] [internal citations omitted]).

The parent appears to argue that, at the time of her due process complaint notice, she anticipated that the district would fail to implement pendency and that, therefore, the IHO should have awarded compensatory education (see Req. for Rev. ¶ 17; see also Parent Ex. A at pp. 8, 9). However, there is no basis in the hearing record to conclude that the parent's speculation came to fruition or that the student was deprived of any portion of her pendency placement and services. Moreover, while the parent raised speculation that the district would fail to implement pendency in the due process complaint notice, I do not find that this triggered the district's burden of proof on this issue since no non-speculative allegation was put forth at that juncture. If the district had failed to implement any aspect of the student's stay-put placement during the pendency of the proceedings, the parent could have raised that issue for the IHO to address. And the parent may still pursue any allegations to this effect by either filing a new due process complaint notice alleging a non-speculative implementation failure, by filing a State complaint against the district through the State complaint process for failure to implement the IHO's pendency decision, or by seek enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City

Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005]).[23] However, absent any evidence in the hearing record, let alone a concrete allegation regarding an implementation failure, I will not order compensatory education services at this juncture.

VII. Conclusion

Having determined that the district offered the student a FAPE for the 2019-20 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether STAR along with home-based ABA services was an appropriate unilateral placement for the student or whether equitable considerations support an award of tuition reimbursement for that school year.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED the IHO's decision, dated May 22, 2020, is modified by reversing that portion which found that the CSE should have reconvened after the psychoeducational evaluation was conducted on March 28, 2019.

Dated: **Albany, New York**
October 22, 2020

SARAH L. HARRINGTON

[23] To the extent the parent's concern lies in the findings of the IHO directed at the qualifications of the provider who delivered the student's home-based ABA services, such concern is misplaced since the IHO opined in this regard in examining the appropriateness of the services as part of the student's unilateral placement (see IHO Decision at p. 10), and a student's pendency placement and the appropriateness of a student's placement are separate concepts (Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 459 [S.D.N.Y. 2005] [finding that "pendency placement and appropriate placement are separate and distinct concepts"]; Student X, 2008 WL 4890440, at *20; see Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 162 [2d Cir. 2004] [a claim for tuition reimbursement under pendency is evaluated separately from a claim for tuition reimbursement pursuant to the inadequacy of an IEP]).